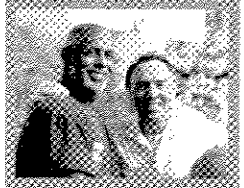
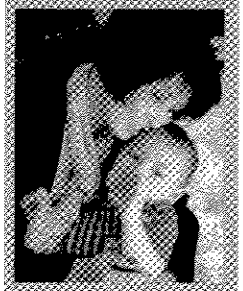
U.S. Consumer Product Safety Commission





TESTIMONY OF COMMISSIONER NANCY NORD, U.S. CONSUMER PRODUCT SAFETY COMMISSION

SUBMITTED TO THE SUBCOMMITTEE ON FINANCIAL SERVICES AND GENERAL GOVERNMENT

March 4, 2010

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TESTIMONY OF COMMISSIONER NANCY NORD TO THE SUBCOMMITTEE ON FINANCIAL SERVICES AND GENERAL GOVERNMENT

MARCH 4, 2010

I am pleased to be here with our new chairman, Inez Tenenbaum, who is providing solid leadership at a time of exciting growth for the agency. I want to extend my personal appreciation for the long standing support and interest of Chairman Serrano, Ranking Member Emerson, and members of this subcommittee in the activities of the Consumer Product Safety Commission.

The Commission submitted a fiscal year 2011 budget request for $118.6 million that I fully support. The increased funding the agency has received over the past two fiscal years has enabled us to put in place the foundation on which the current budget request builds. We have made much progress, thanks to the support this subcommittee has given the agency.

As an example, Chairman Serrano has been a strong advocate of the agency, especially with respect to our efforts to improve outreach to underserved populations. We are building on our Minority Outreach Campaign aimed at increasing awareness of product safety in the home such as safe sleep for babies, TV/furniture tip over and poison and drowning prevention. Staff will expand the Neighborhood Safety Network program and also plans a more focused and concentrated effort to conduct a grassroots initiative to connect with hard-to-reach and vulnerable populations.

As another example, the Virginia Graeme Baker Pool and Spa Safety Act, which went into effect in December 2008, has generated a great deal of activity at the agency. Funding for the act has enabled us to initiate an expansive national education campaign on pool and spa safety. We have been working especially closely with Representative Wasserman-Shultz as we implement requirements of the act. Funding for the pool and spa safety education initiative is proposed at $1 million for FY 2011. This builds on the previous funding of $8.1 million used over the past two years to implement grassroots safety education and advocacy campaigns to address child drowning and the hidden hazard of drain entrapment. These campaigns are designed to warn the public, target underserved populations, and educate state and local jurisdictions and affected industries about requirements of the Virginia Graeme Baker Pool and Spa Safety Act. The act provides the CPSC an important opportunity to work with state and local health organizations as they are our on-the-ground partners at the community level.

In the past two years, our staff has grown from 396 to over 500 employees. With the recruitments pending, we are on target to reach our planned level of 530 staff for FY 2010. This has been an extremely aggressive and successful recruitment effort given that it takes an average of 115 days to bring a new employee on board. The FY 2011 request enables us to add an additional 46 staff people for a total of 576 employees. These new hires are necessary for the successful implementation and enforcement of our expanded authorities.

With passage of the Virginia Graeme Baker Pool and Spa Safety Act and the Consumer Product Safety Improvement Act (CPSIA) at virtually the same time, the agency has been challenged to promulgate a number of new requirements as well as advance its ongoing, existing safety agenda and meeting that challenge has been the agency's focus over the past two fiscal years. In FY 2011, work will shift from mandating new requirements of these laws to enforcing these rules, and that requires a dramatic increase in enforcement capabilities. The FY 2011 request includes a significant increase of $1,647,000 and 15

FTEs to enforce the growing number of rules issued under CPSIA. With the increased enforcement workload, we need more investigators and compliance officers, along with technical, laboratory and legal staff to support their efforts.

