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

MINUTES OF COMMISSION MEETING
October 19, 2011

Chairman Inez M. Tenenbaum convened the October 19, 2011, meeting of the U. S. Consumer Product Safety Commission at 8:30 a.m. in open session. Commissioners Thomas H. Moore, Nancy A. Nord, Robert S. Adler and Anne M. Northup were also in attendance. Chairman Tenenbaum made opening remarks and summarized the agenda for the meeting.

Final Rule: Testing and Labeling Pertaining to Product Certification
(Briefing package dated September 29, 2011)

Chairman Tenenbaum summarized the issues for the decisional matters and recognized members of the public in the audience and the staff that worked on these matters. Chairman Tenenbaum called for any questions of the staff or other statements. Commissioners Adler, Northup and Nord made opening statements regarding the matters. Chairman Tenenbaum called for any motions. Commissioner Nord made a parliamentary inquiry about the order of the decision matters and the offering of amendments. Commissioner Adler moved that the Commission adopt the amendment in the form of a substitute for the *Final Rule on Testing and Labeling Pertaining to Product Certification.* Commissioner Adler explained the changes made to the draft notice. Commissioner Moore seconded the motion. Hearing no discussion on the motion, Chairman Tenenbaum called for a vote on the motion. The Commission voted (4-1) to adopt the substitute draft notice. Chairman Tenenbaum and Commissioners Moore, Northup and Adler voted to adopt the substitute. Commissioner Nord voted to not adopt the amendments.

Chairman Tenenbaum called for any other motions. Commissioner Nord moved that the Commission direct the staff to delete Subpart B from the *Final Rule on Testing and Labeling Pertaining to Product Certification.* Commissioner Northup seconded the motion. Chairman Tenenbaum called for any discussion. Commissioner Nord explained her motion and the Commission discussed the motion. Chairman Tenenbaum called for a vote on the motion. The Commission voted (3-2) to not approve the motion. Chairman Tenenbaum and Commissioners Moore and Adler voted to not approve. Commissioners Nord and Northup voted to approve the motion.

Chairman Tenenbaum called for any other motions. Commissioner Northup moved that the Commission adopt provisions of the draft rules that would amend language pertaining to "due care" and "willful ignorance" contained in the *Final Rule on Testing and Labeling Pertaining to Product Certification* and the *Final Rule: 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.* Commissioner Nord seconded

the motion. Commissioner Northup explained her motion and the Commission discussed the issue. Chairman Tenenbaum called for a vote on the motion. The Commission voted (3-2) to not approve the motion. Chairman Tenenbaum and Commissioners Moore and Adler voted to not approve. Commissioners Nord and Northup voted to approve the motion.

Chairman Tenenbaum called for any other motions. Commissioner Nord moved that the Commission direct the staff to incorporate the language from the proposals to issue the *Proposed Rule: Amendment to Regulation on Testing and Labeling Pertaining to Product Certification Regarding Representative Samples for Periodic Testing of Children's Products* ("*NPR on Representative Samples*") and the *Notice: Application of Third Party Testing Requirements; Reducing Third Party Testing Burdens; Request for Comments* ("*H.R. 2715 Questions*") in the *Draft Final Rule on Testing and Labeling Pertaining to Product Certification* as a Proposed Rule: Testing *and Labeling Pertaining to Product Certification*, including a proposed effective date no later than 15 months after the date of publication in the *Federal Register* ("*FR*"). Commissioner Northup seconded the motion. Chairman Tenenbaum called for any discussion. Commissioner Nord explained her motion and the Commission discussed the motion. Chairman Tenenbaum called for a vote on the motion. The Commission voted (3-2) to not approve the motion. Chairman Tenenbaum and Commissioners Moore and Adler voted to not approve. Commissioners Nord and Northup voted to approve the motion.

The Chairman called for any other motions. Commissioner Adler moved that the Commission approve publication of the final rule titled *Testing and Labeling Pertaining to Product Certification* in the *FR* with the changes to reflect the adoption of the amendment. Chairman Tenenbaum seconded the motions and called for any discussion. Hearing no discussion, Chairman Tenenbaum called for a vote on the motion. The Commission voted (3-2) to approve the publication of the proposed final rule. Chairman Tenenbaum and Commissioners Moore and Adler voted to approve publication. Commissioners Nord and Northup voted not to approve publication.

Final Rule: 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
(Briefing package dated September 21, 2011)

Chairman Tenenbaum called for any motions. Commissioner Adler moved that the Commission to adopt the amendment (that was provided to the Commission offices) in the form of a substitute to the component parts rule. Commissioner Moore seconded the motion. Chairman Tenenbaum called for any discussion. Commissioner Adler explained the changes and clarifications in the amendment. Chairman Tenenbaum called for the vote on the motion. The Commission voted (4-1) to adopt the amendment. Chairman Tenenbaum and Commissioners Moore, Adler and Northup voted to adopt the amendment. Commissioner Nord voted to not adopt the amendment. The Commission discussed the matter.

Chairman Tenenbaum called for any motions. Commissioner Adler moved that the Commission approve publication of the final rule titled *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 in the *FR* with the changes to reflect the adoption of the amendment. Commissioner Moore seconded the motion. Chairman Tenenbaum called for any discussion. Hearing no discussion, Chairman Tenenbaum called for a vote on the motion. The Commission voted (3-2) to approve the publication of the proposed final rule. Chairman Tenenbaum and Commissioners Moore and Adler voted to approve publication. Commissioners Nord and Northup voted to not approve publication.

Notice of Proposed Rulemaking: Amendment to Regulation on Testing and Labeling Pertaining to Product Certification Regarding Representative Samples for Periodic Testing of Children's Products
(Briefing package dated September 21, 2011)

Chairman Tenenbaum introduced the issue and called for any motions. Commissioner Nord moved that the Commission adopt an amendment to conform the language in the preamble determining the phrase "basis for inferring" with the language in the notice of proposed rulemaking. The amendment is to replace the word "knowledge" with "a basis for inferring" in the draft preamble on page 6, under "1. Representative Samples," in the second sentence of the first full paragraph. Chairman Tenenbaum seconded the motion. Commissioner Nord explained the reasoning for the amendment. The Commission discussed the motion. Chairman Tenenbaum called for a vote on the motion. The Commission voted unanimously (5-0) to adopt the amendment.

Chairman Tenenbaum called for any motions. Commissioner Adler moved that the Commission approve publication of the proposed rule titled *Amendment to Regulation on Testing and Labeling Pertaining to Product Certification Regarding Representative Samples for Periodic Testing of Children's Products* in the *FR* with the changes to reflect the adoption of the Commissioner Nord's amendment. Commissioner Moore seconded the motion. Chairman Tenenbaum called for any discussion. Hearing no discussion, Chairman Tenenbaum called for a vote on the motion. The Commission voted unanimously (5-0) to approve the publication of the notice of proposed rulemaking.

Notice: Application of Third Party Testing Requirements; Reducing Third Party Testing Burdens; Request for Comments
(Briefing package dated September 21, 2011)

Chairman Tenenbaum introduced the issue and called for any motions. Commissioner Adler moved that the Commission adopt an amendment in the form of a substitute to the request for comments on the third party testing burdens. Commissioner Moore seconded the motion. Chairman Tenenbaum called for any discussion. Hearing none, Chairman Tenenbaum called for the vote on the motion. The Commission voted unanimously (5-0) to adopt the amendment.

Chairman Tenenbaum called for any motions. Commissioner Adler moved that the Commission approve publication of the notice titled *Notice: Application of Third Party Testing Requirements; Reducing Third Party Testing Burdens; Request for Comments* in the *FR* with the changes to reflect the adoption of the amendments. Commissioner Moore seconded the motion. Chairman Tenenbaum called for any discussion. Hearing no discussion, Chairman Tenenbaum called for a vote on the motion. The Commission voted unanimously (5-0) to approve the publication of the notice with approved changes.

