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Chairman Pryor and Ranking Member Wicker, thank you for the opportunity to provide testimony to this Subcommittee regarding oversight of the Consumer Product Safety Commission (CPSC). This Commission has a proud history of assessing risk and providing leadership in consumer product safety issues across a variety of industries.

As a Commissioner since August of 2009, I now have a tremendous appreciation for the work that goes on in an agency, including the time and effort that agencies expend implementing the laws Congress passes. It is not a simple task, and my colleague, Chairman Tenenbaum, has put in countless hours to ensure that the Commission meets its deadlines and fulfills the difficult tasks it has been given.

Chairman Tenenbaum has been a strong advocate in working with our partners in China to elevate the priority of product safety and to ensure that manufacturers can implement safety measures as far back in the manufacturing process as possible. She has made progress in our import safety objectives, including an agreement with Customs and Border Protection to allow our staff to view shipment documents earlier in the process before potentially hazardous shipments enter the United States. The Chairman's staff also continues to find creative, useful ways to use social media outlets to advertise product safety messages for families and parents. These achievements are impressive.

CPSIA

Despite areas of progress, I would be remiss as a Commissioner if I failed to mention that the central focus of the agency's time and resources in both 2009 and 2010 has been on implementing a law that has almost nothing to do with improving safety—the Consumer Product Safety Improvement Act of 2008, or CPSIA. Although the Commission is a relatively small agency (FY 2010 funding of $118 million), its budget has grown by nearly 48 percent since the law's passage in 2008, with both old and new resources shifted away from more risk-based priorities to implement the arbitrary, non risk-based priorities of the CPSIA, including the lead-in-substrate ban, phthalates ban, consumer database, and third-party testing, certification and labeling requirements. Today's hearing provides an excellent opportunity to shed light on many of the unintended consequences of this law, its impact on our agency and, more importantly, the economy.

As a bit of background, while we know the context in which the CPSIA was passed in 2008, Members of Congress on both sides of the aisle today acknowledge the need for the law's reform. Both Democrat and Republican Members of Congress have introduced bills to fix the CPSIA. The House Energy and Commerce Committee held a hearing earlier this year on potential CPSIA amendments, and the Appropriations Committees of the House and Senate requested a Report from the five Commissioners back in January on ways to amend the CPSIA to avoid its many unintended consequences. (*See the following link for the Report to Congress and the Commissioners' five statements: www.cpsc.gov/about/cpsia/cpsiareport01152010.pdf*). Thus, to say that the law enjoys the broad support it held in 2008 is simply untrue.

The Commission continues to hear from manufacturers, retailers, and Members of Congress that the CPSIA has impacted products that no one anticipated would be affected and which this Commission would not consider unsafe. For example, the law impacts furniture, bikes, recreational equipment, books, rugs, nuts and bolts used to make these products, clothing, school equipment and supplies – and a host of other categories that fall under the rubric of "children's products." The law has caused companies to have to reengineer products to be lead-free (with no measurable benefit to safety) to leave the children's market, or to close altogether. I have brought with me a list of such businesses which I will submit for the record.

Risks associated with lead

It is important to clarify the risks associated with lead. Some advocates, including witnesses in your second panel today, will say that "there is no safe level of lead" which implies that none of us can ever spend enough time and money to reduce or eliminate lead everywhere. However, an important fact to follow up this statement would be that there exists an *unsafe* level of lead, which has been established by our leading scientific agencies, the National Institutes of Health, the Centers for Disease Control and the Environmental Protection Agency. The fact is, lead that is "absorbable" at greater than *minimal levels* is dangerous, especially to children ages five and under.

In order to determine risk, it is necessary to make a distinction between lead that is absorbable and lead that is not absorbable, at least not in meaningful amounts. In many other laws relating to absorbable lead levels, standards exist to allow for such minimal absorption. For example, the Food and Drug Administration allows for 0.1 microgram of lead in a one-gram piece of candy.[1] The Safe Drinking Water Act declares "zero lead" to be the objective for the amount of lead in water, but the pipes themselves are permitted to be 80,000 parts per million (8 percent) lead – allowing for negligible, trace amounts to exist in the water we drink.[2] California Proposition 65[3] as well as the European Union[4] allow for a negligible amount of absorbable (or soluble) lead in children's products. People often are surprised to learn that all children are born with a certain blood lead level, depending on the blood lead level of the mother. Some additional amount of lead (roughly one microgram per kilogram of body weight)[5] is then taken into the body every day through just the food we eat and the air we breathe.

