U.S. CONSUMER PRODUCT SAFETY COMMISSION
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STATEMENT OF CHAIRMAN INEZ M. TENENBAUM ON THE VOTE TO APPROVE THE DRAFT FINAL RULE REGARDING REPRESENTATIVE SAMPLES FOR PERIODIC TESTING OF CHILDREN'S PRODUCTS

July 18, 2012

Last week, the Consumer Product Safety Commission ("CPSC" or "the Commission") unfortunately deadlocked as a result of a deep philosophical disagreement over the appropriate role of government in protecting children from potentially unsafe products. The latest manifestation of this divide occurred on a vote to approve the final piece of the statutorily-required rule governing the periodic, independent safety testing of children's products—the capstone of CPSC's implementation of the Consumer Product Safety Improvement Act of 2008 ("CPSIA").

Because of a last-minute change by Congress to the sampling requirement in the CPSIA, the Commission in October approved by majority vote the entirety of the testing rule, minus those provisions that addressed sampling. In a separate vote, the Commission by unanimous vote put out for comment a revised version of the sampling provisions reflective of the statutory change. The proposal included an associated recordkeeping requirement. After reviewing and considering the few submitted comments, CPSC professional staff put forth for Commission consideration a draft final sampling protocol, which also included the recordkeeping requirement.

While the final vote reflected that the Commission seemingly had no issue with how our professional staff defined the sampling provision, the requirement to create and maintain the associated records triggered the philosophical divide that led to a disappointing and unnecessary standstill. This standstill is especially unfortunate in light of the history and importance of the independent safety testing of children's products.

Congress Has Spoken—Twice

The recordkeeping requirements for sampling protocols, similar to the vote on them, are best considered not in isolation, but rather in the context of the larger periodic testing requirement. Only four years ago, Congress spoke in an overwhelmingly bipartisan and nearly unanimous vote when it passed the landmark CPSIA. Central to this sweeping reform law was our elected

representatives' clear judgment that children's health and safety could no longer depend on effective supply chain management solely by those who manufacture the children's products. No matter how well-intended companies might be—and no doubt most, but not all, are—Congress still felt it necessary to require independent product safety assessments both before any children's product is introduced into the market, as well as periodically while it remains on the market.

Pursuant to the CPSIA, the Commission set out to promulgate a testing rule flexible enough to cover the broad spectrum of products and manufacturers but still highly effective in achieving the larger purpose of safer products in the hands of children. As the Commission neared the end of its work on this rule, Congress deliberated potential changes to the CPSIA, including to the third-party testing requirements.

That the CPSIA might be amended was no small matter. Despite only single-digit votes against final passage of the original law, some had posited on occasion that the nearly unanimous passage of the CPSIA was really nothing more than a reflection of a perfect safety-scare storm, namely highly visible instances of hazardous and defective children's toys imported from overseas, an election year and a pre-financial crisis economy. The theory went, in some corners, that despite the risks to children, Congress would never have approved a bill of that nature under different circumstances, especially a post-financial crisis economy. With that backdrop, Congress's deliberations on the CPSIA amendments last summer provided as realistic a test as possible of this theory. And the end result? An unequivocal affirmation of how the Commission generally has been implementing the law. Nothing less.

In Public Law 112-28, Congress tweaked the CPSIA, no doubt, including the testing provisions, but the final version of the amendments was a far cry from the complete course correction some had predicted. More tellingly, even in the current economic climate, Congress passed the amendments largely affirming the Commission's approach to implementing the law *even more overwhelmingly* than it had passed the CPSIA originally.

With the legislative branch having yet again spoken loudly and clearly, the Commission finalized those portions of the periodic testing rule not directly altered by the amendment to the sampling portion of the underlying statute and proposed new sampling provisions to reflect that change in the law.

Documentation Matters

While the sampling protocol is moving on a separate track, that fact in no way alters or diminishes its importance to the larger independent safety testing system. Its value is readily apparent and well justified, even if compliance with the recordkeeping requirement is not cost-free.

That is not to say cost is irrelevant. The Commission under my watch has not taken lightly what it means for manufacturers to comply with added requirements in the name of consumer safety. In

fact, the final version of the testing rule was significantly more flexible and less burdensome than the proposed version.

The Commission benefitted greatly from the comments it received on the draft version, and, after even more contemplation and deliberation, further refined the balance aimed at ensuring safer products in an economically viable manner. The refined final product always contemplated a focused but necessary recordkeeping requirement related to sampling.

Finding the right balance is often not easy and regularly involves judgment calls that weigh estimated costs against predicted safety returns. But, and I will be crystal clear here, safety—particularly the safety of children—absolutely tips the scales here at the Commission under my stewardship and will continue to do so while I remain Chairman.

More fundamentally, as Congress affirmed through its votes on CPSIA and its amendments, government has a vital role to play here. Wishing it were not so has no impact on reality, which is that requiring the creation and maintenance of these sampling records is an important component not only to discovering why noncompliant products have made it into the marketplace, but also to encouraging further efforts to reduce the likelihood of such from occurring in the first place.[1] Wishful thinking aside, it is insufficient, if not irresponsible, for a federal enforcement agency as a standard practice to rely on oral representations alone. And that approach is not inconsistent with human behavior more generally. There's a very good reason why, when it really matters, people often say, "Put it in writing."

Looking Forward

The testing rule reflects careful thought by our professional staff and responsibly includes a requirement for putting certain key information in writing. As proposed, it was envisioned that should include useful sampling-related documentation, in furtherance of the manufacture of safer products for our children.

Because no compelling reason has surfaced to date to override the strong justification in support of these requirements, I would expect the Commission to revisit this issue again. At that time, I will continue to keep an open mind and engage in good-faith discussions about the requirement's merits, despite the larger philosophical differences of opinion. Throughout, I will also continue to act in a manner consistent with Congress's repeated statements, consistent with our government playing a meaningful role as necessary and consistent with vigorously protecting our nation's children.

[1] It is important to note that the Commission sought comment from our stakeholders, including the entire children's product industry, for a full 75 days and received only 10 comments concerning representative samples. Of these 10 commenters, most of whom were largely supportive of the proposed rule, only one commenter expressed some form of opposition to the recordkeeping requirement. Even though our professional staff did not agree with this commenter on this issue, it is telling that only one individual out of the entire children's product industry expressed opposition.