Critical to this expanded compliance effort is the Import Surveillance Division. Set up in 2008, the division started as a small program that provided the first full-time presence of CPSC investigators at key U.S. ports. It grew last year and is growing again in the budget before you with a request to fund five additional investigators to expand coverage at the ports.

Another related development to enhance compliance activities was the establishment of a CPSC office in China, an effort that has been in the works since early last year. We now have the first staff person located in China and anticipate hiring a second staffer to work on CPSC issues at the U.S. Embassy in Beijing. The CPSC staff in Beijing will facilitate efforts to promote a clearer understanding of U.S. product safety requirements by producers in China, the largest exporter of consumer products to the United States. Representative Kirk has been especially supportive of these efforts.

Our laboratory provides critical support to both the agency's compliance and hazard identification activities. As was reported to you in earlier budget presentations, we have undertaken a focused, multiyear effort to upgrade and improve our laboratory facilities. As a result, in the spring of 2009, we signed a lease for a new modernized facility. The build-outs are underway and we anticipate a move-in date later this year. This new, up-to-date testing laboratory facility will be a tremendous asset for our expanded enforcement and hazard identification activities.

When the agency asked for funding to overhaul our IT system to provide the foundation needed for the public database mandated by Congress, you gave it to us. Building on the success of our Early Warning System (EWS) pilot program that enables staff to mine data for similar hazard patterns for cribs, bassinets and play yards, we are developing a single, integrated web-based environment. Based on the positive results from the EWS, this predictive search capability will expand to all product categories and greatly enhance product hazard identification. The FY 2011 request allocates over $9 million for the integrated database that Congress directed us to establish. The CPSC will complete the first phase of the public database in March 2011. When fully operational, the database will allow the public to submit incident reports, have immediate access to safety information and will provide a single, integrated IT structure, with new data-mining tools that will greatly improve the way staff identifies hazards. We are currently tackling a number of issues as we reengineer our IT system, including assuring accuracy of information in the new public database. These issues will be the focus of our attention over the coming months.

The request before you proposes $2 million to continue support of nanotechnology research relating to the health and safety of consumer products, including exposure and risk assessment of nanomaterials. This is an area where I have an especially strong interest and am pleased to see the agency take a strong role as nanomaterials transition from the research laboratory to the consumer marketplace.

However, the bulk of the focus of the agency's work over the past 18 months has been implementation of CPSIA. This landmark legislation gave the agency many new authorities and resulted in a modernization of our statutes that has been very helpful. In addition, the new law also gave us significant new responsibilities to be implemented under aggressive deadlines. As the budget document before you notes, the number of rules mandated by CPSIA during 2009 and 2010 is more than double the number of rules promulgated by the Commission since 1990.

As the agency has worked aggressively to implement the law, we have found some problems that the agency cannot solve and will require Congressional action to fix. In the Consolidated Appropriations Act of 2010, this committee specifically asked for our views on the need for amendments to the law and the agency has been unanimous in its view that amendments giving us more flexibility would be useful (although we have differed on the substance of those amendments). Attached is a copy of my statement that accompanied the Commission Report to Congress Pursuant to the Statement of Managers Accompanying P.L. 111-117.

To summarize, I believe the statute would be strengthened by the following suggested changes:

- *Focus on products that present real risks.* The lead exclusion provisions of the law (Section 101) need to be amended so that the agency can focus its attention on products that actually present a risk rather than spending scarce public resources regulating products that do not present real risks, as is happening now. In this regard, various solutions have been proposed and they merit close examination. One suggestion put forward is to consider the "functional purpose" of the lead in the product. While there is no agreement over the reach of this language or the products it would actually cover, such an approach would result in a resource intensive product-by-product approval process. Instead the law should direct the agency to regulate products based on whether a child's interaction with a product results in a measurable increase in blood lead levels.