The Commissioners made closing statements on the matters decided in the meeting.

Chairman Tenenbaum and Commissioners Moore and Adler issued a joint written statement. Commissioners Nord and Northup issued separate written statements. Commissioners Adler and Nord issued separate supplemental statements. The statements are attached.

The Chairman and Commissioners noted that this is the last meeting for Commissioner Moore before his retirement. Commissioner Moore made a statement about his departure.

There being no further business on the agenda, Chairman Tenenbaum handed the gavel to Commissioner Moore to adjourn the meeting at 12:10 p.m.

For the Commission:

Todd A. Stevenson
Secretary

Attachments: Joint Statement of Chairman Tenenbaum and Commissioners Moore and Adler
Statement of Commissioner Nord
Statement of Commissioner Northup
Supplemental Statement of Commissioner Adler
Supplemental Statement of Commissioner Nord
Additional Supplemental Statement of Commissioner Adler

Joint Statement of Chairman Tenenbaum and Commissioners Moore and Adler

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

October 19, 2011

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

Today was a monumental day for the safety of America's children, and one that parents and grandparents have waited for years to happen. The Commission adopted rules that require independent, third-party testing of toys and other children's products before they reach consumers. For the past three years, the Commission has worked diligently to implement the world's toughest lead limits and crib safety standards, and bulk up our product safety efforts at the nation's ports. Today, we voted on what many consider the capstone of the Consumer Product Safety Improvement Act of 2008 (CPSIA). With this vote, we have taken safety "to the source."

In 2008, this nation faced a crisis of confidence in our consumer product safety framework. Behind us was the "year of the recall" in 2007, where recall after recall of what amounted to tens of millions of recalled units of children's products motivated moms, dads, and all types of consumers to demand change. Lawmakers faced two choices: retain the failed children's product safety framework of the past and continue to only catch and recall dangerous children's products after they were already in the hands of millions of toddlers and young children, or create a new safety framework designed to ensure the safety of children's products when they are manufactured and before they get into the hands of children.

Congress made this choice through the passage of the CPSIA. After hearing from millions of shocked and disappointed parents, Congress decided that the old, reactive children's product safety system did not sufficiently protect our nation's children or establish the United States as the global leader in product safety. Thus, Congress decided that a truly effective system of product safety for children was needed, and today the CPSC took one of the most important steps in the process of building that proactive system for ensuring the safety of children's products.

Congress' requirement for independent safety checks is a perfectly reasonable requirement when it comes to children's safety. It is the least our children deserve. It is a safeguard parents expect, and it is why the action we took is the centerpiece of the

CPSIA. The final third-party rules we adopted today will fulfill the promise that Congress made to parents through the passage of CPSIA and the promise that the CPSC made to children when it initiated these third-party testing related rulemakings.

The fact that parents were expecting this promise to be fulfilled by our actions was confirmed by the thousands of parents, grandparents, and everyday consumers who took the time to reach out to all five Commissioners during the past week and who urged us to vote yes and support these rules. We believe that such an unprecedented outpouring deserves some recognition, especially considering the fact that we have received more than ten-thousand (and still counting) letters from consumers in all 50 states. This unprecedented flood of letters from consumers asking us to support the third party testing rules has occurred over just the past seven days.

Congress repudiated the philosophy of waiting until children are injured before considering action - despite the calls from some to return to the old reactive system. The bottom-line is that the 'wait-and-see' approach failed. And the consequences were tragic, devastating and permanent. Just ask those parents who have had to live through the unimaginable.

Enough is enough. Through our actions, we have honored the memories of those precious children who have been lost, such as Savannah Pereira, Danny Keysar, Tyler Witte, Jarnell Brown, and, unfortunately, countless other children. With them all in mind, we are proud to say that this is a great day for the safety of children. Today, we took a giant step in transforming the children's product safety framework in this country from the reactive system that tens of millions of consumers still remember from the shocking "year of the recall" in 2007 into a new, proactive framework that Congress directed this agency to create and that the parents, grandparents, and children of this country expect and deserve.

Statement of Commissioner Nord

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

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

The Consumer Product Safety Commission (Commission or CPSC) has now mandated an overreaching testing and certification regime that will drive up costs for consumers and deprive them of choices while adding only nominally to consumer safety. The majority did this without demonstrating safety gains that justify these extraordinary costs. The majority's actions will also harm the manufacturers and importers that serve American consumers—especially ones based here in the U.S. that will have to slow their growth or eliminate jobs to offset these new costs.

Though Congress recently required that we consider ways to reduce testing costs, the majority made a half-hearted promise to think about it, and not before finalizing its testing rule. This gets the process precisely backwards—an agency should think about keeping costs low first, and then issue a final rule. The Commission is issuing a faux final rule that will need to be amended several times before it becomes effective. This is regulatory malpractice. I voted against the final rules the Commission adopted because they represent bad policymaking.

The two final rules the Commission adopted are the *Final Rule on Testing and Labeling Pertaining to Certification* and the *Conditions and Requirements for Relying on Component Part Testing or Certification, or Another Party's Finished Product Testing or Certification, to Meeting Testing and Certification Requirements* (the *Testing Rule* and the *Component Part Testing and Certification Rule*, respectively). My objections to these two rules are substantive and procedural.

The *Testing Rule*

While the *Testing Rule* is an improvement from the earlier proposed rule, it is still rife with provisions that drive up costs needlessly, and it lacks provisions that clarify the obligations of manufacturers under the rule. Since efforts to clarify obligations and lower costs were rejected by a majority of the commission, I could not, in good conscience, vote for this rule.

Costs and Benefits

The Commission's staff conducted a limited but eye-opening analysis of some of the costs of this rule in a Regulatory Flexibility analysis. They explained that the rule "will have a significant impact on all firms" making children's products and, unfortunately, American families should expect to bear the brunt of this rule's impact.

Our staff tells us that firms are likely to mitigate "the adverse impacts [of the rule by] . . . rais[ing] their prices to cover their costs." Not only will the *Testing Rule* impose substantial costs on consumers, it may slow or stop the pace of innovation in the design and manufacturing of children's products. As our staff explained, impacted companies may "forgo or delay implementing improvement to products' design or manufacturing processes in order to avoid the costs of third party testing." Forgone innovation could even include ways to make products safer. So, in order to test to today's safety standards, we may force companies to put off or abandon tomorrow's safety improvements. Our staff tells us that this "rule could be a barrier that inhibits new firms from entering the children's product market." Finally, the staff warns that these adverse impacts are "expected to be disproportionate on small and low-volume manufacturers." Small businesses can expect testing costs to consume a staggering 11.7% of their revenues. In other words, we are knowingly imposing significant and unfair costs on small business, the very drivers of economic growth.

Without explanation, the majority also deleted an exemption for low-volume manufacturers that we included in § 1107.21(c)(3) of the proposed rule and which our career staff recommended be included in the final rule. The exemption was reasonable: a small run of products does not pose the same risk as a run of 10 million products. There is less likelihood of something going awry in such a small run, and the burdens of testing could drive such small runs out of existence. Congress was aware of this exemption when it passed H.R. 2715, and did not move to eliminate it. The inclusion of the small-batch exemption does not vitiate the need for this exemption, because small-batch manufacturers and low-volume manufacturers are not always the same parties.

The heavy costs of the *Testing Rule* could be justified if there was a commensurate safety gain, but that gain simply is not demonstrated. This is not a matter of simply reallocating costs. To do that, the Commission would have had to evaluate the costs suffered in the current system, and the costs likely in the proposed regime. Then, we could have calibrated the system so that any new costs created were offset by benefits, and that costs were appropriately assigned to the party best positioned to avoid them. Without a proper cost-benefit analysis, we cannot assume that we have set the proper balance. That would have been a worthwhile exercise, but it was an exercise the majority rejected. Apparently, sometimes it is best not to let facts get in the way of regulating.

