U.S. CONSUMER PRODUCT SAFETY COMMISSION
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STATEMENT OF COMMISSIONER NANCY NORD
ON THE PROPOSED AMENDMENT ENTITLED
CONSUMER PRODUCT SAFETY ENHANCEMENT ACT OF 2010
March 18, 2010

I. DISCUSSION DRAFT PROVISIONS

While I am pleased to see Congress address issues that have become apparent as the agency has implemented the Consumer Product Safety Improvement Act (CPSIA), this discussion draft needs to be changed to provide the agency the necessary flexibility to make it work more effectively.

Lead Exemptions:

The Problem: The existing lead exclusion provisions of the CPSIA are written so tightly that virtually no product can qualify for the exclusion, even products that agency staff scientists do not believe pose a real health risk. For example, we have been forced to ban brass which is used in a variety of children's products even though there is no concern that the exposure creates a real risk. We have had to ban rhinestones and crystals even though lead exposure, if any, from these products would be less than from products that comply with the standard and hence are legal. This result does not make sense. The draft proposes another exception if the lead has a function in the product. This approach is flawed for several reasons.

The "**functional purpose**" exception has three tests, all of which must be met:

- *Not practicable or not technologically feasible*: The draft bill does not describe what is meant here but using dictionary definitions, *not practicable* means "not capable of being done." Since all lead could be removed at some cost or effort, this places virtually everything outside the scope of the exception. The same concern applies to *not technologically feasible* (it is technologically feasible to use something other than lead but just not affordable or needed from a safety standpoint.) Presumably, recycled metals would not be able to meet this standard and hence, probably could not be used in children's products.
- *Not likely to be placed in mouth*: This test appears intended to disallow an exception for rhinestones, or at least those used in jewelry. Presumably, rhinestones used on clothing would be outside this test, but this is not clear.
- *Exception has no measurable adverse effect on public health or safety:* This is the only criteria that should be applied. If there is no impact on safety, then the CPSC should not be regulating the product. The definition of what is measurable adverse effect should be made by agency scientific experts.

Since the three tests all must be met, it is unlikely that any product could make it through the process and so the exception is as empty as the exception for "no absorption of any lead." Such a provision does not really help anyone. The functional purpose exception adds one unworkable approach to an existing unworkable approach.

The **narrow scope provision** (page 5, lines 15-20) is so limited as to be of little utility in any practical way. For example, it seems to require that even inaccessible or electronic parts, which already have an exception, must meet the three tests if the product as a whole is to qualify. In addition, the section does not allow for the agency to give exceptions on a **commodity** basis. Therefore, we will have to do product-by-product proceedings, which potentially will require significant resources.

The **limitation provision** (page 5, lines 21 and following) makes no sense as it allows us to qualify the exception if required by public health or safety. However, we cannot give the exception in the first place unless we find the product to be safe. (Apparently under this provision, we will need to do a repetitious analysis which does not add any efficiency to the process.)

The Solution: The section would work if the first two tests were deleted and we looked exclusively at the safety aspects of the product, determined by increases in measurable blood lead levels. (See Section II below.)

Resellers:

The Problem: The retroactive nature of the lead and phthalates provisions creates impossible compliance issues for retailers. Because products can be available for resale for a longer period of time, through yard sales, at consignment shops, charity stores and similar venues, the problem is even greater for these kinds of sellers.

The Solution: The draft bill deals only with lead and not with phthalates so, to that extent, it only deals with half the problem. The draft bill is limited in its application to yard sales, consignment shops, charity shops and libraries and would address some of the problems the CPSIA created for these entities. A cleaner way to proceed would be to address the problem straight-on by eliminating the retroactive nature of the law.

Retroactivity:

The Problem: Retroactivity stranded billions of dollars of inventory which was legal when manufactured. Large retailers have the ability to require suppliers to take back inventory but small retailers do not. In addition, large retailers have required that suppliers meet the lowest level set out in the statute, even though the statute deems products with 300 ppm of lead to be safe until 2011.

The Solution: Getting rid of retroactivity as the standard migrates from 300 ppm to 100 ppm is a good change. A better change would be to get rid of the 100 ppm standard altogether, giving the agency the option to impose a standard lower than 300 ppm if the exposure pattern of a particular product indicated a safety-related issue. In addition, retroactivity should be eliminated for phthalates.

Relief for Small Manufacturers:

The Problem: The testing and certification provisions of the act have a significant economic impact on product manufacturers, especially small manufacturers. However, the proposed solution in the draft bill is flawed.

The first problem with this provision is that it is too restrictive in its definition of low volume manufacturer. It makes no sense to lock such a restrictive definition into the law, since it ends up being a disincentive for a company trying to grow, skews business decision-making and does not anticipate inflation. The definition of low volume manufacturer should be left to the Commission.