- *Focus on the most vulnerable population group.* The law treats all children—from infants to preteens—the same even though product interaction at various ages is quite different and the risks are different. The scope of the law should be narrowed to apply to products intended for younger children, especially since the agency has the authority to regulate other products if they indeed do present risks at higher age limits.

- *Focus on effective testing, without needless burden.* The law should provide more flexibility with respect to third party testing (Section 102) which adds costs to products and has proved to be especially burdensome on small manufacturers. The agency should have the ability to set appropriate testing requirements as long as those requirements provide for a reasonable testing program and provide reasonable assurance of compliance with the underlying safety standards.

- *Focus on prospective rather than retroactive implementation.* Another needed change is to limit the retroactive aspect of the law which hits especially hard on retailers, small businesses, charities and other resellers.

Small businesses have been especially hurt by the sweep of this law. The agency has not done a full economic impact on the effects of CPSIA on small businesses; however anecdotal information puts the impact in the billions of dollars range. We know that many small businesses have been put out of business or have left the children's products market.

There is only limited action the agency can take under CPSIA to ease the burden it places on small businesses while still protecting consumers. Nevertheless, we are trying to do what we can. For example, we have put out information and education materials to explain the law to the small business community and these activities will be enhanced by the budget we have submitted. The component testing enforcement guidance is intended to push testing obligations upstream and take some of the test burdens off the final producer, including the small manufacturer. The Compliance: Continued Testing Rule, which will come out this fall, will impose significant new testing obligations on producers in

addition to those now in place. We hope to ameliorate the adverse impact this rule will have on small businesses by delaying some of the testing burdens for small volume producers. While we hope that these actions will be helpful, we will not know the success of their efforts or their impact for some time. In the meantime, small businesses are suffering now and the agency needs the authority to ease unnecessary and counterproductive regulatory burdens. In my view, the component testing enforcement policy and a possible small volume provision for additional testing requirements, along with education, are not sufficient to address legitimate small business concerns. I recommend Congress give the Commission additional flexibility to ease the regulatory burdens on small businesses and charities while still providing the strong consumer protection that we all desire.

With the changes outlined above, the CPSIA could become a much stronger tool for consumer protection. These changes would allow the Commission to focus its efforts and its limited resources on the real hazards that impact consumers, a goal that we all can agree is needed.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
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STATEMENT OF COMMISSIONER NANCY NORD ON THE COMMISSION REPORT TO CONGRESS PURSUANT TO THE STATEMENT OF MANAGERS ACCOMPANYING P.L. 111-117

January 15, 2010

My fellow Commissioners and I, together with the agency's staff experts, have been working diligently to respond to the request of Congress for recommendations on how to change the CPSIA. Our bipartisan approach has produced a report that is a good step in the right direction. While the report identifies several recommendations with which all the CPSC Commissioners agree, it stops short of addressing all the issues that need to be considered before the CPSIA can truly become the constructive force for consumer protection envisioned by the Congress when it passed the legislation. The law contains a number of useful new tools, many of which were requested by the agency, to better position the CPSC to act more quickly and effectively to protect consumers. However, there are aspects of the law that limit the flexibility of the agency to act appropriately and, as a result, we have seen unfortunate, unintended consequences flowing from the law's implementation. I have been requesting for some time that the Congress address these problems and I appreciate the opportunity to contribute to that process. The recommendations in the report represent a good start, but the conversation about how to fix the problems with the CPSIA needs to go further. I have listed below some of the critical changes that need to be made to the law.

1. Lead Exclusions and the Process for Granting Exclusions

There is absolutely no disagreement over the need to limit children's exposure to lead. However, the language of the CPSIA is drafted so tightly that the exclusions process in the law, which Congress intended for the agency to use, is not workable. The law limits the agency's ability to focus on products that present actual injury or harm to children. The CPSC scientific staff has told us that they are not aware of any product that could meet the exceptions requirements of the law and hence have had to recommend denial of each of the petitions for exclusions that have been considered. This is in spite of the fact that staff has told us with each petition for exclusion that the products in question do not present a risk of harmful exposure to lead.

