U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

DRAFT Record of Commission Action

(Final Minutes of the Meeting will be posted in 5 days)

Commissioners Voting at Open Decisional Meeting, October 10, 2012

Commissioners Voting: Chairman Inez M. Tenenbaum
Commissioner Nancy A. Nord
Commissioner Robert S. Adler
Commissioner Anne M. Northup

ITEM:

Consideration of Opportunities to Reduce Third Party Testing Costs Consistent with Assuring the Compliance of Children's Products
(Briefing package dated August 29, 2012, OS No. 5716)

DECISION:

Chairman Tenenbaum moved that subject to resources allocated by the Commission in subsequent operating plans on the potential opportunities to reduce third party testing costs consistent with assuring compliance of children's products, the Commission approve that staff undertake certain specific work in the following areas: 1) International Standards Equivalency to Children's Product Safety Rules; 2) Determinations Regarding Heavy Metals; 3) Determinations Regarding Phthalates; 4) Fourier Transform Infrared Spectroscopy; 5) Determinations Regarding Adhesives in Manufactured Wood; 6) Determinations Regarding Synthetic Food Additives; 7) Guidance Regarding Periodic Testing and Periodic Testing Plans; and 8) Accreditation of Certain Certification Bodies. Commissioner Nord seconded the motion.

Chairman Tenenbaum called for any discussion or proposed amendments to the motion. Commissioner Nord stated that she had a proposed amendment to the motion that would add a ninth action, titled 9) Staff Findings Regarding Production Volume and Periodic Testing. Commissioner Nord explained her proposed amendment to the motion. Commissioner Northup seconded the motion to amend.

Chairman Tenenbaum called for discussion. Commissioner Adler talked about the proposed amendment. Hearing no other discussion, Chairman Tenenbaum called for the question on Commissioner Nord's motion to amend. The Commission voted (3-1) in favor of Commissioner Nord's motion to amend Chairman Tenenbaum's motion. Chairman Tenenbaum and

Commissioners Nord and Northup voted in favor of the amendment. Commissioner Adler voted against the motion to amend. The Commission discussed the hard work of the staff and thanked the staff.

Chairman Tenenbaum called for a discussion of her motion as amended by Commissioner Nord's amendment. Hearing none, Chairman Tenenbaum called the question on her motion as amended by the Commission. The Commission voted unanimously (4-0) to approve Chairman Tenenbaum's motion as amended.

Commissioners Nord and Northup issued the attached statements regarding this matter.

For the Commission:

Todd A. Stevenson
Secretary

Attachments: Motion of Chairman Tenenbaum
Motion to Amend of Commissioner Nord
Statement of Commissioner Nord
Statement of Commissioner Northup

Chairman's Motion

Since the passage of Public Law 112-28, the United States Consumer Product Safety Commission ("CPSC" or "the Commission") has been considering opportunities to reduce third-party testing costs consistent with assuring the compliance of children's products with all applicable safety rules, bans, standards or regulations. Subject to the resources allocated by the Commission to carry them out in subsequent CPSC Operating Plans, the Commission approves the following actions by its Staff:

1. International Standards Equivalency to Children's Product Safety Rules: The Commission directs staff to draft a Request For Information (RFI) for publication in the Federal Register to determine which, if any, tests in international standards are equivalent to tests in comparable CPSC-administered Children's Product Safety Rules. The RFI shall include questions regarding how establishing equivalency between tests in CPSC's regulations and comparable international standards would reduce overall third party testing burdens, while assuring compliance with the applicable children's product safety rules, regulations, standards, or bans. The burden of demonstrating equivalence shall be on the submitter of information. Upon receiving the responses to the RFI, staff shall review the responses and summarize any recommended course of action for the Commission. This summary shall include the costs of the course of action, including any additional research that might be warranted. Staff shall seek Commission approval prior to formally establishing a list of equivalent tests to those in CPSC-administered Children's Product Safety Rules.

2. Determinations Regarding Heavy Metals: The Commission directs staff to draft a Request For Information (RFI) for publication in the Federal Register regarding whether there are materials that qualify for a determination, under the Commission's existing determinations process, that do not, and will not, contain higher-than-allowed concentrations of any of the eight heavy elements specified in Section 4.3.5 of ASTM F963-11. (The elements are antimony, arsenic, barium, cadmium, chromium, lead, mercury, and selenium.) The burden for demonstrating whether any material qualifies for a determination shall be on the submitter of the information requested in the RFI. Upon receiving the responses to the RFI, staff shall review the responses and summarize any recommended course of action for the Commission. This summary shall include the costs of the course of action, including any additional research that might be warranted.. Staff shall seek Commission approval regarding a determination relating to any of the eight heavy metals specified in Section 4.3.5 of ASTM F963-11.

3. Determinations Regarding Phthalates: The Commission directs staff to draft a Request For Information (RFI) for publication in the Federal Register regarding whether there are materials that qualify for a determination, under the Commission's existing determinations process, that do not, and will not, contain prohibited phthalates, and thus are not subject to third party testing. The burden

for demonstrating whether any material qualifies for a determination shall be on the submitter of the information requested in the RFI. Upon receiving the responses to the RFI, staff shall review the responses and summarize any recommended course of action for the Commission. This summary shall include the costs of the course of action, including any additional research that might be warranted. Staff shall seek Commission approval regarding a determination relating to materials that do not, and will not, contain prohibited phthalates.

