



**Testimony of Anne M. Northup
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Hearing on the 2012 Performance Budget Request of the CPSC

Before the

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Committee on Appropriations**

**Subcommittee on Financial Services
and General Government**

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Chairman Emerson and Ranking Member Serrano, thank you for the opportunity to provide testimony to this Subcommittee regarding the Consumer Product Safety Commission's 2012 Performance Budget Request. This Commission has a proud history of assessing risk and providing leadership in consumer product safety issues across a variety of industries.

As a Commissioner since August 2009, I now have a tremendous appreciation for the work that goes on in an agency, including the time and effort that agencies expend implementing the laws Congress passes. It is not a simple task, and my colleague, Chairman Tenenbaum, has put in countless hours to ensure that the Commission meets its deadlines and fulfills the difficult tasks it has been given.

As you know, I did not support the Commission's overall 2012 budget request of \$122 million, because it calls for an increase in \$3.8 million over current funding levels. I believe we can be doing much more with less. Given the imperatives of reducing the national deficit and controlling federal spending, we as Commissioners have a responsibility to cut programs or advocate for reforms that will ensure that we are using our resources efficiently and not straying from our core mission of safety.

In that regard, my testimony today focuses upon the ways in which Commission resources have been wisely spent to improve safety outcomes for Americans, and areas where I believe there could be vast improvement. In particular, my testimony will focus on the Consumer Product Safety Improvement Act (CPSIA), a law that largely is not based on risk and whose implementation has overwhelmed the time and resources of this agency since August 2008. Because the CPSIA's lead, phthalates, and testing and certification standards are not risk-based, the enforcement of such standards diverts the Commission from focusing on real risk. The law has strained the Commission's resources and has had a devastating impact on American business growth and competitiveness, all with little or no offsetting improvement in product safety.

Effective Uses of Commission Resources:

Improved Enforcement Tools

Today, the Commission has enforcement tools vastly improved over those available even a few short years ago. Since the advent of our agency's Import Surveillance Division in 2008, we have continued to grow our full-time presence of CPSC investigators at key U.S. ports. We have also expanded cooperation with Customs and Border Patrol to maximize our ability to screen for products at all U.S. ports. Today, the Commission intercepts non-compliant toys through more extensive border control efforts, application of x-ray technology to identify violative lead content, and computer databases that flag previous offenders for greater scrutiny. The CPSIA also increased the incentive for compliance through the threat of confiscated and destroyed violative products at the border, by authorizing the Commission to impose higher penalties of up to fifteen million dollars, and by streamlining its authority to seek criminal penalties.

I support the agency's investments in expanding these emerging enforcement methods because I believe they can grow to become a more sophisticated and technologically advanced method of deterring the entry of hazardous products into commerce. Notably, even prior to the Commission's improved enforcement tools, the Chinese manufactured toys containing lead paint that were the impetus for the CPSIA were themselves identified and intercepted using the Commission's traditional methods. The companies responsible faced a class action lawsuit and a massive fine. Today, retailers, private labelers, importers and manufacturers are collaborating to prevent violative products from entering commerce, in order to protect themselves from lawsuits, damage to their reputations, the cost of recalls and the loss of inventories.

Consumer Education and Outreach

Providing safety information to American families is a top priority of the Commission. I have urged the Commission to do more to educate the public on broad-based safety hazards in concert with any new mandatory standards we are required to issue under the CPSIA. Additionally, I have long advocated for broadening the Commission's messaging through non-English language posters, and by working with non-traditional groups, like churches, to increase our outreach to minorities and harder-to-reach populations.

The Chairman's staff has done an excellent job using social media (e.g., online videos, text messaging, Twitter) and other creative ways to broadcast the Commission's many safety messages. In fact, as of last fall, there is now a downloadable "app" available for the Android phone that allows consumers to monitor and search recalls from the CPSC and other agencies: <http://apps.usa.gov/product-recalls2/> I continue to support these efforts.

