U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

SUPPLEMENTAL STATEMENT OF COMMISSIONER ROBERT S. ADLER REGARDING THE APPROVAL OF THIRD PARTY TESTING RULES FOR CHILDREN'S PRODUCTS

October 31, 2011

On October 19, 2011, the Commission took a significant step towards fulfilling the safety vision laid out by Congress in the Consumer Product Safety Improvement Act of 2008 (CPSIA). Congress' vision was both simple and profound: those who make toys and other children's products should take careful measures to ensure that they comply with CPSC safety rules *prior* to introducing them in commerce. I am pleased to have been a part of the majority in this vote.[1]

To explain my vote, I need to offer a few words of history. In 2007 and 2008, the Commission undertook hundreds of recalls involving millions of dangerous toys and other children's products that failed to comply with CPSC safety rules. These seemingly endless recalls convinced Congress that the CPSC's traditional system of taking action against dangerous products *after* they had entered consumers' homes had to change.[2] Congress' concern stemmed from the fact that children, our most vulnerable consumers, have no ability to take precautions or otherwise protect themselves against hazardous products. This is especially so with respect to certain "hidden" hazards such as lead or loose magnets where the risks are not necessarily obvious even to conscientious parents.

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[1] See *Joint Statement of Chairman Inez M. Tenenbaum, Commissioner Robert S. Adler and Commissioner Thomas H. Moore on the Votes to Approve the Final Rule on Third-Party Testing and Certification, the Final Rule on Component Part and Finished Product Testing, the Notice of Proposed Rulemaking on "Representative" Testing, and the Federal Register Notice Seeking Public Comment on Reducing the Costs Associated With Third-Party Testing*, October 20, 2011 at: www.cpsc.gov/pr/tenenbaummooreadler10202011.pdf.

[2] The most highly publicized of these incidents included the death of a small child after he swallowed magnets, and popular children's toys produced in China found to contain dangerously high levels of lead. Loose magnets inside a child's digestive tract can easily block and puncture a child's intestines – in some cases leading to death. Lead is a powerful neurotoxin that accumulates over time. Even low levels of lead are widely associated with learning disabilities, decreased growth, hyperactivity, impaired hearing, and brain damage. With respect to magnets see Patricia Callahan, *Toy Magnets Kill Young Boy*, Chicago Tribune, May 5, 2007, and *Inside the Botched Recall of a Dangerous Toy*, Chicago Tribune, May 7, 2007. With respect to lead, see e.g. Environmental Protection Agency, *Lead Poisoning and Your Children*, EPA 747-K-00-003, October 2000; Kim Cecil, et. al. My previous views on the CPSIA and lead regulation can be found at: http://www.cpsc.gov/pr/adler08012011.pdf and http://www.cpsc.gov/pr/adler01222010.pdf.

With the many recalls of 2007 and 2008 fresh in mind, Congress took direct action to protect children in the CPSIA. Briefly stated, Congress required manufacturers of children's products to have their products tested for compliance with CPSC safety rules at independent, third-party laboratories accredited by the agency prior to introducing the products into commerce.[3] Based on these tests, manufacturers must then certify to their customers that their products comply with CPSC rules.[4] To implement this mandate, Congress directed CPSC to write rules governing the testing and certification of children's products. That is what the Commission did on October 19.

Congress did not impose this procedure without great thought and consideration. They undertook it only after careful deliberation and extensive consultation with members of the public, including the regulated community. In effect, Congress insisted that the Consumer Product Safety Commission act as the fence at the top of the hill, not the ambulance at the bottom.

In a manner similar to Congress, the Commission undertook significant study, careful deliberation and extensive consultation before issuing its final rule on testing and certification.[5] As the CPSC worked on the rule, the agency, in response to several suggestions along the way, decided to issue a complementary rule permitting suppliers of components for toys and other children's products voluntarily to test and certify their components for compliance with CPSC rules.[6]

In addition to providing a substantial measure of reassurance to safety-conscious consumers, these rules represent the Commission's best effort to provide meaningful guidance to manufacturers about how and when to conduct third-party tests. In providing such guidance, however, the Commission chose to leave substantial discretion regarding the testing details in the hands of the experts – the manufacturers themselves. In sum, considering the enormity of the task, I believe the CPSC got it just about right.