Third-Party Testing

As our staff has told us, the single biggest element on the cost side of the balance is the requirement that all testing of children's products be done by an outside third-party laboratory. This decision goes well beyond the statute's language. 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. This is unnecessary from the standpoint of safety. Indeed, since the rule allows safety to be served by first party testing, one wonders how the majority can say that safety requires periodic testing to be done by third parties. Requiring periodic testing to be done by third parties also raises the costs so much that I fear that families will stop buying the children's products subject to this regime and shift their purchases to non-children's product that are not subject to these overreaching requirements. We have already heard of instances where this is occurring. This result creates a greater danger than the risks addressed by this testing regime ever did.

Enforcement Threats

Given the heavy costs imposed by third-party testing, the least the Commission should do is to clearly explain what a firm must do in a testing program to meet the CPSC's expectations. This the majority did not do. Instead, they feinted at permitting firms to adopt one-, two-, or three-year testing programs, while retaining the authority to question the frequency of testing based on nearly any factor a CPSC compliance officer thinks that a firm should consider. Because the agency will most often be looking at a testing program only after a non-compliant product turns up, we will be hard-pressed to identify what actually constitutes an appropriate testing frequency from a before-the-fact perspective. (It has even been suggested that the CPSC could initiate action for violation of this rule against the maker of a compliant product.) This violates a basic principle of Anglo-American law: the government should give clear notice of the lines that must not be crossed before punishing someone for crossing that line. This rule gives the CPSC authority to make *post hoc* judgments about what should have be done, rather than clearly defining expectations.

Regulatory Uncertainty

Beyond failing to set clear terms about the design of periodic testing programs, manufacturers and importers have reason to fear that something worse may be waiting for them. The Commission's majority created a climate of regulatory uncertainty because they refused to delete Subpart B from the rule, which defines and sets requirements for a "reasonable testing program" for non-children's products. (This refusal to delete came only after their telling staff to delete it, then changing their mind, later offering to delete it for votes, only to finally rescind the offer—"ping pong policy" at its best.)

This decision allows the Commission, if it wishes, to finalize the reasonable-testing-program provisions from the proposed rule without going through notice-and-comment rulemaking again. This is inappropriate for three reasons. First, the groundwork of the proposed definition of reasonable testing program was altered in the present rule and may be further altered if the Commission makes changes following responses to the questions posed by H.R. 2715. Second, the excessive burdens of the Commission's first attempted definition were part of what prompted the clamor that led to Congress's passing H.R. 2715—reintroducing the reasonable testing program without fundamentally rethinking it defies our congressional mandate. Finally, the Commission's decision to reserve this authority deprives manufacturers of the certainty they need to plan their quality assurance/quality control systems. This untenable position is unnecessary. If it

becomes appropriate to issue a rule defining the elements of a reasonable testing program, the Commission should do so through a full notice-and-comment process.

Process

It is not entirely surprising that the Commission developed such a wrong-headed rule here. The process that led up to this vote was questionable and driven by political concerns, and it may open the rule to legal challenge. In H.R. 2715, Congress expressed concern that the Commission had not adequately considered testing costs in the proposed rule. They imposed a new requirement on the Commission to seek guidance from the public to identify and reduce the testing costs that the proposed rule would have created. Congress further directed us to either make appropriate changes or to explain what powers the Commission would need to make those changes. Thus, Congress signaled that the Commission should go through a new notice-and-comment rulemaking process.

Had we followed that congressional signal, we would have sought the public's guidance on establishing a rational, effective testing regime. "The purpose of the notice and comment requirement is to provide for meaningful public participation in the rulemaking process. The opportunity to participate is not meaningful unless it occurs reasonably close to the time in which [an agency] makes a decision." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995). There is nothing meaningful about allowing public comment only after the rule-making process concludes. Instead of releasing a faux final rule and then proceeding to ask the public for comments that might prompt the Commission to amend its rules, the Commission should have re-proposed the rule (with the notice of proposed rule on the meaning of "representative" and the questions Congress directed us to ask in H.R. 2715, both discussed further below).

I proposed an amendment that would have taken us through this process and resulted in a final effective date no later than the one the majority supported. Had the majority agreed to my amendment, they would have followed the advice found in the ABA's *Guide to Federal Agency Rulemaking*, which explains that "circumstances that might support a second cycle" of rulemaking include a change in the relevant statutory framework, as occurred here. Courts routinely explain to agencies in circumstances like these that re-proposal is the appropriate procedure.

Not only is it legally wise to re-propose, it is technically wise. This is what our technical staff told us. They believed it was appropriate to reconsider the *Testing Rule* in light of H.R. 2715, and therefore re-propose it for public comment. They explained their view immediately after the H.R. 2715's enactment, and they still favor that approach. The changes that Congress mandated are so fundamental that the only logical path from a technical standpoint was re-proposal.

The *Component Part Testing and Certification Rule*

The other final rule that the Commission approved was the *Component Part Testing and Certification Rule*. Intertwined with the *Testing Rule*, this rule's *raison d'être* was mitigating the burden of testing by spreading those costs across the supply chain. An

effective version of this rule would have driven safety efforts up the supply chain to the source. Unfortunately, in its final form, this rule lacks a structure embodying this principle. The present rule conflates "test results" and "certificates" such that no reasonable manufacturer will be able to rely on test results. This means that if a component part manufacturer decides to perform testing on a part and provide the test results to a manufacturer or importer, the recipient will effectively be no better off than if it had not received any test results.

Additionally, the preamble contains troubling language about "due care," among other terms. Specifically, this language goes beyond the accepted legal definition of the term "due care" in explaining that, for example, site visits and confirmatory testing may be required for a manufacturer or importer to be considered as having exercised "due care." Fortunately, this rule is voluntary so if it is too burdensome then manufacturers will simply ignore it. The more manufacturers are led to ignore this rule, the more it proves to be a regulatory charade. It is lamentable that the Commission needlessly squandered this opportunity to reduce the *Testing Rule*'s costs.

The *"Representative" NPR*

Fortunately, the Commission did make some positive moves due to congressional prodding. Among other changes in H.R. 2715, Congress told us that periodic tests on children's products could be performed on "representative samples," rather than "random samples," as our statute previously read. The Commission today voted to issue a notice of proposed rulemaking on this: the *Amendment to Regulation on Testing and Labeling Pertaining to Product Certification Regarding Representative Samples for Periodic Testing of Children's Products*. I wholeheartedly agreed with the change that Congress made, so I joined my colleagues in supporting this proposed rule. We unanimously made an amendment to a portion of the text of the preamble that did not align with the proposed rule's text.

I note that the proposed rule includes "random" sampling as an option for a manufacturer to use in selecting "representative" samples. This simply means that a manufacturer *may* choose to use that method in selecting its samples. Given the heavy criticism that the "random" standard engendered when the Commission first released its proposed *Testing Rule*, it seems unlikely that manufacturers will make such a choice.

H.R. 2715 Questions

Finally, as Congress directed, the Commission issued a set of questions soliciting information from the public about the costs of the *Testing Rule* and how the Commission can reduce those costs. I wholeheartedly supported asking these questions because I believe the rule's costs are huge and can be reduced. I look forward to receiving the responses to these questions, and encourage the public to offer us creative solutions to the costs imposed by our *Testing Rule*.

Because Congress has directed us to consider even methods that are not currently within the Commission's power, commenters need not restrict themselves the present framework. Of particular interest to me is determining whether the Commission can design a testing regime that allows manufacturers to focus their resources on riskier elements of their products, rather than testing obvious or benign elements with the same frequency and intensity as riskier or more dangerous elements. I look forward to reviewing the public's suggestions for improving the *Testing Rule*.

Conclusion

The Commission could have advanced safety for Americans without burdening our economy with rules that create greater costs and questionable safety gains. This it did not do. Our decision to move forward with the costly *Testing Rule* and the dubious *Component Part Testing and Certification Rule* without ensuring that they are truly tied to substantial safety gains was unwise. The majority created a regime in which paper violations proliferate without regard to substantial product compliance. This was rash and wrong, and it did not have to be done this way.