Second, it is not clear exactly to what the provision refers. The relief, such as it is, appears to be only for third party testing done in the first instance. However, the provision amends the ongoing testing provision and leaves ambiguous its applicability to ongoing testing requirements.

This provision would impact the "15 month" ongoing testing rule we are now getting ready to issue and could certainly slow down, and complicate, this rulemaking activity, perhaps the most complex we have ever considered.

The Solution: Unfortunately, the draft bill's definition of small business is so narrow as to provide very little relief. Testing and certification provisions need to be amended to protect consumers without damaging manufacturers with unnecessary costs. The agency should be able to set appropriate testing requirements as long as those requirements provide for a reasonable testing program and provide assurance of compliance with underlying safety standards.

Office of Business Education:

This is something that was already contemplated by the agency's FY2011 budget. The FY2010 operating plan lays the groundwork with its requirement for a full-time ombudsman. While having such an office is long overdue, locking such organizational matters into the statute may limit future options.

Phthalates Inaccessibility:

It is good that the bill clarifies this point although I would argue that the agency already has this authority. The rules required to implement this new section seem to be unnecessarily complex. The bill should also clarify that the phthalates provision is not retroactive.

Coordination with Voluntary Standards:

This seems to be an unnecessary and complex requirement which may have the impact of impeding voluntary standards work. There are several examples in the Consumer Product Safety Act (CPSA) of mandated voluntary standards which are updated in an automatic manner. Following these examples, which have shown to have worked, would be a simpler, quicker and less burdensome way of assuring that standards are kept up-to-date.

Information Disclosure:

While this amendment is styled as a mere "clarification of law" it actually makes a significant change to one of the CPSA's important tools for obtaining sensitive information from companies. Sliding a change like this into the law may well end up providing disincentive for companies to give us information quickly and cooperatively.

Subpoena Authority:

This provision would allow the Commission to delegate to the agency staff the authority to issue subpoenas. There is no reason to make this change in the law. It is hard to believe that the Congress would wish to see the Commissioners cede oversight of subpoena authority to agency staff.

Imminent Hazard Provisions:

This is a potentially significant change which seems to turn the current imminent hazard provision in the CPSA on its head. In Section 12 of the CPSA, dealing with imminent hazards, a federal district court makes the determination that the hazard exists. The draft bill language could be read as saying that the Commission could publicize the existence of such an alleged hazard prior to the court making the determination that the hazard actually exists. If this is the correct reading of the draft bill, it guts the existing imminent hazard provisions of the law. If that is not the correct reading, then the bill should be changed to make that clear. In any event, the CPSIA gave the agency increased and ample authority to immediately notify the public of dangers, so this section seems to be unnecessary.

Voluntary Recall Notice Requirements:

The agency has just issued final rules for the content of mandatory recall notices as required by CPSIA. We do not yet know how successful the requirements will be or if they will need to be adjusted. The Commission unanimously agreed to undertake a proceeding to consider whether other rules are needed for voluntary recalls and specifically determined that while the mandatory recall notice rules would be a guide for voluntary recall notices, the Commission did not want to make that a requirement. Instead, the Commission will be asking for public comment on these issues. Since each recall is unique, we need flexibility to negotiate these recalls as quickly as possible. This provision may well act as an impediment to such a result with a resulting adverse impact on safety.

II. NEEDED AMENDMENTS

The following changes to the CPSIA would address the implementation problems that have become apparent:

- **Lead exclusions** Section 101 needs to be amended to give agency more flexibility to address unintended consequences. ("Functional Purpose" language does not provide adequate relief since, at best, it is subjective, costly, is very resource intensive for the agency and favors big companies, and at worst, it is useless.)

- Amendment needs to recognize expertise of the agency to define what is unacceptable risk based on whether the child's interaction with the product results in measurable increase in blood lead levels.

- **Scope of lead provisions too broad**.
  - The law treats all children—from infants to preteens—the same even though product interaction is quite different and risks are different.
  - Scope should be narrowed to apply to products intended for younger children.
  - Level of safety would not be impacted because agency can always take action against unsafe products but cost of compliance with the bill would decrease significantly.

- **Lead and phthalates provisions** Section 101 and Section 108 need to be amended so that law applies prospectively, rather than retroactively.

- **Mandatory third-party testing requirements** for all children's products impose a significant cost burden especially on small businesses. Section 102 testing and certification provisions need to be amended to minimize the damaging impact on small manufacturers while protecting consumers. (Draft bill's definition of small business is so narrow as to provide very little relief.)
  - Agency should be able to set appropriate testing requirements as long as those requirements provide for a reasonable testing program and provide assurance of compliance with underlying safety standards.