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[3] I need to emphasize two points about this action. First, Congress applied this stringent procedure only to toys and other children's products – not to adult products. Presumably, adults have a greater ability to judge the safety of the products they use. Second, Congress's action satisfies a long-held view among consumers that toys should be reviewed for safety before they are sold. As far back as 1982, 88 percent of Americans surveyed favored governmental approval of new toys for safety before being marketed. See Lou Harris and Associates, Inc., *Consumerism in the Eighties* (1982)(Study No. 822047, conducted for the Atlantic Richfield, Co.) at 36.

[4] As described later, page 8, manufacturers must third-party test their products before they are introduced into commerce. This is called "initial" third-party testing. They must also third-party test when they make "material changes" to their products. And they must third-party test on a regular basis. We call these tests "periodic tests."

[5] The official title of this rule is "Final Rule on Testing and Labeling Pertaining to Product Certification Testing" (the "testing and certification" rule).

[6] The official title of this rule is "Conditions and Requirements for Relying on Component Part Testing or Certification, or Another Party's Finished Product Testing or Certification, to Meet Testing and Certification Requirements (the "component parts" rule). The benefit to manufacturers is reduced costs of testing and certification for components that their suppliers furnish to them.

As the Commission deliberated on the testing and certification rule, Congress simultaneously explored several issues with it. Many small manufacturers had voiced concerns about the costs they faced in meeting the third-party testing requirements. In response, Congress, and the President, on August 12, 2011, enacted a measure of relief in legislation, H.R. 2715.[7] I note that despite numerous calls for halting or gutting the third-party testing rule under consideration by the Commission, Congress refused to do so. Instead, Congress essentially affirmed the Commission's approach while directing us to consider whether alternatives to third-party testing for small manufacturers might be found as well as seeking ways to reduce the burdens of third-party testing for all manufacturers.

As with any agency rulemaking, there are sometimes issues that call for extra words of explanation, clarification, or even occasional dissent. I will briefly touch on a few of these, including a suggestion to re-propose the rule, and comments on the costs and benefits of these rules, reasonable testing for non-children's products, third-party testing requirements, due care and small batch manufacturers.

Whether the Testing & Certification Rule Needed to be Re-Proposed

Congress passed the CPSIA in August 2008. The law mandated that the Commission promulgate the testing and certification rule no later than fifteen months after the Act's passage.[8] On October 19, after a series of twists and turns, the Commission approved the rule, along with the complementary component parts rule. What had informally been called the "fifteen-month rule" became, in fact, the "thirty-eight month rule." While the process took longer than anyone expected, this delay arose largely in response to calls from the regulated community to put more flexibility in the rule – which we did. Accordingly, there can be no argument that the Commission rushed this rule.

Two of my colleagues, Commissioners Nord and Northup, have insisted that we re-propose the testing and certification rule because of the passage of H.R. 2715. Upon careful consideration, I respectfully, but strongly, disagree. The crux of their argument is that Congress wanted the agency to stop its testing and certification rulemaking and start over again. They assert this notwithstanding the lack of any language in H.R. 2715 or its legislative history – or even a hint, wink or nod in that direction – that supports their argument.

[7] Among other things, H.R. 2715 modified a number of provisions pertaining to lead in the CPSIA, directed the Commission to solicit comments from the public about how to minimize the impact of its third-party testing and certification rules, required the agency to try to develop alternative testing requirements for many "small-batch" manufacturers that still provide reasonable methods to assure compliance with any applicable consumer product safety rule, ban, standard, or regulation, and changed the requirement for manufacturers to conduct third-party tests of "random" samples to tests for "representative" samples.

[8] Section 14(d)(2) of the CPSA.