4. Fourier Transform Infrared Spectroscopy (FTIR): The Commission directs staff to investigate whether Fourier Transform Infrared Spectroscopy (FTIR) can be effective as a screening technology for determining that a plastic component part contains no phthalates. A summary of the results of this investigation, including any additional costs expected to complete the investigation, shall be provided to the Commission no later than 1 year after the investigation has commenced.

5. Determinations Regarding Adhesives in Manufactured Woods: The Commission directs staff to draft a Request For Information (RFI) for publication in the Federal Register regarding whether any adhesives used in manufactured woods can be determined not to contain lead in amounts above 100 ppm. The burden for demonstrating which, if any, adhesives should qualify for a determination shall be on the submitter of the information requested in the RFI. Upon receiving the responses to the RFI, staff shall review the responses and summarize any recommended course of action for the Commission. This summary shall include the costs of the course of action, including any additional research that might be warranted. Staff shall seek Commission approval regarding a determination relating to adhesives used in manufactured woods.

6. Determinations Regarding Synthetic Food Additives: The Commission directs staff to draft a Request For Information (RFI) for publication in the Federal Register regarding whether the process by which materials are determined not to contain lead in amounts above 100 ppm can be expanded to include synthetic food additives. The burden for demonstrating which, if any, synthetic food additives should qualify for a determination shall be on the submitter of the information requested in the RFI. Upon receiving the responses to the RFI, staff shall review the responses and summarize any recommended course of action for the Commission. This summary shall include the costs of the course of action, including any additional research that might be warranted. Staff shall seek Commission approval prior to formally publishing a determination relating to synthetic food additives.

7. Guidance Regarding Periodic Testing and Periodic Testing Plans: The Commission directs staff to draft a guidance (in the form of a "FAQ" or similar forms of guidance) to clarify that manufacturers who do not engage in ongoing or continued production of a previously third-party certified product, (such as an importer or a manufacturer with short production runs) are not required to conduct periodic testing as defined in Section 1107. This guidance should also make clear

that those manufacturers who do not engage in periodic testing for the reasons described above are not required to create a periodic testing plan. This guidance shall be provided to the Commission for approval no later than December 31, 2012.

8. Accreditation of Certain Certification Bodies: The Commission directs staff to develop a Staff technical report for Commission consideration on the feasibility of CPSC-acceptance of certification bodies to perform third party testing of children's products as a basis for issuing Children's Product Certificates, and to undertake activities to ensure that continuing production maintains compliance with certification requirements as a basis for increasing the maximum periodic testing interval from 1 to 2 years.

Insert:

9. "Staff Findings Regarding Production Volume and Periodic Testing: The Commission directs staff to report back to the Commission whether, and, if so, on what basis staff is able to make the following findings:
(1) including a low volume exemption of fewer than 10,000 units of a product from periodic testing requirements for a maximum of three years is consistent with assuring compliance with all applicable children's product safety rules, regulations, standards or bans;
(2) the selection of the 10,000 unit figure for such an exemption is based on statistically significant and readily available safety, compliance and/or economic data. If so, staff shall provide the data along with its reason(s) for making the finding based on such data;
(3) providing such an exemption is consistent with providing a high degree of assurance of compliance of all children's products, as required under 16 CFR § 1107 ("the testing and certification rule"); and
(4) providing such an exemption is practicable from an enforcement and compliance standpoint, in light of available resources, anticipated future levels of funding and agency safety enforcement and compliance priorities.

Any staff work on this report would not affect the effective date of 16 CFR § 1107."

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

COMMISSIONER NANCY A. NORD

Statement on the Commission's Decision Concerning Opportunities to Reduce Third Party Costs Consistent with Assuring the Compliance of Children's Products

October 10, 2012

The Commission's unanimous vote today on our Congressionally-mandated review of opportunities to cut the burdensome costs of our testing and certification rule for children's products was a welcome first step that gives me hope that we will continue such efforts even absent further direction from Capitol Hill.

I supported this package because it is a good starting point of ideas for staff to further develop. I believe, however, we could have gone further. My understanding from staff is there are numerous other ideas, though not included in their proposal, that are worthy of review. In addition, there were suggestions from staff that were not included in today's Commission action. We owe it to all of our stakeholders to give each of those ideas the consideration it deserves and to continue looking for more. We should help our regulated community avoid hitting walls as they maneuver the path of compliance.

Having served as Acting Chairman when the Consumer Product Safety Improvement Act (CPSIA) became law, I am fully aware of our budgetary constraints while implementing this legislation. Our resource constraints affect the implementation of these ideas to reduce testing costs associated with CPSIA. Nonetheless, we must remember the companies we regulate have limited resources as well, and it is our obligation to require no more than is necessary to achieve our safety goals. To that end, we should incorporate an on-going effort to reduce testing costs into our operating plans. With careful planning we can achieve this even with our strained budget. Indeed, I believe that we have an affirmative obligation to do so. While we maintain our obligation for safety rulemaking, we need to maintain our obligation to correct issues we have created by our testing rulemaking, especially when those issues mean increased costs, lost jobs, and no real increase in safety.

