Testimony of Anne M. Northup
Commissioner
United States Consumer Product Safety Commission

Hearing: "Oversight of the Consumer Product Safety Commission."

Before the

U.S. House of Representatives
Committee on Energy and Commerce

Subcommittee on Commerce,
Manufacturing, and Trade

August 2, 2012

Chairman Bono Mack and Ranking Member Butterfield, thank you for the opportunity to provide testimony to this Subcommittee in connection with your Oversight of the Consumer Product Safety Commission. I have testified before this Committee several times since my tenure as a Commissioner began in August 2009. On those occasions, I have brought to your attention the severe economic impact of the Commission's regulations on the American marketplace, and, in particular, the unforeseen adverse consequences of the Consumer Product Safety Improvement Act (CPSIA). While I do not intend to repeat that testimony today, **attached** is a sample list of businesses impacted by the CPSIA, as well as other economic data.

Since the passage of the CPSIA, both President Obama and Congress took action intended to reduce the economic burdens of excessive and unjustified regulation. In January and July 2011, President Obama issued Executive Orders 13563 and 13579 calling on regulatory agencies to "afford the public a meaningful opportunity to comment" during the rule-making process, "use the best, most innovative, and least burdensome tools for achieving regulatory ends" and to "take into account benefits and costs [of regulation], both quantitative and qualitative." E.O. 13563. The President also asked independent regulatory agencies to formulate plans for the retrospective review of existing regulations in order to "determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving regulatory objectives." E.O. 13579.

Congress, for its part, passed in August 2011, H.R. 2715, which requires the Commission to (1) consider opportunities to reduce the cost of third party testing and permits it to prescribe new or revised third party testing regulations if it determines doing so will reduce third party testing costs consistent with assuring compliance with applicable product safety rules, bans, standards, and regulations; (2) report to Congress those opportunities to reduce third party testing costs that would require new legislative authorization; (3) exempt from third party testing, or provide an alternative testing requirement for, covered products produced by small batch manufacturers; and (4) issue standards and protocols calling for "representative" rather than "random" samples to be selected for periodic third party testing to ensure continued compliance following initial certification testing.

While the intent of the President's Executive Orders and H.R. 2715 are admirable, both have fallen short of having the desired impact on the CPSC. Over the past 18 months, the Commission's majority has done nothing to slow the feverish regulatory pace that has become the norm at our agency and refused to provide an opportunity for public comment on several of our most controversial and sweeping rules. It also has yet to formulate a plan for retrospective rule review that embraces the President's call for meaningful regulatory burden reduction. Instead, we are hearing new calls for the Commission to be free from the obligation to rationally justify its rulemaking.

Another Year of Regulatory Overreach

Just since August 2011, the Commission majority:

- reduced the acceptable limit of lead in a children's product from 300ppm to 100ppm, notwithstanding CPSC staff's determination that no health benefit would result, while businesses would incur substantial compliance costs;
- finalized its very complex and burdensome rule implementing the CPSIA requirement that manufacturers periodically procure third party laboratory tests of every component of every children's product to ensure continued compliance with all applicable safety standards, irrespective of any risk posed by the product or of the cost of the testing, proceeding despite Congress's passage of H.R. 2715 requiring the Commission to seek public comment on ways to reduce the cost of third party testing, letters from members of Congress urging the Commission to consider ways to reduce the costs of third-party testing *before* implementing the rule, and the recommendation of its professional career staff that the rule should be reproposed to permit consideration of public comment;
- without allowing for notice and a comment period, changed its interpretation of the term "unblockable drain" in the Virginia Graeme Baker Pool and Spa Safety Act, resulting in the closures of hundreds of pool throughout the country, and an *increase* in the risk of pool drain entrapment; and
- sought to impose additional burdensome record-keeping requirements with no offsetting benefit to product safety, in its interpretive rule defining the term "representative sample".

Moreover, none of these actions were preceded by any effort to determine the qualitative or quantitative costs, let alone by consideration of whether the benefits justified the costs, or whether less burdensome alternatives were available. Clearly, Cass Sunstein, Administrator of the Office of Information and Regulatory Affairs, was not talking about the CPSC when he wrote in a 2011 op-ed for *The Wall Street Journal*: "This insistence on pragmatic, evidence-based, cost-effective rules is what has informed our [the Administration's] regulatory approach over the past two and a half years."[1]

The Decision to Reduce the Children's Product Lead Limit from 300 ppm to 100 ppm.