So what lead is actually risky? Lead is risky when it is absorbable into the bloodstream at significant levels. The experts at the CDC and NIH have found that lead paint in old houses as

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[1] "Supporting Document for Recommended Maximum Level for Lead in Candy Likely To Be Consumed Frequently by Small Children," Food and Drug Administration, November 2006: http://www.fda.gov/Food/FoodSafety/FoodContaminantsAdulteration/Metals/Lead/ucm172050.htm

[2] Environmental Protection Agency, Safe Water Drinking Act, Fact Sheets: http://www.epa.gov/safewater/sdwa/basicinformation.html

[3] California Office of Environmental Health Hazard Assessment (OEHHA), Proposition 65 - http://www.oehha.org/prop65.html, Children's Health at OEHHA - http://oehha.ca.gov/public_info/public/kids/schools041707.html

[4] European Committee for Standardization (CEN), EN 71-3 Safety of Toys-Part 3: Migration of certain elements. CEN, Brussels, Belgium, 1994: http://ec.europa.eu/enterprise/policies/european-standards/documents/harmonised-standards-legislation/list-references/toys/

[5] Centers for Disease Control, Agency for Toxic Substances and Disease Registry, Toxic Substances Portal: Lead: http://www.atsdr.cdc.gov/PHS/PHS.asp?id=92&tid=22

well as lead in dirt[6] near old gas stations can be very dangerous for small children (http://www.cdc.gov/nceh/lead/.) In other words, the *risk of absorbability* with lead paint in an old home that becomes chipped and may be inhaled or ingested is quite high. In the same vein, a lead-laden metal charm or piece of jewelry that can be swallowed presents a danger since such an item could get caught in the stomach and absorbed. However, none of these agencies, including the CPSC, has ever found that a child touching a brass musical instrument, touching a vinyl lunchbox, or riding a bicycle, could ever rub off enough lead, day after day, year after year, to affect his or her health.

Now let us look at the CPSIA's lead requirements in comparison to these known lead hazards in the environment today. The CPSIA's arbitrary lead content limits (currently 300ppm, and moving to 100ppm by next August) remove the ability of the Commission to assess risk, or the *absorbability* that exists for a particular product. In other words, the law's lead content levels dictate that the metal handle bars of a bike that pose ***no health risk*** to a child be outlawed right alongside lead paint or a solid-lead charm on a piece of children's jewelry that is dangerous.

The effect of the CPSIA has been to outlaw children's books published before 1985 that are likely to have lead in the inks, for example, which both the Commission and Congress now feel was an overreach because children are not likely to eat the pages of old books or ingest more than miniscule amounts of lead after touching their pages. Likewise, youth ATVs and bicycles are outlawed or must be reengineered even though the lead that is in the hood, handlebars, or hubcaps will not become ingested and absorbed at any discernable level (from hand to mouth touching where miniscule amounts of lead may rub off—not from actually eating the hood, handlebars or hubcaps). Other everyday products such as school lockers, the hinges on a child's dresser, or jackets with zippers and buttons are outlawed if they contain tiny levels of lead in the substrate. Even ball point pens may be outlawed if they have a toy or game attached to them and are marketed to children, due to the brass found on the tip.

Finally, children do not live cooped up inside of their rooms surrounded only by "children's products." Children live throughout the house, run around outside, and are exposed to lead in their everyday environment. In fact, they are surrounded by it: in the car (adult seat belts, window cranks) and in their homes (pots, pans, furniture knobs, door handles, appliances, lamps). These products do not threaten a child's health because the lead in them is not absorbable. Hence, it makes little sense that the CPSIA bans products with higher than 300ppm lead content in such products as *children's* furniture, *children's* rugs, toys and *children's* clothing—while children themselves are likely to spend more time outside their room handling the TV remote (an adult product), playing on their parents' furniture, or playing with just about anything else.

[6] Although lead in dirt is a proven hazard for small children nearby to old gas stations that used leaded gasoline or certain pesticides, it is notable that the Environmental Protection Agency standard for lead in soil is 400 ppm. http://www.epa.gov/lead/ This standard for safety is less strict than the current lead content standard provided in the CPSIA for children's products, which is 300ppm and scheduled to fall to 100ppm in August of 2011.