Ineffective Use of Agency Resources: CPSIA

The law's non-risk based requirements

In both 2009 and 2010, the CPSC focused its time and resources principally on implementing the CPSIA. Although the Commission is a relatively small agency (FY 2010 funding of \$118.2 million), its budget has grown by nearly 48 percent since the law's passage in 2008, with both old and new resources shifted away from risk-based priorities to implement the arbitrary, non risk-based mandates of the CPSIA, including the lead content and phthalates bans, the Public Database, and the third-party testing, certification and labeling requirements. Over the past two and one-half years, the Commission has issued an estimated 3,500 pages of regulations and guidance documents as a result of the CPSIA—a large portion of which must be read and understood by every affected company in order for them to grasp the law's complex requirements.

The diversion of the Commission's resources to CPSIA implementation reduces our focus on genuine safety hazards. Our agency is charged with "protecting the public from unreasonable risks of serious injury or death" from consumer products—but we cannot

fulfill this mission if our time is spent primarily enforcing the CPSIA, including its non-risk-based lead content and testing requirements.

Indeed, since 2008, there has been a significant delay in progress on actions to address many genuine safety hazards, such as promulgating standards to reduce the risk of death and injuries caused by cigarette lighters, table saw blades and portable generators. These issues would be front and center on the Commission's schedule if it were not for the CPSIA.

Small Business Ombudsman

The creation of a new Office of Education, Global Outreach, and Small Business Ombudsman to assist small businesses will also likely end up a waste of Commission resources. This office was created last fall with an unspecified budget and staff size.¹ The stated purpose of the new office is to provide additional information to small businesses and other industry stakeholders through a "coordinated approach to education and outreach activities."

But this purpose could be fulfilled under existing Commission offices, and does not address small businesses' real concerns with the CPSIA. Small businesses are not clamoring for more information about how to comply with this law; they are asking for relief from this law because it is killing them.

The solution for small businesses negatively impacted by the CPSIA is to repeal the portions of the law that impose tremendous costs without increasing safety. Furthermore, no matter how successful this new office may be, small businesses will still need to hire lawyers to understand their obligations under the Commission's far-reaching and complex regulations.

To date, the Small Business Ombudsman has focused on responding to CPSIA-related questions posed by small handcrafters. This limited service to a small minority of manufacturers does not begin to assist the vast majority of small businesses – with greater numbers of employees and a much larger impact on the economy -- suffering under the CPSIA. If the Commission really wanted to help all small businesses, it would use its rulemakings to mitigate the unintended consequences of the CPSIA, and propose meaningful legislative reforms to Congress. It is wasteful and counterproductive to instead create a new Small Business Ombudsman office to perform limited outreach to micro-businesses when an existing agency office could perform the same service.

¹ The agency has moved around existing employees to fill vacancies in this new office, including an Acting Small Business Ombudsman. The 2012 budget request includes two new FTEs to allow the Commission to hire a Director to develop the office and a permanent Small Business Ombudsman.

Public Database

The new Public Database will also unjustifiably drain Commission resources. According to the Commission's 2012 budget request, by the end of fiscal year 2011, the Commission will have already spent \$29 million on IT modernization and to develop the Database—two expenses that are interlinked. But the official \$29 million figure understates the real cost of the database. It does not include the hours CPSC staff dedicated to developing the database and preparing for its launch, including managing contracts.

Moreover, the \$29 million figure represents only the estimated contracting costs through FY 2011. And while we have not been able to estimate future costs, it is likely that the costs to maintain the Database will continue to strain Commission resources for years. For instance, the agency has yet to estimate the number of new FTEs we may need, year after year, to administer the public database, including new Compliance investigators and lawyers to handle claims of material inaccuracy. The Commission's 2012 Performance Budget Request discounts these expenses. According to that document, the "New and Reallocated Resources" dedicated to "Data Intake, Incident Review, and Investigation" is derived from an extrapolation of the growth trend line for reported incidents and investigations dating back to 2003. If, as is likely, this projection is proved to be too low, the assigned staff will be unable to timely manage all of the information reported through the database. As a result, Commission staff will be even less likely to resolve claims of material inaccuracy within the ten-day period prior to the posting of unverified information. The Commission will then either request and be provided additional funding in subsequent years, or preside over an increasingly misleading database.