In support of this claim, my colleague, Commissioner Northup, cites two cases as precedent for the proposition that the CPSC should re-propose its rule in light of the statutory changes to its authority.[9] Unfortunately, these cases provide no support for her argument. The first case, *McGavock*, contains a stray piece of dicta that advances the proposition that an agency faced with congressional language that renders a critical term in its rules "obsolete and without effect"[10] should revise its rules to reflect Congress' changes. Of course, that is not the case with the Commission's testing and certification rule. To the contrary, as I shall discuss, a fair reading of H.R. 2715 demonstrates that Congress intended it to supplement and support – not delay – the Commission's work on the testing and certification rule.

The second case, *American Transfer& Storage Co.*, if possible, provides even less support for my colleague's argument. In this case, the Interstate Commerce Commission argued that it had "good cause" under the Administrative Procedure Act (APA) to propose an interim rule without providing a notice and comment period because it had a short time frame for action due to impending legislation by Congress. The Fifth Circuit upheld the agency's determination. Try as I might, I can find nothing in the court's ruling that has any relevance to the CPSC's promulgation of its testing and certification rule. How my colleague can twist a court's ruling that upheld agency discretion under the APA into a precedent for her argument that CPSC violated the APA is beyond me.

Notwithstanding the inapplicability of the cases my colleague cites, I have no quarrel with the general proposition that a subsequently-enacted statute that conflicts with or substantially modifies an agency's rules should cause an agency to revise its rules, permanent or pending. Unfortunately for Commissioner Northup's argument, an essential ingredient is missing. There simply is no conflict between the Commission's rule and H.R. 2715. To the contrary, the clear evidence from H.R. 2715 is that Congress fully intended the Commission to proceed with dispatch to complete the testing and certification rule that it had been working on for several years.[11]

I have read H.R. 2715 and its legislative history with great care. At the outset, I repeat my earlier point that nothing in this Act or its legislative history calls for, suggests, or implies that Congress wanted the agency to stop its rulemaking on testing and certification and start over again. This is particularly striking in light of the fact that an

[9] See *McGavock v. City of Water Valley, Miss.*, 452 F.3d 423, 427-28 (5th Cir. 2006) and *American Transfer & Storage C. v. ICC*, 719 F. 2d 1283 (5th Cir. 1983).
[10] *McGavock v City of Water Valley*, 452 F.3d 423, 428.
[11] The only exception to this is Congress's changing the term "random" to "representative" in section 14(d)(2)(B)(ii) of the CPSA. The only exception to this is Congress' changing the term "random" to "representative" in section 14(d)(2)(B)(ii) of the CPSA. Clearly, this change does call for re-proposal of this term – something the Commission has done. However, I do not see how one can read this statutory change alone as rendering the entire regulation as "obsolete and without effect."

earlier version of H.R. 2715[12] did direct the Commission to stop its testing and certification rulemaking until the agency had completed a series of substantive and procedural steps.[13] This earlier draft, known as ECADA, generated such intense opposition that it never reached the floor of the House of Representatives for a vote. Instead, by a vote of 421-2 in the House of Representatives and by unanimous consent in the Senate, Congress adopted a quite different approach – one that preserved and supported the Commission's ongoing rulemaking effort.

On this point, I note the existence of a colloquy between several key senators who were among the most instrumental in enacting the CPSIA in 2008. In extremely clear and strong language, they pointed out that nothing in H.R. 2715 was intended to prevent the CPSC from moving forward with its testing and certification rulemaking.[14] Commissioner Northup dismisses this colloquy by noting that it occurred after H.R. 2715 had passed and argues that floor statements from a handful of senators "cannot amend the clear and unambiguous language of a statute." I take no issue with this general proposition, but she overlooks several key points.

First, I know of no one who claims that the senators' colloquy amends the clear and unambiguous language of H.R. 2715. Rather, it highlights and emphasizes the clear import of the Act. In fact, even if the senators had never engaged in the colloquy, what H.R. 2715 does – and does not do – is clear. Notwithstanding the calls to kill or delay the Commission's rulemaking on testing and certification, Congress instead stepped aside to permit the Commission to continue its rulemaking and directed the agency to consider whether other approaches to third-party testing might help reduce the costs of the rule.