Statement of Commissioner Northup

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

COMMISSIONER ANNE M. NORTHUP

STATEMENT OF COMMISSIONER ANNE M. NORTHUP ON THE VOTES TO APPROVE THE FINAL RULE ON TESTING AND LABELING PERTAINING TO PRODUCT CERTIFICATION, AND THE FINAL RULE ON 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

October 26, 2011

I am greatly disappointed by the Consumer Product Safety Commission Democrat majority's decisions to issue prematurely a final rule establishing the protocols and standards for the third party testing of children's products to ensure continued compliance with applicable standards; and, to publish a rule, intended to create a market for third party tested and/or certified component parts, containing in a preamble language that may sabotage any chance the rule had to reduce the cost of third party testing for medium and small size domestic manufacturers.

The Third-Party Testing Rule Should Have Been Reproposed.

A Brief History of the CPSIA and H.R. 2715

The Consumer Product Safety Improvement Act (CPSIA) was enacted in 2008 in response to a media storm over a large number of Chinese manufactured children's toys that were recalled due to lead in paint that exceeded a standard in place since 1970. No child was injured by lead paint in the toys, and the offending manufacturers were soundly rebuked under existing law through mandatory recalls, the imposition of the largest penalty in the history of the CPSC, and a thirty million dollar class action lawsuit settlement for one manufacturer.

Notwithstanding the ability of existing law to address the issues, the news of the recalls created a political climate suited to the fulfillment of a long held goal of consumer advocates and liberal members of Congress: the reduction in the lead content of children's products virtually to zero, the elimination of phthalates without any known risk to children, and the requirement that all children's products be tested by third party laboratories before entering commerce to ensure compliance with these and all other applicable safety standards. Thus, the CPSIA requires every component in a children's product, with limited exceptions, to be individually tested and certified as free from lead and phthalates, and compliant with all other applicable product safety rules, through a third party laboratory test of sufficient samples of the product. The CPSC has no discretion in implementing that statutory mandate, and manufacturers have, with limited

exceptions, been required to perform initial third party tests to specific safety standards with each new notice of requirements issued by the CPSC for accreditation of laboratories to test to the standard.

But even before the CPSC began to implement the new "prevention" regime contemplated by the CPSIA, members of Congress from both parties realized that the law had imposed immense cost burdens far in disproportion to any benefit attained through a reduction in risk. As a result, the CPSC received regular and vocal bipartisan exhortations to implement the law as "flexibly" as possible in order to minimize its adverse impact.

The Democrat majority on the Commission failed to heed Congress's call, and, as reflected in its actions implementing the rule over the past two years, took every opportunity to increase the costs of compliance, without any consideration of whether proportional benefits in health or safety were realized. Soon, the inevitable consequences of the Commission's actions became apparent, as business after business reduced its children's product lines, exited the children's product market, or ceased operating completely.

Developing in the background as the Commission majority promulgated overly burdensome material and product specific rules, was the largest and most widely applicable rulemaking the Commission would ever undertake: the promulgation of protocols and standards for the *additional* third-party testing of "random samples" of a certified children's product to ensure continued compliance with all applicable safety standards, both when there is a material change in the product, and periodically during production even in the absence of a reason to believe a certified product is no longer compliant. This rule may be the most intrusive imposition of requirements on a segment of the manufacturing community ever. Its prescriptive mandates insinuate the Commission deeply into the production process of any company that manufactures a children's product for the United States market.

In 2010, the CPSC issued a notice of proposed rulemaking for a new 16 C.F.R. § 1107 setting forth onerous requirements for periodic continued third-party testing, including: the development of plans for testing at intervals that provide a "high degree of assurance" of continued compliance, based on a long list of factors; an alternative schedule of biennial periodic tests dependent upon adherence to a lengthy and overly prescriptive map for the development of a "production testing plan"; an unworkable definition of "random" sample selection; and, massive record keeping requirements that alone had the potential to overwhelm the resources of many manufacturers.

To Congress's credit, while the Commission reviewed comments in response to the § 1107 NPR, Congress continued to take an active interest in the impact of the CPSIA. Chairman Tenenbaum or Commissioner Adler, and I, participated in several hearings in which the CPSC's oversight and appropriations committees in the House sought testimony and evidence regarding ways in which the CPSIA could be improved. The focus of these hearings was often the destructive economic impact of third-party testing

and the failure of the CPSIA to impose its costs in proportion to any improvement in children's health and safety.

On August 1, 2011, almost two months before the CPSC posted its draft final rule of § 1107, Congress passed H.R. 2715. The statute, signed into law by President Obama shortly thereafter, requires the Commission to seek public comment on opportunities to reduce the cost of third party testing requirements, based on seven questions prescribed by Congress. Based on the public comments, the Commission is to consider issuing new or revised third party testing regulations if doing so will reduce third party testing costs while still assuring compliance with applicable standards. Congress even invited the Commission to propose changes to the law to provide it with additional authority to address the costs of third-party testing, if necessary. H.R. 2715 also substituted "representative samples" for "random samples" as the basis for selecting samples for periodic continued testing, and requires the Commission to undertake notice and comment rulemaking to define the new statutory phrase. Finally, the new law requires the Commission to create alternative testing requirements for limited run products manufactured by businesses meeting a gross revenue limit.

The Failure to Repropose Violates the APA and is an Indefensible Policy Choice.

H.R. 2715 enacts changes that go to the core of the CPSIA's third-party testing regime. It mandates a new and, as yet, undefined method for selecting samples for continued periodic testing; it requires new and, as yet, unwritten rules to govern the testing obligations of certain small manufacturers; and, it requires consideration of seven very specific methods to reduce the cost of third-party testing that were not addressed in the draft version of §1107 published for public comment last year. Under these circumstances, the final § 1107 rule voted by the majority is based upon the statute as it was originally passed by Congress, but is insufficiently tied to the underlying statute as Congress has revised it. Courts have held that even existing regulations, let alone ones still under development, were required to be changed to address statutory changes comparable in scope. *See McGavock v. City of Water Valley, Miss.*, 452 F.3d 423, 427-28 (5th Cir. 2006) (holding that a regulation became "obsolete and without effect" after a statute changed the definition of a term used in the regulation); *American Transfer & Storage Co. v. ICC*, 719 F.2d 1283 (5th Cir. 1983) (acknowledging that an agency must substantially revise existing regulations after significant changes are made to the underlying statute that the regulations implemented). Indeed, it is black letter law that a second cycle of notice and comment rulemaking is appropriate in response to "supervening legal developments such as statutes, regulations, or court decisions that significantly affect the rulemaking." J. Lubers (ABA), *A Guide to Federal Agency Rulemaking*, (4th Edition) at 292-93.

Even if the Commission was not legally obligated to repropose § 1107 to solicit public comment on the new issues raised by H.R. 2715, its failure to do so irrationally complicates compliance by the regulated community. The final rule to be codified at 16 C.F.R. § 1107 requires manufacturers to undertake a complex analysis and formulate a

detailed periodic testing plan or production testing plan[1], or obtain ISO/IEC 17025:2005 accreditation for an in-house laboratory, in order to be prepared to begin compliance with the rule's periodic testing requirements on the effective date fifteen months from now. A detailed periodic testing or production testing plan must be written for each product manufactured at each manufacturing site, even where the product manufactured at the site changes frequently, such as on a daily basis. But in the meantime, the Commission will be considering ways to change those very same provisions in order to reduce the costs of third-party testing. Ironically then, the Commission's response to H.R. 2715 is to *increase* the costs of third-party testing by requiring manufacturer's to waste resources in order to satisfy "protocols and standards" that may change substantially in the name of reducing costs.

