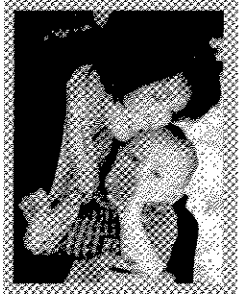
U.S. Consumer Product Safety Commission



TESTIMONY OF
THE HONORABLE NANCY A. NORD
ACTING CHAIRMAN OF THE
U.S. CONSUMER PRODUCT SAFETY COMMISSION

SUBMITTED TO
COMMITTEE ON SMALL BUSINESS
U.S. HOUSE OF REPRESENTATIVES

May 14, 2009

Saving Lives and Keeping Families Safe

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Testimony of the Honorable Nancy A. Nord
Acting Chairman, U.S. Consumer Product Safety Commission

Hearing on
"The Consumer Product Safety Improvement Act and Small Business"

Committee on Small Business
U.S. House of Representatives
May 14, 2009

Good morning, Mr. Chairman, and thank you for this opportunity today to report to the committee on the progress of the U.S. Consumer Product Safety Commission (CPSC) in implementing the Consumer Product Safety Improvement Act (CPSIA) and to discuss the significant impact of this new law on the nation's small businesses.

The Mission of the CPSC

By way of introduction, the CPSC is a small, independent and bipartisan federal commission charged with protecting the public from unreasonable risks of injury and death associated with thousands of consumer products. With a national workforce of approximately 450 individuals, the CPSC is tasked by its governing statutes with three main missions:

1. To identify existing and emerging product hazards that create an unreasonable risk of injury or death and to address those hazards by developing mandatory safety standards when consensus standards fail to do so;
2. To investigate and respond to product-related incidents and conduct recalls of defective and unsafe products; and
3. To alert and educate consumers about product-related safety issues.

Since its establishment in 1973, CPSC's work has contributed substantially to the decline in the rates of death and injury related to the use of consumer products. These reductions include:

- An 84 percent reduction in crib-related deaths;
- An 83 percent reduction in poisoning deaths of children from drugs and household chemicals;
- A 74 percent reduction in product-related electrocutions;
- A 43 percent reduction in consumer-related residential fire deaths; and
- A 41 percent reduction in consumer-related carbon monoxide deaths.

While we are proud of these and the agency's many other achievements over the years, consumer product safety is never a completed task but always an ongoing process of research, standards development, enforcement and public education. Ever more technologically complex products, expanding retail sales over the Internet, and the increasing significance of imported products are examples of the many dynamics that continuously challenge the agency.

The Consumer Product Safety Improvement Act

In response to the dramatic changes in the marketplace since the CPSC was last reauthorized in 1991, Congress enacted the Consumer Product Safety Improvement Act ("CPSIA") in August of 2008 to modernize and strengthen the agency's authorities. The CPSIA is the most far-reaching and comprehensive overhaul of the agency's statutes since its establishment in 1973, and implementing the new law over these past nine months has been a tremendous challenge to the staff as we redirected our available resources to meet the aggressive and ambitious timetable that Congress mandated.

This challenge was exacerbated by a serious lack of funding to implement the CPSIA along with new Congressional directives on nanotechnology and CPSC staffing in China, as well as two other recently enacted laws, the Children's Gasoline Burn Prevention Act and the Virginia Graeme Baker Pool and Spa Safety Act. This last act sets Congressionally-mandated safety standards for swimming pools and brings the approximately 300,000 public swimming pools under the jurisdiction of the CPSC.

Because a reasonable implementation program for these new laws and directives could not be absorbed within CPSC's original fiscal year 2009 budget request without serious disruption

of mission critical activities, my colleague Commissioner Thomas Moore and I submitted an emergency budget request to Congress immediately following passage of the CPSIA. That request was in the amount of $29,048,000.

While Congress subsequently approved $25,404,000 for the agency, regretfully that approval occurred in March of 2009 after the first seven critical months of CPSIA implementation had passed. During that critical period much of CPSC's on-going safety work was adversely impacted as the agency had to delay or defer projects in other important product safety areas, such as rulemaking activities on portable generators and standards work on electrical, fire, mechanical and chemical hazards.