A 3-2 majority of the CPSC voted in August 2011to require every single children's product component to be 99.99% lead free, down from 99.97% lead free. Commission scientists determined that the newly banned products containing between .03% and .01% lead contributed minimally to the overall lead exposure of children (a.k.a. the benefit). Conversely, the Commission's economists concluded that mandating the lower lead limit would have significant adverse economic impacts, including the use of more expensive low-lead materials; the costly reengineering of products to use lower lead materials or to

[1] Cass Sunstein. "21st Century Regulation: An Update on the President's Reforms," *The Wall Street Journal*. May 25, 2011.
http://online.wsj.com/article/SB10001424052702304066504576345230492613772.html

make newly noncompliant components inaccessible; increased testing costs; increased consumer prices; reductions in the types and quantity of children's products available to consumers; businesses exiting the children's product market; manufacturers going out of business; reduction in the utility and durability of products (a.k.a. the cost). This is a rule that would have failed the cost-benefit test.

The Premature Finalization of the Periodic Testing Rule.

H.R. 2715 was enacted on August 12, 2011, and contains a number of provisions to lessen the cost and burden of third-party testing and certification of every component of a children's product. These provisions include exempting certain products entirely from third-party testing and certification, directing the Consumer Product Safety Commission to provide relief to small batch manufacturers, and requiring the Commission to seek public comment on ways to reduce the cost of third-party testing for all manufacturers and importers. H.R. 2715 thus signaled Congress's intent to reduce such testing whenever possible consistent with assuring product safety.

The decision to finalize the third-party testing rule based on the original 2008 CPSIA statutory language, rather than repropose it to solicit public comment on the new issues raised by H.R. 2715, complicates compliance by an already overburdened regulated community. The third-party testing rule (often referred to as the Fifteen Month Rule), codified at 16 C.F.R. § 1107, is the largest and most widely applicable rulemaking the Commission has ever undertaken. It includes the promulgation of protocols and standards for the *additional* third-party testing *after certification tests of sufficient samples have already been performed* of a certified children's product to ensure continued compliance with all applicable safety standards. It applies both when there is a material change in the product and periodically, during production, even in the absence of a reason to believe a certified product is no longer compliant. This rule may be the most intrusive imposition of requirements on a segment of the manufacturing community ever. Its prescriptive mandates insinuate the Commission deeply into the production process of any company that manufactures a children's product for the United States market.

According to the CPSC's economists, "[t]he costs of the third-party testing requirements are expected to be significant for some manufacturers and are expected to have a disproportionate impact on small and low-volume manufacturers." Just the costs of testing alone -- excluding the costs of samples consumed in destructive tests, the costs of shipping the samples to the testing laboratories, and any related administrative and record keeping activity – is expected to consume over eleven percent of a small manufacturer's revenue. Given that a typical profit is only about five percent of revenue, it is reasonable to expect a large number of small business closures resulting from the third-party testing requirement. They cannot simply raise their prices and remain competitive.

Further, Commission economists predict that in response to the "significant increase in their costs due to the final rule", manufacturers will redesign their products to reduce the features and component parts, reduce the number of children's products they offer, exit the children's product market, or go out of business completely. The costs associated with the new rule are also expected to be a "barrier that inhibits new firms from entering the children's product

market", including, in particular, ones serving a niche market, such as products for children with disabilities. Safety and performance related innovation will also be stymied, as manufacturers "delay implementing some improvements to a product's design or manufacturing process in order to avoid the costs of third party testing."

By hastily finalizing the testing and certification rule, the Commission finalized the rule without considering the cost reducing measures urged by Congress, let alone ensuring that its benefits justify its substantial costs.

The Revocation of the More Protective Definition of Unblockable Drain.

The VGB Act requires public pools and spas with a single main drain which is small enough to be completely covered by a human body and thus create a life-threatening suction (known as a "blockable drain"), to be equipped with a system to prevent entrapment. These systems are often referred to as "backup systems". Although five systems/devices are enumerated in the Act as permissible backup systems, the Commission has long recognized the safety vacuum release system to be the most commercially viable and therefore most likely to be used by pool owners. "Unblockable drains" were exempt from the requirement to have one of these back-up systems, because their size and/or configuration prevented a deadly suction from ever occurring

In April 2010, following extensive input from the public, the Commission issued a final rule that interpreted the phrase "unblockable drain" to include an "unblockable drain cover." As a result, pools and spas with a single main drain equipped with an appropriately sized "unblockable drain cover" were not required also to be equipped with a vacuum release or other back-up system.

The Commission adopted this definition based on the recommendation of its staff of career technical experts. In their opinion, an unblockable drain cover is superior to a vacuum release back-up system because it *prevents* all entrapments. A vacuum release system, in contrast, only protects against one kind of entrapment (evisceration), only *stops* an entrapment incident after it has already occurred, and does so only after a delay of up to 4 seconds. As a consequence, once an evisceration takes place, it is already too late for a vacuum release to save a child. And the back-up system does not protect against other types of entrapments such as hair entrapment, mechanical (i.e., necklace) entrapment, or limb entrapment.