While the potential for cost reducing changes may be speculative – and public statements by Commissioner Adler suggest he has no intention of supporting any – other material elements of proposed § 1107 have already changed. Thus, manufacturers are expected to begin preparing to perform periodic third party tests during production, without knowing how the Commission will construe the requirement that "representative samples" be

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[1] Periodic testing plans must include the tests to be conducted, the intervals at which the tests will be conducted, and the number of samples tested. Manufacturers are directed to consider at least all of the following factors when determining the appropriate testing interval for a product:

(i) High variability in test results, as indicated by a relatively large sample standard deviation in quantitative tests;
(ii) Measurements that are close to the allowable numerical limit for quantitative tests;
(iii) Known manufacturing process factors which could affect compliance with a rule. For example, if the manufacturer knows that a casting die wears down as the die nears the end of its useful life, the manufacturer may wish to test more often as the casting die wears down;
(iv) Consumer complaints or warranty claims;
(v) Introduction of a new set of component parts into the assembly process;
(vi) The manufacture of a fixed number of products;
(vii) Potential for serious injury or death resulting from a noncompliant children's product;
(viii) The number of children's products produced annually, such that a manufacturer should consider testing a children's product more frequently if the product is produced in very large numbers or distributed widely throughout the United States;
(ix) The children's product's similarity to other children's products with which the manufacturer is familiar and/or whether the children's product has many different component parts compared to other children's products of a similar type; or
(x) Inability to determine the children's product's noncompliance easily through means such as visual inspection.

16 C.F.R. § 1107.21(b)(2)

A production testing plan must contain, among other things, a description of the production testing plan, including, but not limited to, a description of the process management techniques used, the tests to be conducted, or the measurements to be taken; the intervals at which the tests or measurements will be made; the number of samples tested; and the basis for determining that the combination of process management techniques and tests provide a high degree of assurance of compliance if they are not the tests prescribed for the applicable children's product safety rule. A manufacturer must also document the production testing methods used to ensure continuing compliance and the basis for determining that the production testing plan provides a high degree of assurance that the product being manufactured continues to comply with all applicable children's product safety rules. 16 C.F.R. § 1107.21(c)(2)

collected for testing. The NPR on representative samples may provide a clue, but if the extensive changes from the § 1107 NPR to final rule are any indication, reliance upon it may be perilous. Similarly, "small batch" manufacturers of "covered products", as those terms are defined in H.R. 2715, must await a separate rulemaking to learn how their obligations may differ from final § 1107. In the meantime, they can do nothing to prepare for compliance.

Not surprisingly based on these considerations, our CPSC career staff recommended that the final testing rule be reproposed along with the NPRs on cost reduction and representative samples, so that a final comprehensive rule could emerge that addresses Congress's H.R. 2715 mandate and protects regulated industries from detrimental reliance on a tentative "final" rule. This conflict between staff's expert opinion and the political directive from the majority explains why, on at least 18 occasions, the preamble to § 1107 published in the *Federal Register* evokes the cost saving comments to be solicited under H.R. 2715 as a reason to defer rather than respond fully to a comment proposing means to ameliorate the excessive costs of the rule as originally proposed. Setting aside so many of the comments without a full response mocks the due process requirements of notice and comment rulemaking under the APA. The majority's preferred course of finalizing a burdensome rule now and paying lip service to considering comments later, is not a permissible alternative to the mandatory APA procedures.

The transparent weakness of the Majority's rationale for refusing to repropose the testing rule suggests that a hidden political motive related to the impending vacancy of a Democrat Commission seat may have been at work. They point to a post-passage colloquy among three Senators, who urge the Commission to finalize the rule before soliciting additional comment under H.R. 2715. But it is well recognized that "the statements of individual Members of Congress (ordinarily addressed to a virtually empty floor) . . . [are not] a reliable indication of what a majority of both Houses of Congress intended when they voted for a statute . . . The *only* reliable indication of *that* intent – the only thing we know for sure can be attributed to *all* of them – is the words of the bill that they voted to make law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 390-91 (2000) (Scalia, *J.*, concurring in the judgment). *See also Barnbart v. Sigmon Coal Co.*, 534 U.S. 438, 457 (2002) (explaining that floor statements from a handful of Senators "cannot amend the clear and unambiguous language of a statue," and there is "no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text.").

The specter of delay has also inevitably been raised. By now it should be apparent that this majority falls back on the risk of "delay" whenever its precipitous and ill reasoned actions are challenged. The argument is particularly cynical in this case, because Commissioner Nord offered an alternative time line that would have allowed for consideration of cost saving alternatives, as well as rulemaking regarding the meaning of "representative samples" and the extent of small batch relief, while still finalizing the rule effective on the same date as the one published this week.

The Majority also grossly overstate the benefits of third party testing every component of every children's product to all applicable safety standards. Reading from one of the "thousands" of letters received (there were actually only about five unique letters, mostly forwarded by one advocacy organization), Chairman Tenenbaum trumpeted the supposed reductions in recalls the rule will produce. But she must be aware that most recalled products contain design or manufacturing defects that are unrelated to the Commission's product and material specific safety standards. Moreover, given the Commission's decision to reduce the lead in the substrate of children's products well below a level presenting any risk to health, recalls of products violating the new standard will not even necessarily protect against a real risk of injury.

My heart goes out to the parents of children who are injured or killed by defective products. But I cannot continue to remain silent while the Majority exploits the deaths of children to further a policy agenda that would not have saved their lives. Compounding the incredibly poor taste of displaying at the decisional meeting a morbid gallery of lost innocents, the Democrat's joint statement on the testing rule evokes by name the deaths of four children, to support their argument for third party testing to CPSC safety standards. But each one of those children died under circumstances that would not have been prevented by third party testing. One strangled on a baby monitor cord that met all safety standards, one swallowed a lead charm sold with a non-children's product that would still not be subject to third party testing, one died in a drop side crib that met all applicable safety standards at the time and would have passed all third party tests, and one died in a crib that had already been recalled. The deaths of these children are tragic, and should inspire us to strive to improve product safety and identify defective products. But they should not be used to justify regulatory overreach that would not have saved their lives.

In contrast to the limited benefits secured through third-party testing, the costs to small businesses are crushing. According to the CPSC's economists, "[t]he costs of the third-party testing requirements are expected to be significant for some manufacturers and are expected to have a disproportionate impact on small and low-volume manufacturers." Just the costs of testing alone -- excluding the costs of samples consumed in destructive tests, the costs of shipping the samples to the testing laboratories, and any related administrative and record keeping activity – is expected to consume over 11% of a small manufacturer's revenue. Given that a typical profit is only about five percent of revenue, it is reasonable to expect a large number of small business closures resulting from the third-party testing requirement. They cannot simply raise their prices and remain competitive. This is especially true in the children's product market, where most consumers are young families who are unable to pay higher prices. Moreover, in preparing its analysis, Commission staff relied upon the "low to middle part of the ranges" of third-party testing costs. Domestic manufacturers will be especially hard hit then, because the actual cost of testing varies significantly among testing labs, with the cheapest ones based in China.

Commission economists predict that in response to the "significant increase in their costs due to the final rule", manufacturers will redesign their products to reduce the features

and component parts, reduce the number of children's products they offer, exit the children's product market, or go out of business completely. The costs associated with the new rule are also expected to be a "barrier that inhibits new firms from entering the children's product market", including, in particular, ones serving a niche market, such as products for children with disabilities. Safety and performance related innovation will also be stymied, as manufacturers "delay implementing some improvements to a product's design or manufacturing process in order to avoid the costs of third party testing."

Congress mandated third-party testing in the CPSIA, and it is therefore responsible for the massive product, business and job losses the country will suffer once the full brunt of its costs are felt upon the effective date of § 1107. But Congress at least recognized its error and tried to encourage the Commission to explore ways to reduce the costs of third-party testing before it is too late. The Democrat majority's heedless rush to finalize § 1107 without even considering ways to do so represents the basest example of political expediency at the expense of the public interest that I have ever seen.

The Majority Sabotaged the Component Parts Rule.