Additionally, the Commission did not perform a cost-benefit analysis of their Database Rule. I believe the rule that was passed by the Commission's Majority is tremendously flawed and will result in a public database that is full of inaccurate or unverifiable information and therefore helpful to no one.² If this Commission is to have a public database funded by taxpayers, it should be *different and better* than any source of information that already exists in the public domain, such as websites like Amazon.com or Yelp.com. Unfortunately, due to the agency's regulation, our public database will be no more useful than similar sites that are already available to the public today, and will, in fact, be more misleading to the public, given the likelihood of inaccurate reports and the lack of ability for anyone to verify them. Many believe the public database, if left unchanged, will be useful only to trial lawyers or advocacy groups that will be able to populate it with unverifiable, second-hand information for their own purposes.

² The Commission Majority's database rule suffers from three major infirmities: 1) It interpreted the statute to allow *anyone* to report incidents to the database—even consumer advocacy groups, trial lawyers, and others with ulterior motives and who may not have firsthand knowledge of the incident; 2) the rule fails to require enough information from submitters so that reports are even verifiable; and 3) the rule requires that all reports will be made public on the 10th day following transmittal to the manufacturer, regardless of whether there's a pending, valid claim of material inaccuracy.

Further, the Commission has limited resources for enforcement. As a result, unverifiable information in the Database will divert resources from addressing genuine risks to monitoring and processing the likely increase in reports to the agency. Additionally, because inaccurate incident reports will be indistinguishable from accurate ones, the media's attention may focus on inaccurate reports, pressuring the agency to prioritize its efforts based on publicity rather than risk level.

CPSIA: Impact on the Economy

The lack of cost-benefit analyses

In March 2009, Commission staff reported that the economic costs associated with the CPSIA would be “in the billions of dollars range.”³ Industry associations representing manufacturers of furniture, mattresses, sports equipment, children's clothing and handmade toys, just to name a few, have all told us that they will be saddled with enormous costs, first to reengineer their products to satisfy the new standards imposed by the law, and then to third-party test every component of every product they make to demonstrate compliance with all of the applicable standards.

This Commission has received a considerable amount of anecdotal evidence from companies and trade associations regarding the costs to test at independent labs, as well as the cost of certification, tracking labels, continued testing, record keeping, testing to product standards, and the potential reputational and litigation costs that will result from the upcoming Public Database. **Attached** is a sample list of businesses impacted by the CPSIA, as well as other economic data. Our staff has compiled some sample testing costs for toys and bikes, as part of a Regulatory Flexibility Analysis for our Testing and Labeling Rule. But the Commission has never conducted a full cost-benefit analysis of any regulation we have promulgated under the CPSIA.⁴

I believe such analyses would reveal that much of our CPSIA mandated regulation cannot be justified. To begin with, there is no scientific evidence suggesting there is any benefit from many of the law's requirements. For instance, no government health agency, including the CPSC, has ever concluded that the components of children's products containing either 300ppm lead content or the interim-banned phthalates pose a safety risk to children. The Environmental Protection Agency (EPA) and the Centers for Disease Control (CDC) report that in 1978, about 13.5 million children ages 1-5 had elevated blood lead levels. However, by 2007-2008, this number had declined to about 250,000 children.⁵ Similarly, 2007 data indicates that one percent of children selected for testing across the country showed an elevated blood lead level as established by the CDC. This

³ Letter from Acting CPSC Chairman Nancy Nord to Representative John Dingell, March 20, 2009.

⁴ Most of the CPSIA mandated regulations are not required to be promulgated under Section 9 of the CPSA, which normally would entail a cost-benefit analysis. However, it also does not *prohibit* the agency from doing so, if the Commission recognizes a need for such analyses.

⁵ http://www.epa.gov/opeedweb/children/body_burdens/b1-graph.html

number was down from nearly eight percent in 1997,⁶ and is likely attributable to the elimination of lead in gasoline, as well as lead paint education and abatement. The CDC and the EPA have issued guidance for reducing children's exposure to lead, and neither has ever suggested that parents take away a child's bicycle because of the lead in the substrate of the metal comprising the spokes, pedals or handlebars. Nor has it ever been argued that the CPSIA, with all of its costs, will lower the number of children reaching the "tipping point" of having an elevated blood lead level.

