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STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON THE PROPOSED TESTING AND CERTIFICATION ("FIFTEEN-MONTH") RULE AND THE PROPOSED COMPONENT PARTS RULE

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This week the Commission unanimously passed two major proposed rules designed to provide guidance to the regulated community as it works to implement compliance programs required by the Consumer Product Safety Improvement Act (CPSIA) of 2008. My enthusiastic support of both rules should be understood in the context of the entire law's impact. I continue to believe the CPSIA has serious flaws for the following reasons:

- The law sets new safety standards unrelated to risk and not based on scientific evidence that such standards will improve the health of children;
- The law imposes unnecessarily complicated and expensive testing, labeling and certification requirements on businesses on top of new safety standards;
- The implementation of the law and its innumerable rulemaking requirements are overtaxing the resources of the Commission, causing truly safety-related areas to slip despite heroic efforts by the staff to try to do more than what is humanly possible;
- The law already has cost the economy millions (if not billions) of dollars in lost productivity;
- The law has destroyed thousands of American jobs and deterred domestic production at a time when this country needs to expand job opportunities and grow its manufacturing base;
- The law has diminished the choices for American consumers of children's products in an otherwise diverse and innovative marketplace; and
- To implement this law, Congress has had to increase funding for the agency by *nearly 48 percent* at a time when skyrocketing federal debt has caused Americans to call for slashing government spending.

However, unless and until Congress amends the CPSIA, the Commission has a responsibility to interpret the law in a timely and reasonable manner, using what little flexibility the statute allows to minimize unnecessary, negative effects. Fortunately, I believe the Commission has sought flexibility in these proposed regulations. I support these two proposed rules because I believe they integrate the statute's continuing testing requirements in a way that will be the least disruptive to businesses already coping with a complicated set of new standards and other mandates.

Today, Americans enjoy a marketplace that is brimming with new products and a variety of choices in color, size, quality, price and complexity. 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. The complex needs of today's manufacturing sector involve: small and large manufacturers, internationally sourced components and foreign manufacturing, sophisticated processes and systems like "just-in-time" inventory and delivery, supply chains that a single company may or may not control, integrated communications, and quality controls. Ideally, in proposing these two rules, the statute's additional testing and certification requirements should cause the least disruption possible to what companies already rely on every day in the way of safety precautions, quality controls and complex supply systems. Unduly prescriptive rules would wreak havoc.

I believe that the rules' treatment of component testing, periodic testing, and verification embody to a large extent the flexibility achievable under the statute. The Conditions and Requirements for Testing Component Parts Rule ("Component Parts Rule") ensures that a certificate that accompanies a component part has currency so the component can be passed through the supply chain without having to be retested. The Testing and Labeling Pertaining to Product Certification Rule ("Testing and Certification Rule" – often referred to as the Fifteen-Month Rule) requires that periodic testing for children's products be done by a third-party lab once every other year if a company has a reasonable testing program, rather than every year. The rule also defines a "reasonable testing program" in a minimal way. Such a definition allows established companies to keep what they already have in place and helps give less sophisticated companies implementing full-scale testing programs for the first time the flexibility to implement such a program without turning their businesses inside out. Taken together, these rules have a synergy that hopefully will enable different companies to comply in a variety of ways, including allowing for new supply chain efficiencies and innovations to develop.

Component Testing

Component testing has the potential to significantly lower compliance costs for manufacturers of children's products. With this week's Component Parts Rule, the Commission allows a manufacturer to rely on a component part certificate for a component that must comply with the rules on lead content, phthalates, and paint and other surface coatings. This newly named certificate, the Component Part Certificate, may be issued at any stage of the supply chain, including several steps back, as long as the issuer assumes responsibility for all required testing and the manufacturer exercises due care in relying on the certificate. This arrangement means that a manufacturer (or, Finished Product Certifier) is relieved from any and all testing requirements for certified components—and is responsible only for the ultimate compliance of the product with the applicable safety rules. The manufacturer then can issue the other type of certificate, a Finished Product Certificate, based on the Component Part Certificates that a supplier has issued. For example, if a toy car uses a plastic hood that would need to be tested for phthalates, that toy's manufacturer could rely on a Component Part Certificate from the manufacturer of that original plastic resin (that was tested by a CPSC-recognized lab) and not have to test the hood for phthalates again.

For component testing to work, a certificate issued by a component supplier has to mean something. It makes no sense for a company producing a product to have to re-test the same components that have been tested already by a third-party lab at an earlier stage in the supply chain. To provide an example from the food world, it is unlikely—if not utterly impracticable—for a baker who makes organic bread to oversee the growing and processing of each and every component to ensure that every supplier's product is organic,

including visiting the farm where the wheat is grown, and then the silo where it is kept separate from other wheat, and then the flour mill where it is processed, and then the salt mine and factory, and then the sugar cane grower and refinery, then the yeast producer and finally the dairy farm that milked the cow and made the butter. Rather, the baker buys on the market the raw materials that are already certified as organic and bakes the bread with his unique recipe and, having used all organic ingredients, labels it as Organic Bread.