I was the leading proponent of permitting the voluntary certification of component parts as a means to reduce the cost of third-party testing for medium and small sized domestic manufacturers and importers. As I envisioned it, an "upstream" manufacturer who sold components to many other manufacturers, could pass third-party tested and certified components down the stream of commerce. As each manufacturer in turn incorporated a certified component into a subassembly, it could then pass the subassembly on to the next manufacturer in line, along with the original component part certification and any additional certifications required for the subassembly. In this fashion, each certification would have "currency," until the finished product certifier could rely on all of the component part certifications passed down to it – as well as any testing required of the finished product – as a basis for its own finished product certification.

Two essential elements are required for this system to reduce the costs of third party testing. A finished product certifier must be insulated from CPSA § 19(a)(6) liability for issuing a "false or misleading" certificate, even if its finished product certificate is based on a predecessor's certificate rather than its own third-party testing, so long as it relied reasonably on the predecessor certificate. And, such reasonable reliance must be defined in a way that does not impose on the finished product certifier such a costly and burdensome duty of due care that it is more economically rational to third-party test the finished product and each of its components to all applicable safety standards, than it is to risk relying on certifications issued by other parties.

I worked hard to ensure that the NPR for 16 C.F.R. § 1109 satisfied these two elements and struck the proper balance between ensuring the integrity of component part certificates and maintaining their economic value to downstream certifiers. I also believe that the definition of due care contained in the proposed rule did so. The proposed rule stated at § 1109.4(g): "*Due care* means the degree of care that a prudent and competent

person engaged in the same line of business or endeavor would exercise under similar circumstances." The proposed rule also provided at § 1109.5(h):

> A finished product certifier must exercise due care in order to rely, in whole or in part, on a component part certificate issued by a component part certifier or on component part testing by a testing party as the basis for a finished product certificate. If a finished product certifier fails to exercise due care in its reliance on a certificate for a component part, then the Commission will not consider the finished product certifier to hold a component part certificate issued in accordance with section 14(a) of the CPSA. Exercising due care in this context means taking the steps a prudent and competent person would take to conduct a reasonable review of a component part certificate and to address any concern over its validity. Such steps may vary according to the circumstances.

This is a common sense approach that would have permitted a finished product certifier to review a certificate and rely upon it absent a reason to inquire further. In the event the certificate raised concerns over its validity, a finished product certifier was reasonably expected to take the steps necessary to allay those concerns.

The version of 16 C.F.R. § 1109 approved by the Majority as a final rule contains two changes that I believe will inhibit the creation of a market for certified component parts. To begin with, due care is now defined at § 1109.4(g) to include the statement: "Due care does not permit willful ignorance."

Standing alone, this change is not substantive, and that fact is explained in the preamble to the rule. Willful ignorance is a concept well known to the law that presupposes predicate knowledge putting a party on inquiry notice to seek additional information. A party who fails to seek to learn of a problem he has reason to believe may exist can fairly be characterized as willfully ignorant.

However, language in the preamble intended to apply the concept of "willful ignorance" to the due care requirements imposed by § 1109 goes well beyond that established meaning of the term. The preamble invents new, broad and vague terms with no accepted legal meaning, and Commission staff has opined that the terms impose burdens well beyond what was contemplated in the NPR.

For example, in response to Comment 46 to the NPR for § 1107, the Commission states with respect to an importer's reliance on a foreign manufacturer's certification, that "due care by the importer involves ensuring that the foreign manufacturer conducts periodic tests." This language is problematic on its face, because it assumes that an importer exercises sufficient control over its foreign manufacturers to "ensure" they take particular action, and that an importer has the detailed knowledge of a manufacturer's production process necessary to evaluate in light of the ten factors set forth at 16 C.F.R. § 1107.21(b)(2) the appropriate frequency of periodic testing for the product. Considering the highly prescriptive protocols and standards for periodic testing in § 1107, this requirement for those wishing to depend on component part certificates is excessively

burdensome. I queried staff to better understand how "an importer will be able `to ensure' that a foreign manufacturer conducts periodic tests." Staff's response confirmed my fear that the language imposes an onerous burden. An importer cannot even rely on a review of the importer's periodic testing plan; it must obtain "evidence" that the plan "has been implemented", including potentially, by "conduct[ing] occasional site visits to his supplier's manufacturing facility" and obtaining its own third-party tests of "samples from product received from the supplier" to confirm the accuracy of the supplier's tests. *Response to Commissioner Anne M. Northup's Questions Relating to Pending Proposals for Testing and Certification and Component Parts* (October 18, 2011) at 4.

Other preamble language is equally concerning. The preamble published with the final component parts rule explains that "willful ignorance" was added to the definition of "due care" "to emphasize that a party cannot, and should not, purposely avoid knowing a business partner's testing and certification practices to benefit from an exception contained in section 19(b) of the CPSA." The phrase "purposely avoid knowing" has no accepted legal meaning, and therefore begs the question of what obligation of affirmative inquiry it is intended to impose and under what circumstances. Theoretically, one could be found *post hoc* to have purposely avoided knowing anything about which it did not affirmatively inquire, even in the absence of any reasonable suspicion. Staff's attempted clarification in response to my inquiry was not comforting:

> [d]ue care requires taking some affirmative step to ensure the validity of the test report or certification being relied upon. . . . Actions taken by a certifier to ensure the reliability of test reports from a supplier may differ depending on the nature of the component part supplied, the risk of noncompliance, the industry involved, and the nature of the relationship with the supplier. . . . [a]ctions in furtherance of the due care obligation may include asking questions about testing and sampling procedures and the third party conformity assessment body the supplier uses, spot checking a supplier's test results, requesting written procedures, or visiting a supplier's factory or third party laboratory.

Response to Commissioner Anne M. Northup's Questions Relating to Pending Proposals for Testing and Certification and Component Parts (October 18, 2011) at 11.

Importers aware of the Commission's interpretations of "due care" and "willful ignorance" may understandably choose not to risk relying upon certified components or finished products. The Commission identifies a number of factors that impact what affirmative actions are required, but inadequately explains how each will be evaluated by the Commission or what importer actions are required under particular circumstances. This vagueness leaves importers guessing, while knowing that if a certified noncompliant product is discovered, they will likely be found to have guessed wrong no matter what course they choose. Importers wishing to rely on upstream certificates will therefore recognize the safest option to be undertaking the most onerous actions: traveling to China to visit manufacturer sites and third party labs, and procuring additional third-party tests of products whose wholesale prices already reflect that the manufacture has tested and certified them.

While these affirmative obligations are enough to chill a manufacturer's willingness to accept even a single certified component, the burdens grow exponentially when applied to a manufacturer's complex finished product or the numerous such products distributed by a single importer. Under § 1109, a finished product certification can be based on the separate certifications of all of the finished product's components. In order to satisfy the duty of due care as defined by the Majority, a finished product certifier could therefore need to visit multiple manufacturing sites and third-party labs around the world, and conduct numerous third-party tests, in order to exercise its duty with respect to each component. In other words, as Chairman Tenenbaum declared at the decisional meeting, the Commission expects importers and manufacturers relying on upstream certifications "to know everything in the supply chain." And indeed, these same tasks would need to be carried out by each subassembly manufacturer at every level of the supply chain. The result is the exact opposite of the cost spreading the component parts rule was intended to promote; duplication of onerous and costly affirmative actions required to satisfy the duty of due care will instead be the norm. Multiply those obligations by the number of children's products carried by a single importer, and it becomes obvious that procuring initial third-party tests of sufficient samples of each imported finished product is a much more economical option than is purchasing pre-certified products along with the onerous and costly duty of care that accompanies them.

I believe that even large manufacturers and importers may be unwilling to rely on the testing and certifications of other manufacturers under these circumstances. But there is no doubt that medium and smaller sized ones will simply be unable to bear the costs of doing so. Moreover, the Commission intends to hold manufacturers to the "degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances." Because the "line of business" does not depend on the size of the business, small businesses will be held to the same standard as large ones, which have the means to hire full time staffs on location to oversee their foreign manufacturers.