The costs to the economy

While there have been no tangible benefits resulting from the CPSIA's arbitrary lead limits, the costs to businesses have been tremendous—and continue to pile up. In March 2009, the Commission estimated that the economic costs associated with the law would be "in the billions of dollars range."[7] Industry associations from furniture and mattress manufacturers to handmade toy makers have told us how they will be saddled with enormous costs since every component of every product they make (down to the screws in the furniture) will have to be sent to a third-party lab to be tested for lead and all other applicable standards. We have heard from businesses that have had to cut jobs to be able to afford the new testing and compliance costs, reduce product lines, leave the children's market completely, or close—all of this, when the full effects of the law (and I would argue, the most costly mandates) have yet to be felt.[8]

The entire process companies must go through to produce a toy or children's product has drastically changed. Take, for instance, a child's doll. To be compliant with the law, a company must pay to have the doll's body, hair, each color of paint on the lips or eyes, and the doll's clothing tested in an independent lab for lead content – and soon will have to do the same for phthalates and to every applicable component of the ASTM F-963 toy standard. According to a brief small business analysis by our agency, the cost to test one toy could range from $3,712 to $7,348—not taking into account that the toy will likely change to stay competitive for the next Christmas season, or sooner, and every material change triggers a whole new set of tests.[9] These costs also do not include the cost to add a tracking label, to certify to these third-party tests, and to maintain the data and paperwork to be able to trace each and every component and material back to its specific test and lot number. All of these steps are required by the CPSIA without any regard for the actual risk of a product.

In fact, while the costs to companies to reengineer products to meet the lead limits has been steep, many tell us that the ongoing costs to third party test, label and track every component have been much higher—and without any measurable benefit. For example, one furniture manufacturing company informed us they spent upwards of $13 million putting together a testing, tracking, and labeling system for their children's furniture while discovering that not one of their components was in violation of the new lead limits and needed to be replaced. There was clearly no safety benefit, yet they have faced enormous costs. Large and small companies alike have to hire a lawyer or other outside expert just to ensure they understand the extent to which their products may or may not be impacted by various provisions of the law.[10] This is what happens when regulations do not have to be cost-benefit justified.

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

[8] Currently, the Commission has put in place a stay on the lead content testing requirements until February of 2011. A stay was first enacted in February of 2009 following the confusion that ensued after the law's passage. The Commission voted 5-0 in December of 2009 to continue the stay for another year (until February of 2011). Additionally, the Commission has yet to accredit labs for testing to the phthalates ban or the toy standard, which will impose even greater testing burdens. While these three major testing requirements have not even kicked in, many businesses have been forced to plan ahead for the new costs and have already determined they cannot maintain their business and also comply with the CPSIA.

[9] Regulatory Flexibility Analysis: Testing and Labeling Pertaining to Product Certification, 16 CFR Part 1107, Notice of Proposed Rulemaking, CPSC Docket No. CPSC-2010-0038. May 20, 2010

[10] "Mattel Finds CPSIA to be a Challenge," *Product Safety Letter*, November 9, 2009.

The CPSIA fails to make any distinction between large and small businesses, or foreign and domestic manufacturing, thus giving an obvious competitive advantage to large manufacturers who produce items overseas, where manufacturing and testing costs are cheaper. As a result, large toy manufacturers have turned a corner to become supportive of the new regulations and clearly see the competitive advantage that the law gives them over their smaller competitors. Meanwhile, the backbone of our economy, small businesses—from screen printers to manufacturers of chemistry sets for schools—are being forced to cut jobs or take other drastic measures due to the cost of compliance. Given the urgency of our economic situation, this Commission would benefit today from hearing from Members of this Committee on whether these results are what you expected.

Role of the Commission

While the Commission has the authority to provide flexibility regarding the *frequency* of third-party testing requirements under the law, it does not have the ability to exempt companies altogether from burdensome testing requirements that do not improve safety. More specifically, the Commission lacks the authority to exempt manufacturers of otherwise safe products from the following: 1) the initial, third-party test of every product or component to the law's lead, phthalates and other mandatory standards; 2) a new, third-party test of any product or component after any "material change" in the product; or 3) the cost to certify, provide tracking labels, and maintain the data to trace each and every component. Without changes to the statute, the Commission's hands are tied in addressing these arduous requirements, the main CPSIA costs burdening small businesses.

When I was confirmed, every Senator with whom I met asked me to look for flexibility in the CPSIA in order to reduce the impact of the law where safety was not compromised. I have taken those conversations to heart. However, given that the majority of Commissioners so far has interpreted this law in an even more sweeping manner than required, I now believe that our ability to reduce the law's economic impact has waned. It is imperative that we inform you of these challenges and encourage the Congress to alleviate any unnecessary economic impacts on small businesses and families.