Burdensome Testing and Certification Requirements

Given the available tools of manufacturers to determine compliance and our own improved enforcement methods, I do not believe the complex, third-party testing and certification requirements of the CPSIA are necessary or helpful in ensuring compliance with the law's new requirements. In fact, relief from the law's testing requirements is the number one request of small businesses, many of whom may be able to comply with the law's lead and phthalates limits but still cannot afford the mandatory third-party testing.

By requiring all manufacturers of children's products to send their products to be tested at a third-party lab, regardless of risk, the law disproportionately hurts companies with robust in-house testing programs, those with more creative and effective ways of ensuring compliance internally, as well as domestic American companies who have never had a violation. The CPSIA's micromanagement of a company's testing, certification and tracking of each and every component of a product is entirely unnecessary—and in fact, will be less helpful than the sophisticated internal controls manufacturers are currently using and continue to develop and perfect. Furthermore, a "bad actor" with a casual attitude toward safety standards compliance will be just as casual about maintaining accurate records to support CPSIA-mandated certifications.

The CPSIA also requires the creation of massive new paperwork and tracking systems, often without any safety enhancing product changes. A member of the American Home Furnishings Alliance reported that it spent \$13 million dollars on tests, new systems and tracking processes, despite the fact that every single component it used on children's furniture already complied with the current lead standard. The company was therefore not required to change a single material used in its manufacture of children's furniture, and there was no corresponding benefit in the improved safety of its children's furniture to justify the costs.

Similarly, some industry associations have had very few, if any, safety violations; yet, they are required to comply with onerous third-party testing, certification, tracking and labeling requirements that will not improve safety. The American Apparel and Footwear Association writes in their public comments on the Component Parts rule:

As the CPSC continues to issue specific compliance requirements, manufacturers become increasingly wrapped up in ensuring compliance over ensuring product safety. All AAFA members have had long-standing quality control programs in

⁶ <http://www.cdc.gov/nceh/lead/data/national.htm>

place that have developed based on the product, production of the product and the manufacturer's unique circumstances. These programs are effective and do not need to be changed. To demonstrate, only .0084% of all apparel and footwear sold in the U.S. in 2008 were involved in a recall. Moreover, most apparel and footwear recalls have been drawstring violations – a compliance issue that results from lack of information not lack of testing.⁷

The testing and certification requirements of the CPSIA have yet to be fully implemented. This Subcommittee can therefore prevent the law's onerous testing requirements from going into effect by withholding in any upcoming appropriations laws funding from the Commission for the purpose of promulgating regulations to implement the third-party testing and certification requirements of the CPSIA. This would allow the Commission's House and Senate authorizing Committees to fulfill their pledge to reform the CPSIA before it can further undermine the nation's economic recovery.

Recommendations to Reform the CPSIA and Reduce the Budget :

1) Reform the CPSIA's major requirements to be risk-based:

Reforming the CPSIA so that the law's principle requirements are based on risk, would greatly relieve the pressure on agency resources to have to implement, enforce and monitor non-risky products—and allow the agency to use its limited resources more effectively to fulfill its safety mission. This can be accomplished in a variety of ways:

➤ Amend the law's Absorbability Exclusion §101(b)(1)(A) so that it is meaningful:

The CPSIA included three statutory exclusions from the lead limits. But the Commission has meaningfully interpreted only two of them. The law's third exclusion, based on the absorbability of lead in a product, has not excepted a single product from the CPSIA' scope. The CPSIA should therefore be amended to exclude products or materials with a level of absorbable lead that the CPSC determines not to be harmful to a child's health.