My idea to give component part certificates currency had the potential to substantially reduce the cost of third-party testing, especially for those small businesses for which the requirement to third-party test is a death sentence. That potential has fallen victim to the Democrat majority's refusal to give any leeway in its crusade to hold all importers and manufacturers responsible for the third-party testing of all of the components of every children's product they sell, irrespective of cost or risk. My only remaining hope is that Congress will revisit the CPSIA again after the implementation of §§ 1107 and 1109 causes its full effects to be felt.

Supplemental Statement of Commissioner Adler

U.S. CONSUMER PRODUCT SAFETY COMMISSION
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SUPPLEMENTAL STATEMENT OF COMMISSIONER ROBERT S. ADLER REGARDING THE APPROVAL OF THIRD PARTY TESTING RULES FOR CHILDREN'S PRODUCTS

October 31,201 1

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,manufa cturers 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

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[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 ....
>
> 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.
>
> 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.

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[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,Con gress 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:

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[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.

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[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.

Supplemental Statement of Commissioner Nord

U.S. CONSUMER PRODUCT SAFETY COMMISSION
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BETHESDA, MD 20814

SUPPLEMENTAL 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

November 8, 2011

In the past, Commissioners' written statements were issued to explain the reasoning behind their votes, and not to rebut the written statements of other Commissioners. As I have stated, "[w]ithout this understanding, the Commissioner writing last has the last word, and the public will be forced to navigate a potentially endless merry-go-round of statements as one responds to the other." (See my July 29, 2011 supplemental statement.) Unfortunately, this past practice has apparently been cast to the side with the current Commission. Again, Commissioner Adler has posted a supplemental statement that specifically attempts to rebut arguments I made in my written statement, this time dealing with the recently issued *Final Rule on Testing and Labeling Pertaining to Certification* (the *Testing Rule*). His statement deserves response.[1]

As I indicated in my statement explaining why I voted against publishing the *Testing Rule*, I believe that the decision of the Consumer Product Safety Commission's majority to adopt the rule will drive up costs for manufacturers—and, ultimately, consumers—without corresponding safety benefits. I also believe that the Commission chose poor process over reasoned decision-making in deciding not to re-propose the *Testing Rule* after Congress changed the law that directed the Commission to issue the rule in the first place.

Periodic Testing Need Not Be Performed by a Third-Party Lab

Commissioner Adler questions my understanding that periodic testing need not be performed by a third-party conformity assessment body (a third-party lab). I am happy to explain why I believe that a close reading of the statute undermines the notion that all testing of children's products must be performed by a third party.

[1] This statement does not attempt to respond to all Commissioner Adler's arguments against those raised in my statement. Even though I am not responding to all his arguments, I do not concede the merits of those arguments.

In the Consumer Product Safety Improvement Act (§ 14(a)(2)), Congress created the third-party testing requirement by directing manufacturers and private labelers of children's products subject to a children's product safety rule to submit their products for testing *before* the products are introduced into commerce.[2] In other words, a children's product manufacturer must have *initial* tests performed by third-party labs. These tests must be on "sufficient samples of the children's product"—which must be "identical in all material respects to the product" that the manufacturer wishes to sell. Thus, if a manufacturer makes a material change to a product, then the children's product sold would *not* be identical in all material respects to the samples tested, so the manufacturer could not rely on the initial testing of the children's product. *This* section (§ 14(a)(2)) is the source of the third-party testing requirement, which ensures that every new product—including those so materially different from predecessors that they should be considered new—is tested by a party independent from the manufacturer. This section has nothing to say about any continued testing requirements.

In a later section, Congress required the Commission to create protocols and standards for continued testing of children's products. More specifically, the Commission was obligated to "establish protocols and standards . . . 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."[3] This subparagraph does *not* impose any requirement that the periodic testing be performed by a third-party lab; it is only by reference back to the earlier section that one can possibly infer a third-party testing requirement for continuing testing.

A more proper reading of these two sections would require:

(1) initial tests, which must be performed by third-party labs;

(2) tests after material changes, which must be performed by third-party labs; and

(3) continued, periodic testing, which must be performed but need not necessarily be done by third-party labs.

This articulated testing regime would ensure that the most expensive testing—that is, testing done by a third-party lab–is performed before a new product is introduced to the market. Testing that is done on a continuing basis would be performed according to standards and protocols that we would establish but does not necessarily need to be done by a third-party lab.

Commissioner Adler places a great deal of stock in the heading of the continued-testing section which describes the section as "Additional Regulations for Third Party Testing."

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[2] The issue of whether third-party testing is required of children's products subject to a general safety rule or only those products subject to a "children's product safety rule" is outside the scope of this discussion. Nevertheless, I believe that the Commission has over-read the statute in this regard and extended the third-party testing requirement to more products than required by the statute. See my September 29, 2010 statement.

[3] CPSA § 14(d)(2)(B).

Headings and titles, while helpful, do not determine the meaning of the text that follows. As Commissioner Adler knows, this is a basic principle of legal interpretation, and it makes good sense. Titles can be—and are often—misleading. In this case the subsection deals with things other than third-party testing (i.e., labeling). And, as demonstrated, the statutory text does not require continued testing to be performed by a third party.

Testing can often enhance safety by helping manufacturers identify failures in manufacturing processes. Having tests performed by an independent third party might prevent a bad actor from gaming the system. But these tests can be extraordinarily expensive when performed by a third-party lab—especially for small- and mid-sized businesses, who must amortize the cost of testing across fewer units. The costs that the Commission imposes should be tied to the increase in safety created by the Commission's actions. Given the heavy costs and questionable safety benefits of continued third-party testing, I would not read a third-party periodic testing requirement into the statute if Congress did not put it there in the first place.

Re-proposal Was the Correct Course

Commissioner Adler believes that Congress intended the Commission to promulgate the *Testing Rule* without any delay. I argued that Congress had signaled the Commission should reconsider its proposed rule so thoroughly that re-proposal would have best effectuated Congress's intent. The agency's career staff also recommended re-proposal. This would have allowed a single process to move forward, allowing the rule and all of its components to be considered holistically. Piecemeal, *post hoc* analysis and revision of the rule's elements is poor regulatory process. Instead, the Commission is moving forward with a "faux final rule" that may need to be amended multiple times before it goes into effect. Failing to re-propose after Congress made fundamental structural changes to the statute underlying the *Testing Rule* could jeopardize the rule if it is challenged in court.

Commissioner Adler relies on a colloquy among three senators for the proposition that Congress intended that the Commission not re-propose the *Testing Rule*. While the Senators, in statements after the law was passed, indicated their desire that the Commission proceed apace, those statements do not argue against proper procedure or for reckless regulation. What *is* clear is that the post-enactment colloquy is immaterial.

Commissioner Adler is suggesting the odd notion that the opinions, expressed after passage, of 0.6% of Congress are somehow law. With all respect due to the participants in that colloquy, the intentions of a few members of Congress are legally irrelevant. The only "intent" that matters is the text that was passed by both houses of Congress and signed by the president. As Judge Alex Kozinski described it, "The two Houses and the President agree on the text of statutes, not on committee reports or floor statements. To give substantive effect to this flotsam and jetsam of the legislative process is to short-circuit the constitutional scheme for making law."[4] Wisdom counsels re-proposal.

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[4] Alex Kozinski, "Should Reading Legislative History Be an Impeachable Offense?," 31 *Suffolk U. L. Rev.* 807, 813 (1998).

In any event, Commissioner Adler fails to offer any policy justification beyond "delay" to buttress his view that the Commission was right to issue a final rule without re-proposal. But re-proposal would not have delayed the implementation of the *Testing Rule*: As I demonstrated with the alternative timeline that I presented to the other Commissioners at our decisional meeting on October 19th, a re-proposed *Testing Rule* could have gone through a full notice-and-comment rulemaking process and still become effective in January 2013, the same effective date as the one that the Commission just approved. Commissioner Adler's failure to point to any other basis for plowing ahead can only be viewed as a concession that there was no rational policy basis for rejecting staff's expert recommendation that the rule be re-proposed. His silence speaks volumes about the transparent political motivation underlying the majority's decision to barrel ahead with a rule while their majority remained intact.

