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

MINUTES OF COMMISSION MEETING
May 5, 2010

Chairman Inez M. Tenenbaum convened in open session the May 5, 2010, meeting of the U. S. Consumer Product Safety Commission at 9:00 a.m. Commissioners Thomas H. Moore, Nancy A. Nord, Robert S. Adler and Anne M. Northup were also present. Chairman Tenenbaum made opening remarks and introduced the staff for the briefing.

Proposed Rule: Conditions and Requirements for Testing Component Parts of Consumer Products

Chairman Tenenbaum explained the major changes to the proposed rule that would establish requirements for how persons issuing certificates under section 14(a) of the Consumer Product Safety Act ("CPSA"), as amended by section 102(b) of the Consumer Product Safety Improvement Act of 2008 ("CPSIA"), that their products comply with applicable CPSC requirements may rely on tests obtained by suppliers of component parts, or others, as the basis for their certificates. Chairman Tenenbaum asked for any discussion or questions to the staff. After the discussion and questions, Chairman Tenenbaum called for any motions. Commissioner Adler made a motion to approve publication, in the *Federal Register* ("*FR*"), of the draft proposed rule on conditions and requirements for testing component parts of consumer products, as amended. Commissioner Moore seconded the motion. The Commission voted unanimously (5-0) to approve the publication of the proposed rule, as amended.

Proposed Rule: Testing and Labeling Pertaining to Product Certification

Chairman Tenenbaum explained the major changes to the proposed rule that would establish requirements for a reasonable testing program and for compliance and continuing testing for children's products. The proposal would also address labeling of consumer products to show that the product complies with certification requirements under a reasonable testing program for non-children's products or under compliance and continuing testing for children's products. The proposed rule would implement sections 14(a) and (d) of the CPSA, as amended by section 102(b) of the CPSIA. After Commission discussion of the proposed rule and questions to the staff, Chairman Tenenbaum called for any motions. Commissioner Adler made a motion for approve publication of the draft proposed rule in the *FR* on testing and labeling pertaining to product certification, as amended. Commissioner Moore seconded the motion. The Commission voted unanimously (5-0) to approve publication of the proposed rule, as amended.

Chairman Tenenbaum and Commissioners Nord and Northup each issued the attached statements about their votes.

Substantial Product Hazards Posed by Hand-Held Hair Dryers Without Immersion Protection; Staff Draft Proposed Rule under Section 15(j) of the CPSA

Chairman Tenenbaum introduced the staff recommendation that Commission issue a Notice of Proposed Rulemaking ("NPR") that would designate any hand-held hair dryer lacking integral immersion protection to be a substantial product hazard under the authority of section 15(j) of the CPSA. Chairman Tenenbaum asked if there was any discussion of the proposed rule. Hearing no discussion, Chairman called for the question. Commissioner Adler made a motion to approve publication in the *FR* of the draft NPR designating any hand-held hair dryer lacking integral immersion protection to be a substantial product hazard under section 15(j) of the CPSA without change. Commissioner Moore seconded the motion. The Commission voted unanimously (5-0) to approve publication of the NPR.

Substantial Product Hazards Posed by Children's Upper Outerwear With Certain Drawstrings; Staff Draft Proposed Rules under Section 15(j) of the CPSA

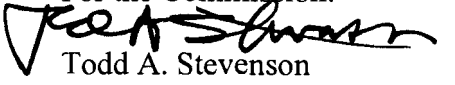
Chairman Tenenbaum introduced the issue involving a draft proposed rule that would pursuant to section 15(j) of the CPSA, issue a draft proposed rule that would specify that children's upper outerwear with certain neck or hold or waist or bottom drawstrings are a substantial hazard. Chairman Tenenbaum asked if there was any discussion of the proposed rule. Hearing no discussion, Chairman called for the question. Commissioner Adler made a motion to approve publication in the *FR* of the draft NPR designating children's upper outerwear in sizes 2T to 12 with neck or hood drawstrings, and children's upper outerwear in sizes 2T to 16 with certain waist or bottom drawstrings, as a substantial product hazard without change. Commissioner Moore seconded the motion. The Commission voted unanimously (5-0) to approve publication of the NPR.