Since the time that the CPSIA was first being considered in Congress in 2007, I have fully supported the goal of modernizing the agency and, in fact, originally suggested a number of improvements that found their way into the final legislation. These improvements include enhanced tools for enforcement and greater ability to deal with imported products.

While I appreciate these new tools, there were certain provisions of the legislation that have proved to be especially problematic to implement, both for the agency and for the regulated community. Of special concern are those provisions regarding retroactivity and the ability of the Commission to make decisions about the safety of products based on scientific risk assessments.

CPSIA Implementation

This is the CPSC's first Congressional hearing since passage of the CPSIA, and I am pleased to have this opportunity today to discuss the consequences of these provisions with the committee. They have had a particularly severe impact on many of the nation's small businesses.

In implementing the CPSIA over these past nine months, the agency has been truly prolific in its output. The Commission has initiated and advanced over 40 rulemaking activities required by the Act and published enforcement guidelines and policies to enhance compliance with the new law.

We are especially committed to educating both consumers and businesses as to the requirements of the new law and therefore have developed a special website dedicated to the CPSIA, issued various guidances, and responded to questions from the public numbering in the thousands. The staff has held public meetings to elicit comments and respond to

questions about how the new law impacts or regulates all-terrain vehicles, books, apparel, bicycles, phthalates, lead, X-ray fluorescence technology, testing and certification, and tracking labels.

Because it is important that our overseas trading partners also understand the new law, I have taken CPSC technical experts to both China and Vietnam to hold training sessions and to discuss implementation of both existing agreements and the new requirements of the CPSIA. We have worked closely with foreign government officials and product manufacturers to help them understand their requirements under the Act.

While the CPSIA mandated a number of ambitious deadlines, during the first six months of implementation the agency met each mandated deadline. For example, the Commission, within 30 days of enactment, approved final requirements for accreditation of third-party conformity assessment bodies and began rolling out testing requirements for various children's products, including full-size and non-full-size cribs, pacifiers, small parts, lead paint and lead in children's metal jewelry; on a schedule as set out in the law. In addition we have issued Final Rules on:

- labeling requirements for toy and game advertisements;
- all-terrain vehicle mandatory safety standards;
- certification and electronic certificates; and
- procedures and requirements for manufacturers seeking an exclusion from the law's lead mandate.

Furthermore, since enactment of the CPSIA, the Commission has issued:

- an advance notice of proposed rulemaking on crib durability;
- a notice of proposed rulemaking for mandatory recall notices;
- guidance regarding which children's products are subject to the ban on phthalates;
- a request for comments and information on tracking labels for children's products;
- a proposed interpretative rule providing guidance on inaccessibility for lead in children's products;
- a notice of proposed rulemaking and an interim final rule on exemptions for certain electronic devices containing lead;
- a notice of proposed rulemaking on proposed determinations regarding lead content limits on certain materials or products;
- instructions on general certification of conformity; and

- data collection procedures to establish the mandated Chronic Hazard Advisory Panel that will study the effect's on children's health of certain phthalates as used in children's toys and child care articles.

As we have worked through this process, we have encountered a number of problems where the law does not give us the flexibility to respond to unanticipated but real world problems that have been presented. In these instances we have had to resort to issuing stays of enforcement in order to avoid disruptions of the market that would be counter to the purposes of the new law. Among others, we have issued:

- a stay of enforcement of certain testing and certification requirements;
- a stay of enforcement of lead content limits for certain youth motorized recreational vehicles, and
- a stay of enforcement of lead content limits for children's bicycles.

We anticipate issuing additional stays of enforcement as specific problems present themselves even though we recognize that this is not the optimal way to address these problems. Nevertheless, it is the only means we have to avoid the damaging consequences that would result from application of the law as written.

Impact of the Law on Small Businesses

I know that the Committee members have heard from their constituents who have been negatively impacted by various provisions of the CPSIA, and I can assure you that the Commission has heard from them as well. Small business men and women, charity volunteers, arts and crafts people who work at home, thrift and consignment shop owners and customers, ATV sellers and enthusiasts, and many other individuals have been in contact with us regarding the often unexpected consequences of the new law. Many of their problems have resulted from the retroactivity of the lead provisions in the law and the lack of flexibility provided to the Commission to regulate based on thoughtful risk assessments. The problems that have been reported to us have been further exacerbated by the nation's economic downturn. While the agency does not have the capability to compute the economic toll that the new law has taken, we are aware of estimates that place the cost of compliance in the billions of dollars.