Additional Supplemental Statement of Commissioner Adler

U.S. CONSUMER PRODUCT SAFETY COMMISSION
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FURTHER SUPPLEMENTAL STATEMENT OF COMMISSIONER ROBERT ADLER REGARDING THE APPROVAL OF THIRD PARTY TESTING RULES FOR CHILDREN'S PRODUCTS

November 14, 2011

My colleague, Commissioner Nord, has issued a supplemental statement in which she, among other things, refers to a past practice of the Commission in which Commissioners' statements were limited to explain the reasoning behind their votes, but not to rebut the written statements of other Commissioners. Her argument is that such an approach is necessary in order to avoid Commissioners responding to each other's argument in "a potentially endless merry-go-round of statements as one responds to the other." [1]

While I am mindful of my colleague's concern and respect the sincerity of her view, I find myself unpersuaded that any such tradition exists, or should exist. It is not one that the Commission followed in the years I spent at the agency previously – and it is not one to which I have ever assented nor one with which I agree. Accepting her approach means that Commissioners would be forever barred from responding on the record to statements of our colleagues which we believe to be erroneous or unfair. That does not make a lot of sense to me. I believe in robust discussion and debate on the critical policy issues that come before the Commission. In fact, I believe that is one of the reasons Congress set the Commission up as a collegial body.

Periodic Testing by Third-Party Labs

Turning to my colleague's supplemental statement, I appreciate seeing an explanation of why she believes that the Consumer Product Safety Improvement Act (CPSIA) does not require periodic testing to be conducted by independent third-party labs. She points to section 14(a)(2) of the CPSIA as the foundation of third-party testing for children's products. Based on the language of this section, she concludes that *initial* tests must be conducted by third-party labs. She further notes the section requires that samples tested must be identical in all material respects to the product and states "if a manufacturer

[1] *Supplemental 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* (hereafter, "Nord Statement") available at: http://www.cpsc.gov/pr/nord11082011.pdf.

makes a material change to a product, then the children's product sold would *not* be identical in all material respects to the samples tested, so the manufacturer could not rely on the initial testing of the children's product." Accordingly, she agrees that *material changes* in products also require third party testing.

So far, so good. I agree with her analysis to this point. She then takes a step too far. She asserts that a later section, entitled "*Additional Regulations for Third Party Testing*,"[2] does not really impose additional regulations for third party testing. Instead, she declares that this section merely creates protocols and standards for continued testing of children's products, but "does *not* impose any requirement that the periodic testing be performed by a third-party lab...."

In asserting this interpretation of the law, my colleague dismisses the significance of the title of section 14(d) being *Additional Regulations for Third Party Testing*. According to her, "headings and titles, while helpful, do not determine the meaning of the text that follows." Unfortunately, my colleague never explains what the title is doing there if it has no applicability to the section.

In fact, the courts have long held that titles serve a useful purpose in shedding light on a section's basic thrust[3] or in resolving ambiguities in the text of a statute.[4] Titles are placed in statutes to provide guidance about what sections mean. What titles cannot do, and what I have never claimed the title in section 14(d) does, is to enlarge the scope of a section or confer powers not otherwise granted in the actual text of the law.

My colleague further notes that titles can be "misleading." True indeed, but they can also be accurate – as in the case of section 14(d). In fact, the title of this section is quite consistent with the language in the section. Her only argument is to note that the section "deals with things other than third party testing (i.e., labeling)." This point is not persuasive. The reference to labeling arises in section 14(d)(2)(A) with respect to the requirement for labeling under section 14(a), which, of necessity, encompasses both children's and *non-children's* products. That is completely irrelevant to third party testing in section 14(d)(2)(B), which is the provision that my colleague asserts not to apply to periodic testing.

Commissioner Nord ignores the difference in language between subsections 14(d)(2)(A) and (B). Section (A) uses the term "consumer product" which necessarily encompasses both children's and non-children's products. Section (B), on the other hand, refers only to *children's products*,w hich are the very things to which third party testing applies.

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[2] Section 14(d) of the CPSA, found at 15 U.S.C. § 2063(d).

[3] See, e.g., *Almendarez-Torres v. U.S.*, 523 U.S. 224, 234 (1998) and *INS v. National Center for Immigrants' Rights*, 502 U.S. 183, 189 (1991).

[4] See *INS v. National Center for Immigrants' Rights*, 502 U.S. 183, 189-90 (1991); *Mead Corp. v Tilley*, 490 U.S. 714, 723 (1989); *FTC v Mandel Bros., Inc.*, 359 U.S. 385, 388-89 (1959); and *Reese v. U.S.*, 24 F. 3d 228 (1994).

And to repeat a point from my statement of October 31,[5] it is in this subsection that the text requires third party testing both for material changes and periodic testing in children's products.[6]

Moreover, given Congress' insistence that children's products be third party tested for compliance with CPSC safety rules, I find it spectacularly odd that the legislature would have so casually exempted periodic testing from third party requirements, as my colleague claims, without one explicit statement – or even a hint, wink, or nod – to that effect either in the CPSIA or in H.R. 2715. In particular, one puzzles why Congress, which knew for over a year that CPSC planned to require periodic testing be done by third party labs, did not clarify the point in H.R. 2715 when it enacted this law if it felt the CPSC to be on the wrong path. Surely, given Congress' desire that the Commission seek ways of reducing third party testing burdens, the legislature would have said something somewhere on the point if they disagreed with the Commission's stated intent.

My colleague's concern about third party periodic testing seems to rest primarily on her objection to the costs of such testing. Unfortunately, that concern, which I generally share, says nothing about what the statute *requires.*

Commissioner Nord's Alternative Approach to Testing and Certification

My colleague claims that I did not offer any policy justification beyond "delay" to support my view that the Commission was right to issue a final rule without re-proposal. Not so. The specific concerns that I stated were threefold:[7] (1) consumer safety required the Commission to proceed to make the rule final, (2) industry needed clear guidance regarding its third party testing obligations, and (3) key members of Congress, knowing our progress on developing the testing and certification rule, emphatically urged that this rule proceed on an expedited and tight time frame. I continue to believe this.

With respect to concerns about delay, my colleague in effect acknowledges them to be important by noting that she proposed an alternative approach to developing the rule that could have gone through a full notice-and-comment rulemaking process and still become effective in January 2013, the same effective date as the one the Commission approved. I acknowledge her sincerity in making such a proposal. Unfortunately, if past is prologue – and in the case of the testing and certification rules, I believe it highly likely – the idea that the Commission could re-propose and promulgate such a massive and complex rule according to my colleague's timeline is unconvincing. I repeat: notwithstanding that

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[5] *Supplemental Statement of Commissioner Robert Adler Regarding the Approval of Third Party Testing Rules for Children's Products* (hereafter "my statement") available at: http://www.cpsc.gov/pr/adler10312011.pdf.

[6] See section 14(d)(2)(B)(i) which requires the Commission to develop third party protocols and standards 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 ...." (emphasis added).

[7] I refer my colleague to pages 3-6 of my statement.

Congress mandated a fifteen month deadline for this rule, the Commission actually took 38 months to promulgate it. Despite my colleague's assertion that her proposal would work as expeditiously as she claims, she has provided no evidence other than her word that it would. On this point, I am guided by the old Latin maxim, *et suppositio nil ponit in esse*, loosely translated as "saying it don't make it so."[8]

In summary, I continue to believe that the Commission did the right thing in promulgating the rules on testing and certification and component parts. And I look forward to implementing the provisions of H.R. 2715 in a thoughtful and reasonable manner.

[8] To be more precise, "and a supposition puts nothing in being."