Final Rule for Bath Seats under Section 104(b) of the CPSIA

Patricia Pollitzer, General Attorney, Office of General Counsel, and Patricia Edwards, General Engineer, Directorate for Engineering Sciences, briefed the Commission on the requirements of section 104(b) of the CPSIA to issue safety standards for durable infant or toddler products and staff recommendations that the Commission issue a final rule under section 104(b) of the CPSIA for infant bath seats that is substantially the same as the applicable voluntary standard, ASTM F 1967-08a, with certain modifications. The Commission commented and discussed the final rule. The staff responded to questions from the Commission. No decisions were made in this part of the meeting.

There being no further business on the agenda, Chairman Tenenbaum adjourned the meeting at 10:35 a.m.

For the Commission:



Todd A. Stevenson
Secretary to the Commission

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CHAIRMAN INEZ M. TENENBAUM

STATEMENT OF CHAIRMAN INEZ M. TENENBAUM ON THE PROPOSED RULES FOR TESTING AND LABELING PERTAINING TO PRODUCT CERTIFICATION AND COMPONENT PART TESTING

May 5, 2010

Shortly after I became Chairman of the CPSC, it became readily apparent to me that the regulated community sought certainty and predictability as it related to their obligations under the Consumer Product Safety Improvement Act. Striving to respond to this need, I directed agency staff to engage and dialogue with our stakeholders and to begin an unprecedented pace of providing concrete answers through rulemaking, guidance, education, and outreach. The agency's staff has responded remarkably well. As a direct result of the staff's very hard work, our stakeholders constantly express their appreciation for what is now an agency that actively seeks stakeholder input and gives solid answers, providing certainty and predictability where much confusion previously existed.

Nothing is a better example of this commitment from both the Commission and its staff than the two consensus testing rules proposed by the Commission today. Our significant outreach efforts on these rules began last year with the decision to seek extensive stakeholder input prior to issuing a notice of proposed rulemaking. Agency staff spent several weeks preparing a guidance document on testing pertaining to product certification that was made publicly available last November. This guidance document and a Federal Register notice seeking input from stakeholders provided the background materials and topics for discussion at a widely attended public workshop last December. This two-day workshop was a resounding success, as it was attended by over 250 stakeholders and viewed online by hundreds more, received great reviews as an excellent approach to significant rulemakings, and provided our staff with stakeholder input directly relevant to the proposed rules promulgated today.

Following the workshop, the Commission formally adopted an interim enforcement policy allowing for component part testing for lead content and lead in paint. After the close of the comment period on both rules in January, agency staff dedicated many more hours to analyzing the extensive stakeholder input that the agency had received and developed two draft proposed rules for the Commission's consideration. I would like to express my deep gratitude to the staff for their incredibly diligent work on these two very important proposed rules and to our stakeholders for providing valuable input and informing our rulemaking in a very significant and meaningful way.

Component Testing

Upon arriving at the agency, many stakeholders told me that a rule related to component testing was long overdue. I asked our staff to begin researching this issue and to propose options for issuing such a rule. After much consideration, we decided that the best course of action was to seek stakeholder input on issues related to a component testing rule and to develop an interim enforcement policy on such testing before issuing a proposed rule. I was very pleased that my fellow Commissioners agreed with this approach and last December, demonstrating our commitment to common sense and a practical approach to the law, the Commission issued an interim enforcement policy related to component testing for lead content and lead in paint.

We now have taken what I consider to be an even greater step forward by formalizing a proposed rule related to component testing for lead content, lead and other toxic metals in surface coatings, and phthalates. As was evidenced during today's Commission meeting, the Commission is unanimous in its desire to see this rule provide significant relief from testing requirements for both small and large manufacturers while simultaneously moving safety upstream in the manufacturing process. By allowing testing to be performed by component part suppliers and designating component part certificates as certificates issued under section 14 of the CPSA, the Commission has provided great incentive for manufacturers to start utilizing component part testing. At the same time, the Commission has established safeguards such as requiring all component parts to be traceable to their original manufacturers and expressly requiring that manufacturers exercise due care when relying on component part testing certificates. I look forward to receiving comments from our stakeholders on whether we have provided common sense relief from testing requirements while still ensuring consumer safety through the establishment of proper safeguards.