Over the past 18 months, staff has taken thousands of hours away from dealing with ongoing, significant safety concerns to consider issues such as the following:

- Determining whether to exempt ball point pens, which have a tiny brass tip that holds the ball. That brass tip contains lead over the statutory limit. After much deliberation, the Commission decided that a pen that is used by both adults and children is not a children's product and is not subject to the law but if that same pen is decorated with brightly colored cartoon characters it may fall within the reach of the law and if so, could not be sold.
- Determining that it is illegal to sell children's products containing crystals or rhinestones which, by necessity, contain more than the statutory amount of lead and for which there is no suitable substitute. This is true even though the lead in rhinestones and crystals does not easily leach out and even though a child could be exposed to more lead from products that meet the statutory requirements than from

exposure to rhinestones and crystals.

- Determining how to allow for the continuing sale of children's bicycles even though some parts contain lead, e.g. the Schrader valve used to put air in the tire. Many bicycles are made with recycled metal that also may contain lead at levels that are unpredictable and not easily controllable but which may exceed the statutory limits. In this case, a stay of enforcement was the only way to avoid an unacceptable regulatory result – banning children's bicycles – flowing from applying the statute to this product.
- Determining that a brass collar and other brass components of die-cast toys are prohibited even though staff reported there is no real risk of harmful lead exposure. The implications of this decision for other products containing brass, not only those in the home, but also in our schools – such as desk hinges, locker handles and coat hooks – are significant and far-reaching.

The agency needs flexibility to deal with products that contain lead over the statutory limits but which do not present a risk to children. The Congress specifically asked the agency to look at risk and exposure in crafting a solution to this problem. To solve the problems we have had in applying the exclusions language of the current statute, Congress needs to give the agency the flexibility to look at whether there is a real risk of lead exposure based on the child's interaction with the product and the extent to which that interaction results in a measurable increase in the child's blood lead levels, rather than the absolute language that is now in the statute. This would address the conferees direction to look at risk and exposure and the many concerns expressed by individual members of Congress, including primary sponsors of the law, who have indicated that they thought the statute contained this flexibility. As we do this analysis, it is important to look at how other jurisdictions and agencies address lead exposure so that we consider consistent requirements where appropriate.

In addition, additional thought should be given to the scope of the law. There are certain products – most toys and children's metal jewelry, for example – that warrant aggressive regulation with respect to lead. There may be others – books, educational products, sporting equipment and apparel, for example – where there is less concern. Congress should either write the law specifically to spell out what they want included and excluded, or they should give the agency sufficient flexibility to regulate appropriately. This could be done either by product category or by age. With respect to age, the agency has extensive experience in dealing with the ways that children of different ages interact with consumer products. The CPSIA does not allow flexibility for the agency to utilize this expertise. It treats all children – infants to pre-teens – the same, and, as a result, our regulatory decisions cannot be tailored to meet the requirements of the age of the child and thereby apply the most effective solution for the greatest risk and exposure. Lowering the age requirements of the statute and making clear the agency's ability to regulate upward as safety circumstances warrant, would go a long way to solving many of the problems in the law and keeping the agency's resources focused on providing real protection for consumers.

2. Testing and Certification/Small Manufacturer and Crafter Concerns

The agency and the Congress have heard from many small manufacturers and crafters that are being severely and adversely impacted by the CPSIA. Indeed, a website has been established that tracks the demise of businesses attributed to the law. The testing and certification requirements are at the heart of the complaints being made by small manufacturers and crafters. The agency has worked hard, within the confines of the statute, to deal with the issues small manufacturers and crafters are facing as they struggle to meet CPSIA's requirements, but our options are limited. Our report points to the guidance booklets we have published, the component testing enforcement guidance and possible regulatory relief in the so-called '15-month rule' dealing with frequency of ongoing testing. It is not clear that the problems small manufacturers and crafters are having now can be adequately addressed with more education, a policy on components that is still unimplemented and unproven, and by the promise of future regulatory action, months from now, that treats only part of the problem.