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[12] *See* the vote of the House Energy and Commerce Subcommittee on Commerce, Manufacturing, and Trade regarding the discussion draft, Enhancing CPSC Authority and Discretion Act of 2011 (ECADA), May 12, 2011 at http://energycommerce.house.gov/news/PRArticle.aspx?NewsID=8585.

[13] These steps ranged from conducting a lengthy cost-benefit analysis to establishing, by rule, exemptions for works of art, specialty products for the disabled and certain products produced in small quantities.

[14] Colloquy between Senators Rockefeller, Durbin, and Pryor regarding the passage of H.R. 2715, August 2, 2011 at: http://www.gpo.gov/fdsys/pkg/CREC-2011-08-02/html/CREC-2011-08-02-pt1-PgS5236.htm (Senate Colloquy). Among other things, these key legislators stated:

> Senator Durbin: I am frustrated that the Consumer Product Safety Commission has taken too long to promulgate … the rules on third-party testing obligations and the component part testing rule. I did not oppose H.R. 2715 because it does not delay or impede the Commission's ability to implement these rules ….
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> Senator Rockefeller: The provisions in section 2 of H.R. 2715 were not intended to delay or stop the Commission's current rulemaking … to implement the critical provision related to the third-party testing of children's products. I fully expect the Commission to go forward with these important rulemakings with no disruption from the passage of this bill.
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> Senator Pryor: I also share [Senator Rockefeller's] view that nothing in H.R. 2715 is intended to delay the Commission's rulemaking with respect to third-party testing and believe that [the] Commission should conclude its testing rulemakings in the next 2 months.

Second, the senators that engaged in this colloquy constituted the key supporters of the original CPSIA in 2008. As such, their statements were not random floor chatter. They represented the strongly held views of Members who would never agree to legislation that they considered likely to undermine a law that they had so carefully and exhaustively drafted. Any move to stop the testing and certification rule seems very likely to have drawn their immediate opposition. Moreover, contrary to my colleague's statement – and notwithstanding her reliance on a concurring opinion of Justice Scalia[15]– the courts have not rejected congressional floor statements, such as this colloquy, as aids in interpreting statutes.[16]

Third, Senator Rockefeller clearly explained why the colloquy occurred on the day after H.R. 2715 passed rather than before the vote. The bill passed the Senate by unanimous consent, and therefore "bypassed regular order and failed to receive consideration in the Commerce Committee."[17] Senator Rockefeller, the Chairman of that Committee then stated the purpose of the colloquy: "I believe it is important to explain our intent in passing this bill."[18] Had it gone through regular order, he and others undoubtedly would have had the opportunity to point out in report language that the bill in no way affected the Commission's ongoing rulemaking. In short, given the clarity and strength of views in the colloquy and the lack of any legislative history to the contrary, I find the colloquy both powerful and persuasive.

As a policy matter, the time to issue the "38 month rule" is long past due. Consumers deserve the increased safety of children's products that this rule will ensure, and businesses deserve the certainty and guidance that this rule will provide.

Costs and Benefits

The testing and certification rule stands as a comprehensive step forward for safety. It is hard to imagine that such a substantial mandate would not constitute something "major" and significant. So, I find it unsurprising that our staff determined that it was a "major" rule under the Congressional Review Act of 1996, based on its potential impact on the economy. This seems a fair appraisal given the breadth of the rule.

That said, for many children's product manufacturers, I believe this rule constitutes a change more of form than of substance. It is my sense that most manufacturers already meet or exceed the requirements in this rule when they make their products. The major change they face will be the inclusion of CPSC-accredited laboratories in that process.

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[15] Justice Scalia's concurring opinion in *Crosby*, did not persuade the majority of his fellow judges. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

[16] To cite a prime example, in *Crosby*, the majority specifically points to floor statements made by members of Congress to assist in interpreting the meaning of the statute before the Court. *Crosby*, 530 U.S. 363, 376 n.9, 377 n.12, 378 n.13 (2000).