Testing and Labeling Pertaining to Product Certification

The proposed testing and labeling rule outlines the basic principles for what constitutes a reasonable testing program for nonchildren's products and also establishes the testing requirements for manufacturers of children's products. I believe the requirements set out for children's and nonchildren's products within this proposed rule are a great step forward for the safety of regulated consumer products as a whole.

CPSC has encouraged domestic and foreign manufacturers to adopt best manufacturing practices for quite some time, and today we have issued a rule that sets out the basic elements of a reasonable testing program that reflects the foundation of testing programs that many manufacturers already have in place. It is my hope that the reasonable testing program requirements described in the proposed rule can be integrated into existing quality control and quality assurance programs to ensure high quality products with minimal production line disruption. I also am encouraged that manufacturers currently lacking these basic and flexible parameters for ensuring product safety may soon be required to have them in place. I look forward to receiving comments from our stakeholders that further refine our ability to outline the most basic requirements for a reasonable testing program while still maintaining sufficient flexibility for varying types of testing programs.

I know that some may believe agency staff should have left "reasonable testing program" entirely undefined or minimally defined to this provide manufacturers with absolute and maximum flexibility. While I understand the reasoning behind this position, I fully support the rule proposed by our agency experts and endorse it as the truly responsible approach to ensuring product safety and also providing the regulated community with certainty and predictability when it comes to the Commission's expectations for what constitutes a reasonable testing program.

Another great aspect of the proposed testing and labeling rule is that it provides extra incentive for manufacturers of children's products to establish reasonable testing programs. If a children's product manufacturer implements a reasonable testing program, then the manufacturer will only be required to conduct third party periodic testing at least once every other year. I was willing to endorse this approach because it encourages children's product manufacturers to adopt reasonable testing programs that employ production testing techniques on the manufacturing floor while still requiring a certain level of independent third party testing. Staff crafted this creative approach for reducing testing costs for children's product manufacturers after extensive consultation with the regulated community, and it is my hope that it results in most children's product manufacturers adopting reasonable testing programs, as the proposed rule intends.

Continued Stakeholder Input & Agency Outreach

Although the agency has already engaged in extensive stakeholder outreach, it is very important that we continue to receive input from all stakeholders on the consensus rules proposed by the Commission today. I encourage all of our stakeholders to provide constructive feedback as we move towards completing these rules later this year. Agency staff and the Commission have already demonstrated a solid commitment to actively seeking and considering input from our stakeholders and will continue to do so moving forward with these and other rulemakings.

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STATEMENT OF COMMISSIONER NANCY NORD ON THE VOTE TO APPROVE THE NOTICE OF PROPOSED RULEMAKING FOR THE TESTING AND LABELING FOR PRODUCT CERTIFICATION
May 5, 2010

While I am voting to issue the notice of proposed rulemaking for testing and labeling for product certification, I do so with reluctance. My vote is premised on the fact that the statute requires that we issue regulations establishing protocols and standards for ongoing product testing, among other things; we are behind the statutory schedule for accomplishing this task; and, to avoid unnecessary confusion, a rule should be in place before we lift the stay of enforcement for certain testing requirements now due to go into effect in February 2011. My vote is only to get the process started and does not suggest that I support in its totality the rule before us. In my view, this proposed rule goes well beyond what is required by the statute and what is needed to get the job of safety done. It may well impose unprecedented, burdensome, and costly regulations without the requisite payback in terms of safety.