While independent third party testing is the most robust way to provide assurance of compliance, it is also the

most costly and least efficient. The requirement that all children's products be third party tested has raised the cost and added to the complexity for many small producers of children's products. The application of this requirement to handcrafted products made by individual artisans has raised serious concerns about their continued viability. While we hope that our component testing enforcement policy will address some of this concern, we have been told that this is not a panacea and more must be done. In addition, small producers face higher testing costs, are receiving conflicting information from testing labs about what must be tested, and are facing barriers from retailers who are requiring redundant testing or additional testing to be done by laboratories they specify, often at prohibitive cost.

Given all this, Congress should consider whether child safety can be served by other testing alternatives that will assure adequate compliance testing without the cost and complexity of third party testing. Specifically, the agency should have the ability to establish, by rule, alternative testing requirements for certification under section 102 of the CPSIA for manufacturers based on small volume or other appropriate criteria, as long as the requirements provide for a reasonable testing program and such other provisions as the Commission deems necessary to provide reasonable assurance of compliance with underlying consumer product safety rules.

3. Retroactivity

The report's recommendation that retroactivity not apply when the lead provisions of the statute transition from 300 ppm to 100 ppm is the minimum that must be done to address the significant losses that businesses have incurred because of the retroactive nature of the statute. The problems with retroactivity have been exacerbated by retailers who have required the lower limits ahead of their implementation dates in the statute, stranding safe inventory that cannot be sold. Although it is unfortunate that a recommendation could not have been made and acted upon a year ago to forestall the economic losses that have already been suffered, it is imperative that it be implemented as soon as possible.

We are seeing the same phenomenon occur with respect to phthalates, where the testing process to determine the presence of phthalates is much more difficult than is that for lead. The CPSIA permanently banned three types of phthalates and banned, on an interim basis, three other types until more health data could be assembled and analyzed. A Chronic Hazard Advisory Panel is being convened according to the timetable set out in the CPSIA, to look at the health effects of the various phthalates banned on an interim basis by the statute. The Commission is trying to define the universe of products to which the phthalate ban is applicable, is still working on a test method to determine the presence of phthalates in those products, and has not yet approved a laboratory accreditation process. Unlike lead, there is no screening test to more easily determine the presence of phthalates. It is unreasonable to require that retailers and resellers either face potential liability or go back through their inventory to try to determine the presence of phthalates when we do not even have a test method in place, putting aside questions of testing practicality and affordability. Congress should consider clarifying that this provision will not apply in a retroactive manner. At the very least, retroactivity should apply only to the three permanently banned phthalates.

Finally, the recommendation with respect to retroactivity does not go far enough since it does not treat sales by charities, consignment shops and other resellers. For example, we have been told that many of the charities are not selling children's apparel because of the potential liability imposed by this law. Obviously, it is crazy for people not to be able to buy their children winter coats or boots at a Goodwill store or at a yard sale. Yet that is where the CPSIA leads us and I doubt Congress really intended this result. The agency has an excellent working relationship with charities such as Goodwill and the Salvation Army, and our regulation of these groups should focus on stopping the sale of recalled products. Congress should act to assure that the products parents need to buy are available in the resale market.

Conclusion

This statement is not intended to be a comprehensive description of all the implementation issues we have seen with respect to the CPSIA. I have focused for the past 18 months on the major challenges we have faced in implementing this law. As Congress reflects on the implementation issues presented by the CPSIA, there are a number of other things – both technical and substantive – that should be considered, including coordination with the state attorneys general in enforcing the law and issues related to improving the agency's database.

Please be confident that the Commission shares the commitment of the Congress to assure American families that products on store shelves do not present an unreasonable risk of injury. These recommendations are given in the spirit of finding a path forward that, while minimizing unnecessary regulation, assures parents that the products they buy are as safe as possible for their families.