[17] Senate Colloquy at: http://www.gpo.gov/fdsys/pkg/CREC-2011-08-02/html/CREC-2011-08-02-pt1-PgS5236.htm.

[18] *Id.*

This is not insignificant, but it is not as if most medium-to-large size companies were not already engaged in vigorous quality control programs for their products. To suggest otherwise is to besmirch those businesses and either to demonstrate or feign naiveté about how industry operates.

With respect to smaller businesses, larger concerns seem justified. As required by law, the Commission undertook a Regulatory Flexibility Act (RFA) analysis and determined, appropriately, that the testing and certification rule was likely to have a "significant impact on a substantial number of small entities."[19] Major safety steps forward can carry cost implications, and this rule is no exception. On the other hand, I believe there are real benefits both to consumers (safer products) and to manufacturers (fewer recalls, less-expensive recalls, fewer complaints, and lower litigation expenses) that should not be overlooked when assessing the overall impact of this rule.

Further, I understand why Congress chose to grant relief to "small batch" manufacturers – those grossing less than $1 million per year and making less than 7500 units of their products.[20] These really small companies are the least able to spread the costs of testing over many units and are the most in need of our help in finding alternative methods for complying with the law. I am confident that the Commission will do all that it can to work with these companies to try and find ways to lessen their financial burdens. It is my fondest hope that the problems they have encountered will be short-lived as the market adjusts to the changes in the law.[21]

Finally, one of my colleagues and one commenter to our rulemakings have thrown around numbers of 15%, 20%, 30%, and even 50%, increases in the cost of children's products – purportedly naming the exact impact of third-party testing across the entire spectrum of children's products. Unfortunately, these widely divergent figures have not been accompanied by facts or sources. Our staff, therefore, has no means to investigate or confirm the basis for any of these figures. While it is clear that there will be some increased expenditure necessary to meet the requirements of the law, I find it unnecessary to exaggerate what those expenses might be. I am fully confident that, within our statutory framework, the final testing and certification (and component parts) rule is the least burdensome route to achieve the safety ends envisioned by law.

[19] 5 U.S.C. §§ 601–612.
[20] Section 14(d)(4)(E)(i) and (ii) of CPSA as amended by H.R. 2715.
[21] I have little doubt that in the long run, the spirit of entrepreneurship that animates our society will provide relief to the small batch manufacturers. The challenge, however, is to ensure their survival during this shake-out period.

Third Party Testing Requirements

Congress recognized three different situations in the CPSIA that call for third-party tests:

"Initial" Third-Party Tests: The CPSIA requires that new products be third-party tested prior to their introduction to the marketplace. This is generally referred to as "initial" third-party testing. This testing is perhaps the most widely understood piece of the CPSIA – products intended for children must meet CPSC safety rules before being placed into the hands of children.

Third-Party Tests for "Material Changes": Congress understood that some production changes might be unnoticeable to a consumer but significant enough to affect a product's ability to comply with CPSC rules. Such changes are referred to in the law as "material" changes. These changes could be dramatic – a children's product once made from metal is now made from plastic. They could also be more subtle – the supplier of paint used on a toy is changed. In either case, the changes can be "material," and the CPSIA requires independent, third party testing to demonstrate the products still comply with applicable CPSC rules.

Periodic Third-Party Tests: Congress also recognized there are children's products that might not undergo a material change for years. Given this fact, Congress did not want to allow those products to continue to enter the stream of commerce based on a single series of third-party tests from years before. In the case of a popular children's product, for example, pre-CPSIA, millions of units could potentially be produced without being tested for ongoing compliance with CPSC safety rules. To ensure such compliance, Congress directed that children's products be third-party tested from time-to-time. This ongoing testing is called "periodic" testing.