Component Testing:
Before addressing my concerns with the proposed rule, I must acknowledge the potentially helpful proposed component and composite testing regulations that are being issued as a separate proposed rule, but which are substantively tied to this proposed rule (The Notice of Proposed Rulemaking for Testing Component Parts). It is hoped that these rules will spread out and thereby somewhat ease the very significant testing burdens that the rest of proposed rule imposes. Under the scheme proposed, if a component manufacturer is willing to test for compliance to CPSC rules and those components will be used in children's products, then those components must be tested and certified by a CPSC-approved third party testing laboratory. In addition, that component maker must also agree to take on the additional testing as required by this rule. In this respect, the component maker is standing in for the final product manufacturer with respect to the testing requirements of the rule.

Retailer Liability:
In addition, I draw attention to language in the preamble of the rule dealing with retailers' responsibilities for testing and certification. We have heard that some retailers, because of the significant new liability risks the law imposes not only from the federal government but also from state governments, are requiring suppliers to engage in additional costly testing. The proposed rule emphasizes that retailers may rely on testing and certification done by their suppliers if that reliance is made in good faith, and in that case, retailers will not be subject to penalties for selling products that do not comply. An issue is presented when a retailer also acts as a direct importer. This is because the certification requirements flow to the domestic manufacturer or importer. However the retailer can still rely on the testing done by the foreign manufacturer in preparing its certification. We must look for ways to drive down costs and avoid redundant testing. We do not want perceived liability to result in unnecessary testing and if our regulations contribute to this result then amendments to those regulations may be warranted. Additional comment on this issue is sought.

Reasonable Testing Program:
Section 14 (a) of the Consumer Product Safety Act (CPSA) requires that product manufacturers certify, based on a test of the product or a *reasonable testing program*, that their products meet applicable CPSC regulations. This certification is referred to as a general certification of compliance (GCC). For children's products, certification of compliance must be based on tests done by an independent third party testing laboratory. While the agency has the authority to issue regulations defining what a reasonable testing program is for purposes of Section 14(a), *the statute does not require that we do so.*

What we are required to do is spelled out in Section 14 (d) (2) of the CPSA. In that section we are required (1) to issue regulations for a voluntary program for labeling products as compliant, and (2) to establish standards and protocols for (a) ensuring that children's products are tested periodically; (b) ensuring that children's products are tested when there is a material change; (c) random sample testing; (d) verifying results from testing laboratories; and (e) safeguarding against efforts to unduly influence a testing laboratory. The CPSA imposes a very short timeline for finishing the work required under Section 14 (d) (2). In other words the statute spells out what we must do and when we must do it.

Instead of directing our attention to what is required under the statute (the most significant of those requirements deal with testing and certification of children's products), we have constructed complex testing and certification requirements applicable to all product makers. In almost two hundred pages of rather dense regulatory language, we define a reasonable testing program (which, again, the statute does not require of us), and direct that those making products requiring a GCC and subject to a CPSC rule implement those requirements.

Standing alone the individual requirements of the proposed reasonable testing program may be elements of a quality assurance program that many manufacturers have in place. However, those programs are tailored to the needs of the individual company and manufacturing environment. When the individual elements required in this proposed rule are added up, they may well overwhelm some manufacturers who are making perfectly safe and compliant products. Nevertheless, they are mandatory requirements and presumably can and will be enforced. As we have seen in other situations, the new law and our regulations may work for large companies but exceed the capacity of medium or small companies, at least without hiring additional compliance, administrative staff and outside consultants. This is pointed out in the regulatory flexibility analysis accompanying these documents.

Especially since the passage of the Consumer Product Safety Improvement Act in 2008, industries and individual companies have stepped up efforts to put in place quality assurance mechanisms. If we were to finalize what is being proposed today, those efforts may become irrelevant or require substantial change. In addition, it will lock into place a particular path to compliance that may not be the most efficient or effective for all companies. The preamble of the rule recognizes that this may occur when it states that we are not required to "find industry testing programs to be insufficient before implementing a reasonable testing program." I submit that this is exactly what we should do before implementing something of this magnitude on our own initiative and without a record that shows the need for such a far-reaching rule.