Besides the built-in limitations of the vacuum release systems, their unpredictability in practice has been well documented by those who are responsible for aquatic systems, including pool managers, pool maintenance companies, public safety experts and public and private recreation managers. The repeated complaints of malfunction include unwarranted shut off, failure to shut off, incompatibility with the filtration and cleaning systems and regular disconnection as a result of repeated failures. Just last month in Tennessee a child was rescued just in time after the vacuum system backup failed to engage.

The Commission acted in accordance with the expert advice of its technical staff. It did so only after also considering the contrary views presented by the inventor of the vacuum release system, who wanted the Commission to mandate the use of his product; pool safety advocates, many of whom were influenced and mobilized by the backup system manufacturer; and, a few members of Congress who had been lobbied by the back-up system manufacturer. While these parties argued that an unblockable drain cover does not provide the "layers of protection" required by the VGB Act, a majority of Commissioners recognized that the VGB Act's overriding intent to prevent child drowning was best served by reasonably and lawfully interpreting "unblockable drain" to include these newly invented systems that cover a blockable drain and convert it to an unblockable drain. The wisdom of their judgment is confirmed by the fact that, since that time, there has not been a single entrapment incident in a pool equipped with a compliant unblockable drain cover.

Then, in September 2011, Commissioner Bob Adler, who had previously voted with the majority, placed on the agenda a vote to revoke our original interpretation of "unblockable drain" to no longer permit consideration of these new covers. Moreover, Commissioner Adler and his two Democrat colleagues did so without notice to the public or any opportunity for public comment, and without a public briefing before the vote. They even refused my colleague Nancy Nord's request to at least notify, prior to the vote, the state agencies responsible for pool administration and safety and obtain their input. And after the majority rushed through this significant change, the Chair took the virtually unprecedented step of choosing not to issue a press release even informing the public of the Commission's decision.

While the vacuum release systems can be expensive to purchase, the real cost can be their integration with the other complicated systems including the compressors, the pump, the filtration cleaning process and the state health codes that require water turnover at specific rates. At the pool to which I belong, the price of compliance went from an original price of several thousand dollars to almost $50,000 for final installation. It is therefore not surprising that we later learned from numerous municipal park and recreation departments, as well as nonprofit groups created to promote aquatic recreation safety, that, as a result of the Commission's precipitous and inexplicable action, many state, municipal and other public pool operators will be unable to afford this new and expensive mandate coming shortly on the heels of the expensive work required to come into compliance with the Commission's original interpretation. As a result, many public pools opened late or closed, with the brunt of the losses suffered by economically-disadvantaged regions. There have been no injuries associated with compliant pool drains since 2008. But the CPSC estimates that 4400 children under 15 suffered emergency room treated submersion injuries in 2011. Children cannot learn to swim in closed pools, and economically disadvantaged children are at the greatest risk of drowning.

To date, over 1100 pools have closed throughout the country as a result of the cost of maintaining their operation.[2] This outcome is inconsistent with even the most basic concepts of rational cost-benefit based rulemaking.

This abrupt change in the law has also put out of business the manufacturers of unblockable drain covers, who no longer have a market for their product. Cash strapped public pool owners required to install vacuum release systems will not also bear the additional cost of an unblockable drain cover when it is no longer required. Unfortunately, the absence from the market of unblockable drain covers also leaves private pool owners without the most effective means to prevent drain entrapment in pools with single main drains. And many who are unable to afford even the inferior protection of a vacuum release system will be left with no protection against drain entrapment. Ironically, the Virginia Graeme Baker Act was named after a little girl who was eviscerated in the drain of her family's private pool. The Commission's reinterpretation makes it more likely other families will suffer the same tragic loss.

The Attempt to Impose Unjustifiably Burdensome Recordkeeping Requirements with the Interpretation of "Representative Sample".

In H.R. 2715, Congress changed the sampling requirements for periodic testing from using random samples to representative samples. This provided significant relief to manufacturers, because "random" sample has a highly technical/mathematical meaning in manufacturing processes, as distinguished from "representative' sample, which has only a common usage meaning. Congress directed the Commission to establish protocols and standards for testing "representative samples".

The Draft Final rule for the testing of representative samples prepared by CPSC staff properly recognized Congress' intent by defining "representative" according to its common meaning. It afforded manufacturers the flexibility to select samples that best suited their product and production process, so long it provided a basis for inferring the compliance of the untested samples.

But the Draft Final rule also included costly new record keeping requirements that were not mandated by law. The draft final rule would have required the creation and maintenance of records that our own economists estimate would cost manufacturers $32.3 million in the first year alone, with another $1.3 million to $6.5 million every year thereafter. And this cost is in addition to the enormous burden of the record keeping already required by 16 C.F.R. part 1107 – Testing and Labeling Pertaining to Product Certification. Regardless of which of the three alternative testing intervals a manufacturer selects to comply with the continued testing requirement under that rule, it must create and maintain for five years extensive records that far exceed what is necessary to ensure continued compliance under the CPSIA and to facilitate enforcement.