Similarly, a certificate must be a valued currency that can pass through the supply chain to the ultimate manufacturer or importer who will certify the finished product. In this week's rule, the Commission has ensured that component part certificates will have such value by treating a voluntary component part certificate as a certificate issued under section 14 of the Consumer Product Safety Act. Once the component part certifier subscribes to all the necessary testing requirements (*i.e.*, the initial third-party test, tests resulting from any material change, and any periodic tests), its certificate may be used further down the supply chain—and the finished product certifier is not liable for any testing requirements.

While voluntary component part certifiers may not emerge overnight, I believe we have laid the groundwork for a market to develop to meet this demand—which may extend beyond the children's product market. Component part testing, as constructed under the Component Parts Rule, will foster an environment in which manufacturers or distributors of raw materials and components used in children's products may become dependable suppliers of an increasingly wide variety of certified lead-free or phthalates-free component parts. For example, one supplier of certified lead-free zippers (all colors, weights, and lengths) or snaps could provide many children's clothing manufacturers access to choice and variety, promising just-in-time inventory without making it necessary for each children's product manufacturer to test each component, maintain large inventories, or reduce choices of zippers available due to testing costs. It also makes little sense for a maker of children's clothing to perform the *periodic* testing of each type of zipper while each zipper is in commerce—particularly when the supplier several steps back is performing such testing. Ultimately, the creation of dependable component part certifiers serves both the goals of advocates who wish to make compliance with the CPSIA a part of the supply chain as far upstream as possible, and the manufacturing community, that not only must obey the law and have compliant products, but must do so efficiently in order to remain competitive.

I would also specifically request comments on the suggested proposal in the rule to allow voluntary certifiers upstream in the supply chain **to certify to *final product testing* done at CPSC-recognized labs.** This concept is posed as a question in the introduction to the preamble of the proposed Component Parts Rule. Just as the certificate accompanying a certified component part should serve as currency that may be carried down the supply chain, as long as due care is taken by the finished product certifier, so too a certificate to a final product test must also carry its value forward in order to be useful. The Commission continues to certify labs overseas to test to standards and bans that require the whole product, or final product, to be tested, such as certain aspects of the bike standard and the ASTM F-963 toy standard, the small parts ban, and flammability testing—and I am aware of no reason why legitimate certificates for those tests cannot also alleviate the need for additional testing downstream. Again, it is important to remember that a finished product certifier for a product distributed in commerce in the United States (a domestic manufacturer or importer) who bases its certification on component part certificates (in addition to any final product testing) is still liable for the cost incurred for corrective actions resulting from noncompliant product and would still be liable if it failed to exercise due care in relying on a certificate that turned out to be false (per section 19(a)(6) of the CPSA).

Periodic Testing

Periodic testing under the CPSIA refers to the tests that a manufacturer must do in between the initial test of the product to a particular rule and any material change to that product or the creation of a brand new product. In other words, periodic testing must occur if a company continues to produce the *exact same item* or component for many years in order to make sure it remains the same product to which the company originally certified. In the initial staff draft of the proposed Testing and Certification Rule, the proposal required that all periodic testing be conducted by third-party labs. However, this week's rule improves upon the initial draft by requiring that periodic testing for children's products be performed by a third-party lab once every two years as long as that children's product manufacturer has a "reasonable testing program." The rule also exempts small-volume manufacturers who produce no more than 10,000 units of a particular item from having to do periodic testing.

As a regulatory agency whose core mission is safety, we want to encourage safe manufacturing practices upstream in the supply chain as much as possible; but we cannot force it. If the government over-prescribes requirements such as how often a manufacturer has to test or who must perform each test, products do not necessarily become safer, but we simply make it tougher for companies to comply and remain competitive. That is why Congress asked the Commission several months ago for suggestions on amendments to the law, as many of the CPSIA's requirements have resulted in dire unexpected consequences, including lost jobs, reduced product lines, and the closure of many small businesses. While the Commission has some flexibility as to how we implement these two rules, the statute is not flexible regarding the requirement to conduct an initial third-party test, nor to obtain a third-party test after any material change, nor to certify based on those tests—all without regard to whether the product poses a risk. Currently, we are waiting to see if Congress will amend the law in a way that adequately addresses its many unintended consequences.

It should be noted that the plain statutory language of section 14(d)(2) of the CPSIA does not require *any* periodic testing to be done by a third-party lab. Nor does section 14(a)(1)(A) require children's product manufacturers to have reasonable testing programs. In those respects, I believe the Testing and Certification Rule could provide even more flexibility than it does currently. However, given the disparate views among Commissioners, I am pleased that this rule provides at least this degree of flexibility. I welcome comments from manufacturers or importers regarding the added costs of the periodic testing requirement overall and the cost of adopting a reasonable testing program in order to avoid annual or more frequent periodic testing by third-party labs.