My colleague, Commissioner Nord, has challenged the notion that the CPSIA requires periodic testing to be done by independent third-party laboratories. She states, "I agree that the statute requires that a product be tested by a third-party lab initially and after a material change is made. However, the statute does not require that ongoing, periodic testing be performed by a third-party."[22] To say the least, I disagree with my colleague.

The relevant language occurs in the CPSIA under the heading "*Additional Regulations for Third Party Testing.*"[23] Because I believe that a simple glance at the language of the statute quickly refutes this idea, I quote the relevant words here:

[22] *Statement of Commissioner Nancy Nord on the Votes to Approve the Final Rule on Testing and Certification, Component Part Testing Final Rule, Proposed Rule on Representative Sampling and Issuing Questions About Reducing the Cost of Testing*, October 20, 2011 at 2-3.
[23] 15 U.S.C. § 2063(d).

(d) Additional Regulations for Third Party Testing –

(1) ***

(2) Compliance; Continued Testing – Not later than 15 months after the date of enactment of the Consumer Product Safety Improvement of 2008, the Commission shall by regulation –

(A) ***

(B) establish protocols and standards –

(i) for ensuring that a children's product tested for compliance with an applicable children's product safety rule is subject to ***testing periodically*** and when there has been a ***material change*** in the product's design or manufacturing process, including the sourcing of component parts; (emphasis added)

As one can easily see, the sentence that addresses testing for material changes is the very same sentence that requires testing periodically. Given that Commissioner Nord freely acknowledges that material changes require third-party testing, I find myself baffled that she would reject third-party periodic testing. How could Congress apply third-party testing to the first half of the sentence but then exclude it from the second half? To say the least that makes no sense. In short, I believe that my colleague has substituted what she thinks the statute ought to say for what it actually does say. [24]

Given my conclusion that the CPSIA mandates third-party periodic testing, I believe the agency has taken a very flexible reading of the statutory language. That is, within extremely broad limits, we allow each manufacturer of children's products to choose the periodic third-party testing interval that best suits its manufacturing processes. To be more specific: the Commission's testing and certification rule allows manufacturers substantial flexibility in choosing the period to submit their products for independent, third-party tests. Depending on the degree of in-house production testing or testing at ISO-approved laboratories, manufacturers may extend the intervals of third-party testing at CPSC-accredited labs up to three years.

In summary, Congress wanted to be sure that manufacturers tested their children's products in a manner that would best catch problems before those problems made it to the marketplace. The Commission's expectations, as always, are that manufacturers will act

[24] On a related point, Commissioner Nord expresses dismay at the thought that "CPSC could initiate action for violation of [the testing and certification rule] against the maker of a compliant product." *Nord statement*, at 3. I do not share her concern. That the Commission has the authority to enforce its testing and certification rule is unquestionable. Section 19(a)(6) specifically makes it illegal "to fail to comply with any requirement of section 14 … or any rule or regulation under such section." Moreover, just as society should sometimes give speeding tickets to prevent accidents even where an offending driver has not yet caused one, the Commission should sometimes enforce the testing and certification rule where a company's violation presents a potential risk of serious harm to the public even if no one has yet been injured. Categorically ruling out enforcement until a company has actually placed the public at risk would return the agency to pre-CPSIA status. I, for one, oppose such a move.

reasonably under their individual circumstances because the Commission recognizes that one size does not fit all.

Due Care

The concept of "due care" has a long and established history in legal canons. Because the testing and certification rule and the component parts rule involve contractual relationships with manufacturers' suppliers, the Commission has included due care requirements in both rules. A due care requirement is necessary to police compliance as parts and products move from party to party in the supply chain.

The Commission's concept of due care is a simple one drawn primarily from standard legal texts. We define the term as the "degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances."[25] Frankly, our use of the term should not be controversial. In fact, the Commission made only one change from its NPR, adding the sentence "[d]ue care does not permit willful ignorance." As noted in the preamble, this was not a substantive change because any party who is willfully ignorant of material facts, by definition, would not exercise due care. Unfortunately, some of the language in the rules' preambles and in staff responses to written questions have triggered a dissent from my colleague, Commissioner Northup. I regret this because I do not believe that she and I have a serious substantive disagreement about the term.