Drawing the line at the level of absorbable lead that is harmful to a child's health is consistent with the findings of our leading scientific agencies, the National Institutes of Health, the CDC and the EPA. Only lead that is "absorbable" at greater than *minimal levels* is dangerous, especially to children ages five and under. Thus, the experts at the CDC and NIH have found that lead paint in old houses and lead in dirt near old gas stations are the main source of environmental lead presenting a danger to small children (<http://www.cdc.gov/nceh/lead/>). In other words, the *risk of absorbability* from lead in dirt that is tracked into a home or lead paint in an old home that becomes chipped and may be inhaled or ingested is quite high. Notably, the EPA standard for lead in soil is 400 ppm

⁷ American Apparel and Footwear Association. Request for Comments. Docket No. CPSC-2010-0037 & CPSC-2010-0038. August 3, 2010.

(<http://www.epa.gov/lead/>). This standard for safety is less strict even than the current 300ppm lead content standard provided in the CPSIA for children's products, including bicycle handlebars where any lead is embedded in the metal substrate and cannot be absorbed.

Unlike other Commission rules, the CPSIA, as interpreted by the Majority, has led to the banning or substantial reengineering of many products that pose no risk of harm from lead. For example, the CPSIA has led to a ban on children's books published before 1986, because the ink in them is likely to contain lead above the allowable level. But children are not likely to eat the pages of old books or ingest more than miniscule amounts of lead after touching their pages. Likewise, youth ATVs and bicycles are outlawed or must be reengineered even though the lead that is in the hood, handlebars, or hubcaps will not become ingested and absorbed in meaningful amounts. Other everyday products such as school lockers, the hinges on a child's dresser, or jackets with zippers and buttons are outlawed if they contain tiny levels of lead in the substrate. Even ball point pens are outlawed if they have a toy or game attached to them and are marketed to children, due to the brass found on the tip. Because there are still *negligible amounts of lead detectable by scientific equipment* that may be wiped off by touching a bicycle handlebar, the CPSIA treats these items in exactly the same way it treats products that truly could hurt a child by increasing the blood lead level.

If the law is amended to unambiguously exclude products with a level of absorbable lead that is not harmful to a child's health, the scope of the CPSIA will be considerably narrowed, and the Commission can focus its limited resources on real risks to children.

➤ Lower the age-range of products impacted by the law:

Under the CPSIA, a "children's product" is any product intended primarily for use by children twelve years old or younger. The CPSIA thus treats all products intended primarily for use by children under thirteen the same, regardless of whether they are intended for one-year olds or twelve-year olds. Recognizing the substantial difference in risk presented by the same products to different age groups, CPSC staff have suggested to the Commissioners that lowering the age range of products impacted by the CPSIA would be one of the most efficient ways to amend the law in order to exclude those products which many believe should not be impacted.

The 12-and-under age range affects many products that are also used by teenagers, thus creating enforcement difficulties over marginal products. Producers argue that the products are primarily intended for children age thirteen and older, and the Commission examines marketing and other factors to assess the claim. Some blurring of the age lines will happen regardless of the age cut-off, but there are many more products subject to this uncertainty for "tweens" (e.g., certain sporting goods, apparel, etc.)

In addition to enforcement difficulties, the benefits of the law are vastly reduced as applied to products for older children who are well past the age when they mouth things or constantly put their hands in their mouths. Thus, Congress could amend the statute to apply only to products primarily intended for children under age six, while giving the agency discretion to raise that age limit for particular materials or categories of products that are found in the future to pose a risk to older children. And in any event, the CPSC would retain the authority to issue a stop-sale order or to recall any product determined to pose “substantial product hazard” under the FHSA.

➤ Eliminate third-party testing and certification requirements:

As stated previously, the law’s third-party testing, certification, tracking and labeling requirements are the most burdensome for small manufacturers. They are also unnecessary for verifying compliance, particularly given the agency’s improved traditional enforcement tools. As a result, Congress could eliminate current third-party testing and certification requirements all together, allowing manufacturers to test in-house and/or in the best way they know how to determine compliance. The Commission would retain the discretion to impose third-party testing requirements on products with a risk that such testing would address.

At the same time, this Subcommittee can also prevent the law’s onerous testing requirements from going into effect by withholding funding from the Commission for the purpose of promulgating regulations to implement any further third-party testing and certification requirements of the CPSIA.