The Commission has attempted to ease the burden on these individuals by developing common sense enforcement policies (including stays of enforcement) to the extent that the law allows, issuing comprehensive guidance, identifying certain materials that do not need to

be tested, finalizing exemptions for electronics and inaccessible parts, and putting in place a formal process for exclusions. While the Commission has placed a high priority on processing exclusion requests as quickly as possible, the new law is very restrictive on this point. We have not yet been able to identify any products that would meet the law's requirements for exclusions, and the Commission lacks the authority to change the essential requirements of the underlying statute. Only Congress can do that.

To assist small businesses, in January the CPSC issued a guide to the new law aimed specifically at small businesses. Recently, we published an updated guide for resellers of children's products, including thrift and consignment stores. Both guides are designed to help small businesses, including sellers of used products, in identifying products that may violate the new law or are otherwise unsafe and try to dispel confusion regarding the requirements of the CPSIA.

New Lead Requirements: The CPSC has a long history regulating lead starting with a ban issued on lead-based paint in 1977 under the Consumer Product Safety Act. In more recent years, the CPSC has identified and taken action on a range of different products that presented a potential lead health risk from sources other than paint. Those products have included imported vinyl mini-blinds, crayons and chalk, figurines used as game pieces, toys and children's metal jewelry.

New limits for lead content in children's products and the amount of lead in paint used on those products are set out in Section 101 of the CPSIA. The Act reduces the current lead in paint limit from 600 ppm to 90 ppm for products sold or otherwise distributed in commerce after August 14, 2009.

With regard to lead content, the limits are phased in over the course of three years. As of February 10, 2009, products designed or intended primarily for children 12 years of age and younger may not be sold or otherwise distributed in commerce if they contain more than 600 ppm of lead. As of August 14, 2009, this limit is reduced to 300 ppm of lead, and the limit goes down further to 100 ppm as of August 10, 2011, unless the Commission determines that that limit is not technologically feasible.

New Phthalates Requirements: Turning to phthalates, the CPSC has traditionally had regulatory authority over phthalates under the Federal Hazardous Substances Act (FHSA), and since the early 1980's, the CPSC has researched, and monitored phthalates used in children's products under the agency's jurisdiction. The agency conducted comprehensive behavioral observations and laboratory analysis on phthalates in toys and other products that small children could be expected to mouth in 2000 and 2001.

The CPSIA has permanently prohibited three phthalates, DEHP, DBP and BBP, in concentrations of more than 0.1 percent in children's toys or child care articles. However, since these three phthalates are generally not used in toys or child care articles, the impact of this permanent ban is negligible. Three additional phthalates, DINP, DIDP and DnOP, have been prohibited pending further study and review by a Chronic Hazards Advisory Panel of outside experts convened by the Commission. These interim prohibitions, which took effect on February 10, 2009, apply to any child care article or toy that can be placed in a child's mouth or brought to the mouth and kept in the mouth so that it can be sucked or chewed and that contains a concentration of more than 0.1 percent of these particular phthalates.

Section 108 of the CPSIA applies the prohibition on phthalates to all parts of a children's toy or child care article, not just the plastic parts likely to contain phthlates, and the law does not provide for an exception or exemption for inaccessibility for phthalates as is the case for lead in children's products under Section 101. In addition, because there is no screening test for phthalates (like there is for lead) and because the test requires destruction of the product sample, the test is expensive, especially for a small business or a crafter.

Impact of Requirements: The CPSIA's bans on lead and phthalates are retroactive, rendering illegal inventory on store shelves and in warehouses that was perfectly legal and considered safe when manufactured. This sweeping retroactive application of the lead and phthalates provisions has caused most of the problems that you are hearing from your small businesses, since these businesses may very well have violative product but have no way to make that determination without incurring significant testing costs. The CPSC has never in its history been presented with such a broad based principle of retroactivity. In the 35 year history of the agency, it has been well understood that regulations apply on a prospective basis. The economic damage being done to many small businesses testifies to the wisdom of applying requirements prospectively.