Due care is a contextual concept. What prudent and competent business people are likely to do in any given circumstance is clearly going to be determined by the given circumstance. Commissioner Northup claims to agree with such a statement – but still wants the level of "care" that is "due" to stop in most cases at receipt of a certificate or a test result. As I understand her view of due care, if I were an importer and I received a component part for my children's product and the part came with a certificate, and the certificate on its face appeared authentic, my responsibilities would be complete and my liability ended. In short, I would have exercised "due care."

While I believe it is likely that in *most* instances inspecting a supplier's certificate would be sufficient, I think it also possible that there might be *occasional* circumstances where more "care" is needed. For example, an importer approached by a foreign manufacturer who nervously asserts that its toys have been third-party tested at a lab the importer has never heard of ought, at a minimum, check the Commission's web site to see whether there is a CPSC-accredited lab with the name mentioned by the seller. And, in cases of greater suspicion, any reasonable importer should do more investigating. It is for these admittedly uncommon, but real, instances that our staff has provided the language in the

[25] § 1107.2 of testing and certification rule and § 1109.4 of component parts rule.

preamble and the written answers to Commissioner Northup's questions.[26] I found the examples given to be useful explanations of how one might choose to act in a given situation.

Unfortunately, my colleague has interpreted the staff's examples as far more likely to occur than I do. To me, they are simply illustrations of possible scenarios that might happen, but should not be viewed as the norm in the market. Due care, as contemplated in the Commission's rules, does not mandate a duty to inquire into every possible nook and cranny of a supply chain. It simply requires not turning a blind eye to obvious warning signs.

I regret my colleague's dissent because I continue to believe that we essentially agree about how the agency should interpret the term due care. I fear that her statement may unnecessarily dissuade some manufacturers, importers, and others from taking advantage of the component parts rule. If so, that is regrettable because I believe the rule is a valuable tool that will assist many of our medium and smaller size children's product manufacturers.

Small Batch Versus "Low-Volume" Manufacturers

When the Commission proposed its testing and certification rule last May, the agency proposed special treatment for manufacturers deemed "low-volume." Under this proposal, manufacturers that qualified as "low-volume" producers were not required to conduct periodic testing on their products until they had made at least 10,000 units.[27] This provision was the Commission's attempt to reduce the burden for small manufacturers. During the pendency of the testing rule, however, Congress passed H.R. 2715, which contained a different approach to dealing with small manufacturers. Under H.R. 2715, Congress directed the Commission to grant relief through certain procedures providing "special rules for small batch manufacturers."[28] As a result, the Commission reserved the proposed "low volume" section in the testing and certification rule because for the moment, it makes sense to try our best to deal with "small batch" manufacturers, as set forth in H.R. 2715.[29]

I note that the distinction between Congress's "small-batch" approach and the Commission's "low-volume" is substantial. Congress limited small-batch manufacturers to those that gross less than $1 million annually and make no more than 7,500 units of the same children's product. The Commission's proposed scope for low-volume producers

[26] *Response to Commissioner Anne M. Northup's Questions Relating to Pending Proposals for Testing and Certification and Component Parts*, October 18, 2011 at:
http://www.cpsc.gov/library/foia/foia12/brief/testcertCOAN.pdf.
[27] 75 Fed. Reg. 28336, 28365 (May 20, 2010).
[28] 15 U.S.C. § 2063(d)(4)(A)(i).
[29] This process began with a public hearing on Alternative Testing requirements for Small Batch Manufacturers, held at the Commission on October 26, 2011.

encompassed a far larger group. We treated any manufacturer, regardless of size or gross sales, as totally exempt from the requirement to conduct periodic testing until it had produced or imported more than 10,000 units of a children's product.