2) Eliminate the 5-member Commission and put the agency under one Administrator:

I believe the CPSC could be run more efficiently by one Administrator, rather than a Commission of five or even three. In fact, similar proposals have been considered in the past: <http://www.gao.gov/products/T-HRD-87-14>. Managing a small agency simply does not require more than an Administrator. Additionally, I have confidence that Chairman Tenenbaum (or a future Administrator) would be able to run the agency much more efficiently without the pressures from her Democrat and Republican colleagues, who wish constantly to influence her actions in one direction or another. Reducing from five Commissioners to an administrator would save the substantial costs of office space, Commissioner and staff salaries, and all other expenses associated with a Commissioner’s office.

The Chairman is already solely accountable for all of the agency’s core functions, including setting the rulemaking agenda, public relations, human resources duties, and budgeting. The other four Commissioners may be asked to sign off on these things from time to time as a formality or to provide input, but ultimately all accountability lies with the Chair.

Rulemaking involves the participation of five Commissioners. However, I would argue that this “participation” rarely involves more than duplicative analytical efforts—all of which usually result in a 3-2, party-line vote. This also means five different Commissioners, all their staffs (12 people), plus dozens of technical staff and lawyers are reviewing, editing and analyzing the exact same rule-making document. Moreover, despite hours of effort by me and my staff, many of the Commission’s largest regulations approved by the Majority have actually become *worse* through the process rather than more balanced—simply because at the end of the day, the Majority’s vote rules on any contentious, policy votes.

3) Public Database – require reforms to the Database Rule to ensure that incident reports are verifiable and useful.

Finally, the Commission’s Database Rule could be revised in order to ensure that incident reports going up on the new, public database are verifiable. Potentially inaccurate and unverifiable information is of no value to the Commission in its enforcement efforts, and useless to consumers seeking actionable product safety information.

Several features of the Majority’s rule guarantee a database populated by inaccurate information. The Majority has broadly defined the statutory categories of submitters to the Database to include groups and individuals with no direct knowledge of the incident or the person harmed. Such groups include consumer advocacy groups, trade associations and attorneys, for whom the accuracy of the incidents they report may be secondary to their own agendas, giving them no incentive to avoid the posting of false or misleading information.

The Database Rule also does not require sufficient information from the submitter to ensure that Commission staff or consumers can tell one type of product from another. Only the minimal amount of information is required, including manufacturer name and a “description of the product” which could include simply “baby stroller.” But one company may produce dozens of different models of baby strollers, some of which may no longer be in production. As a result, the limited product information required is insufficient to permit the Commission to investigate the claim, and of no value to a consumer seeking to identify a safe model of baby stroller.

The problems created by permitting inadequate product identification and allowing individuals and groups without firsthand knowledge to report alleged incidents of harm, are compounded by the rule’s failure to require the identification of the victim or product owner who experienced the risk of harm. As a result, the Commission’s staff may be unable to verify the accuracy of the report by speaking to the only party with actual knowledge of the product and incident. Moreover, because manufacturers’ bear the burden of proving a material inaccuracy, the Commission will publish a report that contains the

minimal required information, even where inadequate product identification or the absence of victim contact information leaves the report unverified. There are therefore likely to be many cases where a manufacturer will have good reason to believe a reported incident is either completely false or materially misrepresented (and companies routinely receive these types of mistaken or fraudulent claims), but neither the manufacturer nor the Commission will be able to obtain the information necessary to resolve the claim. Under those circumstances, the manufacture will be unable to meet its burden and the challenged, but unverified and unverifiable report, will remain on the database forever.

Inaccurate information will likely also be posted on the database - at least temporarily - even when there is sufficient information to eventually confirm the truth. That is because the Majority's rule requires the Commission to publish an incident report on the public database by the 10th day after sending notification to the manufacturer, notwithstanding that a manufacturer has adequately supported a claim that the report is materially inaccurate. Unless the Commission can conclude within 10 days that the report is materially inaccurate, it is published on the 11th day and remains on the Database while the Commission completes its investigation. And because there is no fixed period within which the Commission must complete its investigation, inaccurate information can remain on the site indefinitely.