Additionally, CPSIA's lead and phthalates provisions have effectively eliminated the concepts of risk and exposure which had been at the core of U.S. safety laws. For lead and phthalates, the new law revokes the Commission's historic ability to make decisions based on risk and exposure and very tightly restricts the Commissions ability to grant exclusions, even in those situations where the CPSC's health scientists do not believe that there is a safety problem.

Off-road ATVs and motorized bikes designed for children 12 years of age and younger are examples of this new policy. These are products that contain lead above the prescribed limits of the law, although no one has ever seriously suggested that their normal use would expose

children to danger of lead poisoning. In addition, lead is needed to maintain the structural integrity of the metal used in the product. We are seeing the same issue with respect to children's bicycles.

The law as written virtually denies the Commission the ability to grant an exclusion for these products so we are now having to resort to the device of enforcement stays to address the inflexibility of the law. I would strongly urge the Congress to revisit the language for exclusions and retroactivity and return to the agency its discretionary authority to make risk-based assessments on a prospective basis.

I would also like to call your attention to Section 218 of the CPSIA that gives state attorneys general the authority to enforce certain federal product safety laws, including those regarding the limits on lead and phthalates. This state authority to enforce CPSC's statutes compromises the ability of our agency's Office of Compliance to engage in reasonable enforcement discretion. For example, the CPSC is powerless to require state attorneys general to join in the agency's stay of enforcement of certain testing and certification requirements. That is regrettable because, as discussed above, enforcement discretion is an important tool that is needed to reach thoughtful and effective outcomes that enhance consumer safety. While we are reaching out to state attorneys general to educate them about our enforcement policies and try to engage them as our partners in safety, the law does limit our ability to exercise enforcement discretion.

Recommendations for Improvements

On March 4, 2009, Congressman John D. Dingell, chairman emeritus of the House Committee on Energy and Commerce, wrote to the Commission and posed ten questions having to do with CPSIA implementation. Congressman Dingell, one of the authors of the original Consumer Product Safety Act, expressed his concern that the CPSIA "includes unrealistic deadlines for rulemakings and compliance, as well as too little implementation discretion for the CPSC, both of which are exacerbated by the CPSC's lack of adequate resources, both in terms of funding and staff." I would like to submit for the record Congressman Dingell's letter and the responses of career agency staff to his questions, which are attached to this statement.

In those responses, staff noted that the deadlines in the CPSIA have proven to be impracticable to meet and are presenting significant problems for the agency to solve. Staff requests that the CPSC be allowed to use risk assessment methodology to establish priorities for common sense exemptions and be given the discretion to move CPSIA effective dates.

With regard to small business relief, I endorse the staff recommendation that the agency be allowed to develop a robust component certification program so that companies would not need to test a product if the components of that product had already been tested and shown to be compliant. Additionally, Congress could choose to apply the new lead and phthalate limits prospectively to ease the impact on inventory existing prior to the effective dates. If the Congress chose to apply the law prospectively, the Commission still retains the ability to removed unsafe products from the store shelves so consumer safety would not be impacted.

The staff response further states that "the CPSIA forsakes the core strengths of the CPSC's original statutory framework which has from the beginning allowed the Commission to prioritize its regulation of consumer products by an overall assessment of all the risks at stake, the magnitude of those risks, and the actual consequences of the hazard."

CPSC staff concluded with three recommendations:

1. "Limit the applicability of new requirements to products manufactured after the effective date, except in circumstances where the Commission decides that exposure to a product presents a health and safety risk to children;
2. Lower the age limit used in the definition of children's products to better reflect exposure and give the CPSC discretion to set a higher age for certain materials or classes of products that pose a risk to older children or to younger ones in the same household; and
3. Allow the CPSC to address certification, tracking labels and other issues on a product class or other logical basis, using risk-assessment methodologies to establish need, priorities, and a phase-in schedule."

I concur with these recommendations. They would go a long way toward helping the agency help your small business constituents and do so without reducing the health and safety standards and enforcement activities that are the core of CPSC's safety mission.

Mr. Chairman, I want to thank you again for holding this important hearing today. The U.S. Consumer Product Safety Commission is a small agency, even with our new funding, and we have a large and important mission to accomplish on behalf of the American public. I am committed to that mission and to efficiently, effectively and aggressively implementing the nation's laws that are designed to provide for the health and safety of consumers. We appreciate your support for CPSC's mission of protecting our nation's families, and particularly our nation's children. I look forward to answering your questions.