[2]Mick Nelson, USA Swimming. Personal Interview, July 24, 2012

These additional recordkeeping burdens were not imposed because my colleague Nancy Nord and I were able to block approval of the rule. But there can be little doubt that when the Democrats regain their majority at the end of my term in October 2012, there will still be no cost-benefit analysis, and the recordkeeping requirements of the representative sample rule will become law.

Little Hope for the Future

Opportunities remain for the Commission to ameliorate the unjustified burdens it has imposed on the industries it regulates, but I fear the formation of a majority with the will to do so is doubtful. The Commission has yet to formulate a plan for meaningful rule review, and the Chair is seeking new opportunities to regulate without regard for cost.

The Failure to Complete a Rule Review Plan

In July 2011, the President gave each independent regulatory agency 120 days to develop and release to the public a plan for the periodic review of its existing significant regulations to determine whether any should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving regulatory objectives. Under Chairman Tenenbaum's leadership, staff did not present a draft plan to the Commission until the end of April 2012. Since that time, I have become increasingly pessimistic about the prospects that a Commission majority will agree to undertake *meaningful* rule review within the spirit of the President's request.

I have two principal concerns with the draft plan released to the public that, unless there is a change in the regulatory philosophy of the Democrats on the Commission, are unlikely to be allayed. First, rule review should, as the President requested, focus on the reduction of regulatory burdens, with prioritization for review given to those rules that impose the greatest burden on commerce. The goal of regulatory review should be to *meaningfully* reduce regulatory burdens. Instead, the draft plan expands the scope of the rules subject to review to include very minor provisions, and does not call for prioritization based on cost or any other measurable burden. In fact, the Democrats recently made the disingenuous claim in an op-ed that they were doing more than the President requested by potentially selecting for review any Commission regulation, not just significant ones. But this expansion in scope has already had its intended effect: the draft plan calls for the retrospective review of two minor and obsolete rules that have long since been superseded by other requirements. Thus, by claiming to do more, the Democrats seek political cover for a plan that does less. It also places equal, if not greater emphasis, on selecting rules with the intent to "strengthen" them and thereby increase the burdens they impose. .

Second, a full cost-benefit analysis – in the President's words, both qualitative and quantitative – should be performed on those rules that are selected for review. Otherwise, the President's goal of ensuring that benefits justify costs cannot possibly be achieved.

In deference to the Commission's internal rules discouraging public disclosure of private deliberations, I will not detail the Commissioners' efforts to negotiate a compromise rule review plan. Suffice it to say that we would not still be negotiating three months after receiving staff's draft plan if a Commission majority shared these core principals.

Efforts to Exempt More Rules From Cost-Benefit Analysis

Under existing law, the CPSC cannot promulgate a consumer product safety rule until it has performed an analysis of the potential benefits and costs of the rule. That analysis must then show that the benefits expected from the rule bear a reasonable relationship to its costs and that the rule imposes the least burdensome requirement to reduce the risk of injury. However, the CPSIA took the extraordinary step of exempting the Commission from those requirements as we established new mandatory rules governing certain toddler and infant products.

Having had the freedom to regulate without the need for a rational justification, the Chair now seeks to expand those powers. In her July 17, 2012, testimony before the Senate Committee on Appropriations, Subcommittee on Financial Services and General Government, Chairman Tenenbaum urged the Subcommittee to amend the Flammable Fabrics Act to permit "this type of flexibility for rules regarding flammability of upholstered furniture" because it "would be very helpful and may allow for expedited consideration of the proposed rules."

The Commission has been studying means to address the risk of the flammability of upholstered furniture and contemplating potential rulemaking *for over twenty years*. Action has yet to be taken because it is such a complicated issue, both in terms of demonstrating the efficacy of risk reduction alternatives, and ensuring that they do not have unintended and more harmful consequences, such as has occurred with the introduction of potentially hazardous flame retardant chemicals in California.

There is no doubt that a proposed rule addressing the flammability of fabrics could be "expedited" if there was no need to establish the efficacy of the rule, or that its quantitative and qualitative costs are justified. But such rulemaking would likely close businesses, increase the cost to American consumers, and reduce choices and options in the market, all for unproven benefits. This is exactly what both Congress and the President recognize is undermining the country's economic recovery.

Many speeches have been made and much has written by both the current administration and Congress urging federal regulatory agencies to reduce the crushing costs of excessive regulation by following the simple common sense approach of measuring the costs and benefits of regulation, and only imposing justified burdens. Three years as a Commissioner has taught me how difficult such a seemingly simple approach can be, when it is obstructed by individuals whose regulatory philosophy is: more is better, and don't bother me about the cost.