Thus, in this Committee's consideration of reforms to the CPSIA, I would recommend various ways to give the Commission authority to provide needed flexibility, including: 1) allowing for *de minimis*, absorbable lead in children's products, which, as mentioned previously, would by itself remove harmless products from most all of the burdensome requirements of the law (and would allow us to harmonize our standards with the European standards); 2) allowing small businesses the option of a "reasonable testing program" rather than a third-party test; 3) providing discretion to the Commission to determine the need for any third-party testing or tracking label requirements at all for various product categories; and 4) lower the age range for the types of products impacted by the law to focus on age groups (e.g., under age 6) at risk of meaningful lead exposure. Any of these reforms would improve the existing law and allow the Commission to focus its energy where we know the risks lie.

Costs to the Commission

Not only has the implementation of the CPSIA continued to burden small businesses and derail job growth, but the law clearly has taken us away from our core mission of safety. As a result, this Commission is spending millions in limited resources in implementing and enforcing a law that is not helping consumers—a worrisome situation given the state of our economy and the need for all of us to find ways to reduce federal spending.

A prime example of wasted taxpayer resources—$29 million worth in fact—will be the consumer database that the Commission is tasked with implementing early next year. The CPSIA requires that the Commission establish and maintain a database on the safety of consumer products that is publicly available and searchable on the Commission's website. Unfortunately, the majority of the Commission adopted a rule just last week that will make the database useless or worse. Among other problems, the rule defines consumers to include just about everyone, so that reports of harm can be submitted by people with ulterior motives rather than just the actual consumers who suffered harm and have firsthand information about the consumer product. In addition, the rule has interpreted a 10-day deadline in the statute to require agency staff to post reports of harm even though the agency has received credible claims of material inaccuracy, even if the staff has not had time to resolve those claims yet. Finally, since groups with ulterior motives (trial lawyers, competitors, groups wanting to sell a "remedial" product, or an association wanting to lobby Congress for a new mandate) can submit reports into this database without providing the consumer's name, it is unlikely that the Commission will be able to ascertain critical facts related to a product. Such blatant disregard for accurate data will undermine the whole purpose of the database—to assist consumers trying to purchase safe products. It will also raise prices, kill jobs, and damage the reputations of safe and responsible manufacturers indiscriminately.

Chairman Henry Waxman's proposal to add a "functional purpose" exemption

It is important to note that Chairman Waxman of the House Energy and Commerce Committee has proposed a very limited "fix" to the problems of the CPSIA, known as a "functional purpose" exemption. Specifically, the proposal would entail giving the Commission authority to exempt a company's products from the CPSIA's lead limits if the company can show that the lead in the product serves a "functional purpose." Unfortunately, this "fix" would do more harm than good.

Adding a "functional purpose" exemption to the Commission's authorities would not provide the kind of broad exclusion flexibility that the Commission unanimously sought in our January Report to Congress. The concept is too narrow, expensive, and uncertain to provide much relief, particularly for small businesses that are unlikely to have the resources available to determine available lead substitutes or even to put together as successful petition to a federal agency. Most companies will not have the in-house expertise (metallurgic, etc.) to make the kind of showings that would be required to meet the burden of proof for an exception. So just as the exorbitant testing costs of the CPSIA favor large companies (who manufacture overseas) over small ones, so too will the exemption process favor the large companies with greater ability to spread their costs. Furthermore, forcing a component-by-component review of exceptions to the law does

nothing to enhance safety, and it converts the Commission from a safety oversight agency (like the FAA) into a product approval agency (like the FDA). That will slow the pace of innovation and dramatically increase the cost and lead time for bringing new products to market.

Conclusion

Today, Americans still enjoy a marketplace that is brimming with new products and a variety of choices in color, cost and complexity—but we are steadily diminishing these opportunities. As a Commissioner, I strive to maintain and expand the type of marketplace that Americans consumers want—vibrancy, choice, and the confidence that consumer products are safe. All of this is possible in a successful market, where consumers demand ever more innovative products from a variety of sources and businesses look for opportunities to meet those demands. However, the CPSIA has and will continue to drastically reduce the number of inherently safe products available in our country. I hope the Congress will restore the responsibility of assessing risk to the experts at the CPSC and allow us to keep our markets both safe and dynamic.

Thank you, Mr. Chairman and Members of the Committee for calling this oversight hearing and for inviting me to testify today.