The vote today is a good start on the path toward a more efficient, effective testing rule. I am very grateful for the hard work and dedication of our talented staff that made it possible, and I am confident that as they continue their efforts, we can have a testing rule that assures compliance in the least costly manner.

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

COMMISSIONER ANNE M. NORTHUP

October 11, 2012

STATEMENT OF COMMISSIONER ANNE NORTHUP ON THE VOTE CONCERNING THE CONSIDERATION OF OPPORTUNITIES TO REDUCE THIRD PARTY TESTING COSTS CONSISTENT WITH ASSURING THE COMPLIANCE OF CHILDREN'S PRODUCTS.

I am pleased that the Commission was able to reach a unanimous consensus on eight actions staff can take to explore potential ways to reduce the huge economic burden imposed by the CPSIA requirement that every component of every children's product be third-party tested for compliance with all applicable children's product safety rules. We know that the cost of third-party testing has already driven products and businesses from the market, reducing consumer choice and adding to the country's persistent struggle with joblessness. It is encouraging to know that there is now the possibility that something may be done to turn that tide.

The Commission passed this list of recommendations by a unanimous vote achieved through compromise. While it did not endorse all the proposals that I would have supported, I recognize that it is more important to champion the cost reductions that might result from these suggestions than to oppose the package for what it did not include. Specifically, we compromised by requiring the private sector to bear the burden and cost of initially substantiating the viability of each proposal, while recognizing CPSC staff may seek additional agency resources to conduct follow-up research. If Congress intended the CPSC to conduct a more thorough examination of the proposals the staff put forth, not limited by the scope of additional ideas to be provided by the private sector, it will have to clarify that responsibility. H.R. 2715 specified that the Commission seek public comment on opportunities to reduce the cost of third party testing and review the comments, while granting the Commission the discretion to prescribe new or revised third party testing regulations. 15 U.S.C. § 2063(i)(3). There is not majority support for a construction of this language that would require the Commission to undertake any additional independent work to identify cost reduction opportunities beyond the package that staff has prepared and the potential for additional research in response to additional private sector input. I would have preferred that the Commission commit itself to complete the examination of the ideas supported by staff and to direct staff to propose specific changes to our rules or practices where warranted. But the compromise we were able to achieve at least sends the message that we are willing (or, in my case, eager) to entertain, consider, collaborate on and, finally, endorse any possible suggestions for cost saving changes that are independently proposed.

Even these modest gains achieved through compromise still depend on the allocation by future Commissions of the resources necessary to undertake the cost reduction projects. I hope the same spirit of compromise that produced a unanimous vote to support them will prevail when actions in

pursuit of third party testing cost reduction are considered during negotiations over future operating plans. A list of potential ideas is a good start, but until resources are allocated to explore them, they amount to no more than letters on paper.

In addition, while I am gratified that a majority supported eight cost saving proposals, I must also point out that the number is only half of the cost reduction proposals recommended by staff. Other good ideas with the potential to reduce testing costs while continuing to protect consumers from the risk of harm were not supported by a majority of the Commissioners. Chief among these were establishing an exception from testing for a *de minimis* amount of paint or plasticized material, modifying the maximum periodic testing interval based on the risk of noncompliance to a regulation or portion of a regulation, and seeking Congressional authorization to permit manufacturers to use production process certification in lieu of third party testing as a basis for certifying compliance.

I do not know whether any of these ideas could successfully reduce third-party testing costs while assuring compliance, but the Commission was not called upon to make that determination through this vote. We needed only to decide whether these ideas should be abandoned forever, or explored further. Based on staff's recommendation, and in light of Congress's intent that we make every effort to reduce the costs of testing where possible consistent with assuring compliance, I can see no justification for ruling them out at this early stage.

Our narrowing the scope of potential cost reduction measures was not warranted by resource constraints. As the language of the ballot makes clear, the Commission has not committed any resources to the actions it has approved. Rather, it has merely identified a list of projects that may someday be undertaken "[s]ubject to the resources allocated by the Commission to carry them out in subsequent CPSC Operating Plans." The Commission's safety priorities as defined by future Commission majorities will always take precedence over the cost reduction projects in the allocation of future resources. And future Commissions will be able to select among the list of cost reduction projects in order to prioritize their completion in whatever order they deem advisable. Under these circumstances, current and future resource limitations do not justify refusing even to consider these additional staff recommended ideas.

Finally, we need to step back and recognize the statutory impediments staff faced in formulating their proposals, and the very limited nature of the ideas that resulted. Many of the proposals put forth by staff are caveated with admissions that their applicability may be limited to a very few products or manufacturers, or might turn out to result in only a modest reduction in testing costs, if any. Thus, while we should make the most of the opportunity presented by this exercise and staff's hard work in brainstorming cost saving measures, it is clear that real cost reduction for third party testing, certification and labeling will only be possible through much more substantial changes in the law.