Rather than locking these requirements into place in enforceable regulations, we should reserve for ourselves the flexibility to provide guidance as appropriate under the circumstances. In November 2009, guidance was made public describing Commission staff's views of what should go into a reasonable testing program. That guidance and any changes that might be made as we get further experience in dealing with the challenges that will inevitably arise as we implement the testing and certification requirements of the CPSIA, could have provided a foundation on which companies build as they construct quality assurance programs. Unfortunately and unnecessarily, we have chosen a path that does not allow for such flexibility.

Periodic Testing:
Building on the reasonable testing program requirements, the proposed rule then addresses periodic testing, one of the things the statute does require that we address. However, the proposed rule sets out a scheme that is both complex and may not really work well in practice. It should be stated at the outset that the Commission recognizes the law does not equate periodic testing with third party testing and that, under the statute, all periodic testing does not need to be done by a third party testing laboratory. Nevertheless, in this proposed regulation we go on to require that periodic testing be done by third party laboratories in certain circumstances.

In those instances in which a children's product maker has in place a reasonable testing program, as defined in this regulation, then that manufacturer must have its products tested by a third party testing laboratory for the product's initial certification of compliance and whenever there are material changes to the product. That manufacturer must also have its product tested periodically by a third party laboratory to determine continuing compliance at least once every two years.

However, it should be noted that, unlike those manufacturers issuing a GCC, a children's product manufacturer does *not* need to have a reasonable testing program under this rule. If the children's product manufacturer decides not to put a reasonable testing program in place, then the testing requirements outlined in the preceding paragraph change. In this situation, the product manufacturer must have its products tested by a third party testing laboratory for the product's initial certification and whenever there are material changes to the product, but periodic testing (by a third party laboratory) must be done at least once a year rather than biannually. In addition, the rule goes on to state that manufacturers are free to do periodic testing more frequently than once a year, but if they voluntarily do such testing, that also must be done by a third party testing laboratory. This is in spite of the fact that the statute does not require such a result. Equally troubling is that such a requirement may either incent a manufacturer not to do testing on a regular on-going basis, or describe the testing program as a "quality assurance" or "production testing" program, rather than as a periodic testing program, because of the cost of third party testing. Such a result apparently is perfectly fine under the rule but it seems silly to put in place requirements that can so easily be circumvented. This result hints of unthinking regulation for the sake of regulation.

Finally, the periodic testing rules do not recognize that manufacturer supply and process controls can often provide a more effective and more efficient method for assuring compliance than does a rote reliance on testing. Yet testing and only testing is the focus of this aspect of the rule.

Conclusion:
There are many other aspects of the proposed rule that are of concern and on which I do hope interested parties will comment. However, read as a whole, this is an unprecedented intrusion of federal regulators onto the factory floor. The regulatory flexibility analysis that is included in the proposed rule documents the immense costs this rule will have, especially on small businesses. Given that, I believe we have an obligation to work to minimize the impact to the extent we can without sacrificing safety and we have fallen short of that obligation. We have gone well beyond what the statute requires and missed the opportunity to develop a safety compliance system that works for all.

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

May 7, 2010

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

- The law sets new safety standards unrelated to risk and not based on scientific evidence that such standards will improve the health of children;

- The law imposes unnecessarily complicated and expensive testing, labeling and certification requirements on businesses on top of new safety standards;

- The implementation of the law and its innumerable rulemaking requirements are overtaxing the resources of the Commission, causing truly safety-related areas to slip despite heroic efforts by the staff to try to do more than what is humanly possible;

- The law already has cost the economy millions (if not billions) of dollars in lost productivity;

- The law has destroyed thousands of American jobs and deterred domestic production at a time when this country needs to expand job opportunities and grow its manufacturing base;

- The law has diminished the choices for American consumers of children's products in an otherwise diverse and innovative marketplace; and

- To implement this law, Congress has had to increase funding for the agency by *nearly 48 percent* at a time when skyrocketing federal debt has caused Americans to call for slashing government spending.

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

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

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

Component Testing

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

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

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

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

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

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

Periodic Testing

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

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

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

Verification of a Children's Product

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

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

Other Issues:

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

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

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

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

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

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

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

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

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