Verification of a Children's Product

Another positive aspect of the proposed Testing and Certification Rule is the Commission's recognition that the statutory language of section 14(d)(2)(B)(iii) does not require verification to involve additional testing nor does it place any other responsibilities on manufacturers. A more effective verification approach would have the agency track which labs were used to test products later found to be non-compliant and act on any patterns that emerge. With all of the other testing that the statute does require, it would have been overkill to construe the statute to force yet another layer of testing by manufacturers in order to verify that a children's product already tested by one CPSC-accredited third-party lab complies with applicable

children's product safety rules. Mandating that all manufacturers submit their third-party tests to different labs every other year would not have made sense either, because getting a passing result one year and a failing result from a different lab on a different sample the following year would not have revealed whether or not the first lab's results were accurate. Over time the Commission will gain needed experience supervising the testing and certification requirements that are in this rule, but not putting the verification burden onto manufacturers is a big step in the right direction.

Other Issues:

Reasonable Testing Program: For both nonchildren's products and as part of the periodic testing requirement for children's products, the Commission has decided to define the term "reasonable testing program." Although we did not have to define the term at all, I believe we have done so in a way that provides a minimal floor that companies can meet. Of course, more expansive testing or compliance programs already in existence will meet the definition, but I believe the definition also provides enough flexibility so that the bar is not too high for smaller companies to be able to implement the five elements. I look forward to reviewing comments regarding this issue.

Labs and Trade Associations Angling For More Business: One challenge that this Commission continues to face is the request by some associations to define "reasonable testing program" specifically in a way that captures their particular, pre-established programs. Some organizations have requested that the Commission at least recognize their programs as "sufficient" so that they do not have to make any modifications and can continue to sell their programs to their members. Some of these associations have new, expensive compliance programs with many "bells and whistles." In contrast, a concept like component testing in this week's rule tries to simplify and provide more choices for businesses in how they comply with the law. The proposed rule also anticipates a dynamic marketplace that will change over time as manufacturers find new sources for components or materials. The danger in the Commission's acknowledging a particular group's program or providing any type of endorsement to one program that may have more requirements than necessary is that suddenly for that association's members the bar would be set even higher. Member companies of a particular association are always at liberty to do more than is required by the law, but the association itself may be motivated chiefly to sell its program.

Cost-Benefit Analysis: I strongly recommend that this Commission conduct, or contract for, a full cost-benefit analysis of the CPSIA, including the impact of testing and certification costs. While the law does not include a requirement that the agency conduct any cost-benefit analyses, it also does not preclude us from doing so. Knowing that the law is causing, and will cause, such massive changes to the market for children's products, this Commission should seek to understand fully the breadth of the law's impact. We owe it to not only consumers and the regulated community to acquire this data, but also to Congress, to better understand the impact that these new regulatory requirements will impose on the public and private sectors.

The potential benefits gained from the law's new lead requirements are likely to be zero. Lead in paint and lead in dust near old gas stations have long been the primary causes of elevated blood lead levels in children—but the numbers of those at risk have decreased significantly in the last decade. As a recent *New York Times* article notes:

> "An earlier wave of increased testing and tougher legislation, including bans on lead-based paint in the 1970s and on leaded gasoline in the 1990s, resulted in sharp declines in poisoning cases in the most vulnerable population, children younger than 6. In 2006, an estimated 120,000 children under 6

tested positive for elevated lead levels nationwide, according to the C.D.C., down from 434,000 in 2000 and 890,000 in 1994."[1]

Last week, an industry group struggling with the law's costly requirements asked me about the number of children who may be helped by the new lead content standard, particularly since leaded gasoline and lead in paint have long since been banned hazards. In response, I indicated that either nothing will change and no benefit will occur from the new standard, or a cost-benefit analysis could guess at but never quantify any benefit, because it would be so miniscule. Neither result justifies the law's unintended consequences or the burden it is imposing in terms of increased consumer prices, job losses, and reduced choices of children's products in the market.

In sum, I am pleased to support both of these proposed rules this week because the Commission's interpretation of the periodic testing and verification provisions and its development of component testing largely reflect what flexibility the law provides. The separation of powers limits the Commission's responsibility to implementing the law in the best way possible, minimizing any negative effects. That we have done so with these two rules demonstrates an interest by all Commissioners in mitigating the widely recognized unnecessary and unintended consequences of the CPSIA.

[1] Mireya Navarro. "Lead Poisoning, a Stubborn Nemesis," *New York Times.* April 21, 2010 http://www.nytimes.com/2010/04/22/nyregion/22lead.html?pagewanted=all