My colleague, Commissioner Nord, states that the Commission, "without explanation," deleted the exemption for low-volume manufacturers contained in its original NPR.[30] My colleague is wrong on two counts. First, as explained above, the Commission did not "delete" the provision on low-volume manufacturers. Instead, we reserved it for later consideration. Second, the Commission did explain its reason for reserving the section, namely, in light of the passage of H.R. 2715, with its addition of the provision on small batch manufacturers, the Commission will "consider how to address cost, low-volume products, and small batch issues more fully."[31]

The Commission made the decision by reserving action on this issue. Although I remain open to considering the possibility of a provision dealing with low-volume manufacturers, at this point I find myself uncomfortable with the language in the Commission's original proposal. I fear that it lends itself to abuse by large manufacturers or importers.

Moreover, if Congress wanted the Commission to keep its low volume definition or otherwise go beyond small batch manufacturers, it could have told us so. However, it didn't. To the contrary, it carved out a much smaller exception than we had proposed. At some point, we may need to revisit this issue, which makes the decision to reserve the section perfectly logical. In the meantime, the Commission has opted to gain experience with the rule and small batch manufacturers before we start discussing further exemptions.

Reasonable Testing Program for Non-Children's Products

While most of my discussion has focused, and rightly so, on children's products, I note that the CPSIA also included provisions relating to non-children's products. One of the most significant of these is contained in section 14 (a)(1) of the Act.[32] This section requires manufacturers of non-children's products to certify compliance with CPSC safety rules based either on a test of each product or on a reasonable testing program of their products. Nothing in the Commission's testing and certification rulemaking changes this statutory requirement. This provision in the law has become controversial lately, perhaps because of its reach to products across many so different categories.

[30] *Nord Statement*, at 2.
[31] Preamble to testing and certification rule, at Section IV, section S "*Alternatives that May Further Reduce the Impact on Small Businesses.*
[32] 15 U.S.C. § 2063 (a)(1)(A).

When the Commission issued its NPR last May, it contained what I refer to as a "gold standard" approach to reasonable testing programs, with five distinct elements.[33] We received many comments arguing that such a program was too prescriptive and failed to provide enough flexibility to manufacturers. After a careful review of those comments, a majority of the Commission decided that the perfect should not be the enemy of the good, so we withdrew the proposed reasonable testing program requirements (or "subpart B" as they became known) and reserved them for possible later consideration.

I, personally, favored retaining this subpart. I had hoped that we would issue a less burdensome, more streamlined set of requirements in response to the comments we received. After all, the law's requirement that manufacturers conduct reasonable testing programs remains regardless of our actions. Moreover, as I understand it, a significant number of manufacturers continue to ask for guidance on what constitutes a "reasonable testing program." I remain hopeful, therefore, that staff will consider publishing some version of subpart B as a "guidance document" for those manufacturers seeking assistance.

Ultimately, I voted for the final rule that included the reservation of subpart B because, as a policy maker, I sometimes have to compromise. I do note that the reservation, rather than deletion, of subpart B allows the Commission to move towards a final rule without re-proposing the subpart. In saying this, I also note that my two colleagues, Commissioners Nord and Northup, prefer deleting subpart B totally. Depending on the circumstances, I believe that may be unnecessary. We heard extensive comments from the regulated community regarding our previously proposed version of a reasonable testing program. The purpose of the notice and comment period seems well fulfilled in that sense. As I stated previously, I hope we can provide some guidance either in a rule or otherwise, particularly to the smaller segments of our manufacturing community, in the near future.

Conclusion

These rules will not unconditionally guarantee the safety of our children's products. But, they will forever change when the law requires producers of children's product to start focusing on safety. In 2008, Congress was clear in telling the world that CPSC would no longer wait until companies had introduced violative goods into commerce. In fact, they didn't want us to wait even if the noncompliant products were sitting in inventory – not yet shipped. What Congress wanted was no noncompliant products produced – period. And the best way to do that is to have manufacturers get independent verification that their products meet CPSC safety rules as they are produced. The time for this approach is long overdue.

[33] The five elements as originally proposed were: product specifications, certification testing, a production testing plan, a remedial action plan, and documentation of the reasonable testing program. 75 Fed. Reg. 28336, 28362.