



U.S. CONSUMER PRODUCT SAFETY COMMISSION

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Chairman Mary Bono Mack  
House Energy and Commerce Subcommittee on Commerce, Manufacturing  
and Trade  
104 Cannon House Office Building  
Washington, DC 20515

Dear Chairman Bono Mack,

I am writing to express my appreciation to the Subcommittee for favorably reporting the Enhancing CPSC Authority and Discretion Act of 2011 (ECADA). The ECADA would correct many of the unintended consequences of the Consumer Product Safety Improvement Act of 2008 (CPSIA) and help to refocus the Consumer Product Safety Commission (CPSC) on its core mission of identifying and eliminating hazardous consumer products. By discarding some of the CPSIA's costly, non-risk based mandates, the ECADA also would remove a significant obstacle to job creation and economic growth, and would promote consumer choice.

A New Focus on Hazardous Lead

The ECADA takes an important step toward distinguishing between children's products that present a risk of lead poisoning and those that do not. The CPSIA mandated that the lead content of all children's products be reduced to at least 300 ppm, and, if technically feasible, to 100 ppm. The requirement ignored the fact that lead presents a risk to children only to the extent it can be ingested and absorbed into the body. As a result, the CPSIA required manufacturers to reduce the lead content of many safe products, which contained non-bioavailable lead imbedded in metal substrate, or were too large to present a meaningful lead ingestion risk, to levels that unnecessarily compromised strength, durability and/or functionality, or priced the products out of the market for which they were intended. When even the nation's leading health agencies, the National Institute of Health (NIH) and the Centers for Disease Control (CDC), do not contend that lead embedded in children's products threatens public health, this Commission's resources should not be diverted from reducing real risks to policing arbitrary lead content limits.

The ECADA ameliorates the CPSIA's over-regulation by imposing the lowest lead level of .01 percent by weight only on products intended for children 6 years of age or younger and which

can be placed in a child's mouth, and by applying the higher lead limits of 16 CFR § 1500.88 to products intended primarily for outdoor recreational use. These changes reflect the recognition that lead imbedded in a product's substrate cannot be released and ingested in meaningful amounts merely by being licked, while also remaining sensitive to the greater likelihood that children 6 and under will place objects into their mouths. Under these new rules, the lead content of a large children's ball, bicycle handlebars, playground equipment, ATV's and other low-risk products need not be reduced to .01 percent by weight. This is because doing so would result in no reduction in risk to justify imposing reengineering costs, increased manufacturing costs, and, ultimately, a higher cost to consumers.

Importantly, the ECADA also authorizes the CPSC to impose the .01 percent by weight lead limit on any additional products that it determines present an unreasonable risk to children's health. Congress would thereby preserve the CPSC's traditional role of regulating based on established risk, striking a better balance than did the CPSIA between legislative mandates and the CPSC's historic discretionary authority.

Finally, the ECADA eliminates the retrospective application of lead limits of .03 and .01 percent by weight, and excepts most used products from the .06 percent lead limit. This change undoes one of the most significant adverse consequences of the CPSIA – the destruction of the second-hand market for children's products that have never been found to present a risk of harm. A family of moderate means is already under tremendous financial pressure to meet the unavoidable costs of raising a child, such as health care, day care, food, clothing and furniture, without also being forced to purchase new many products for which there has long been a risk-free and thriving second hand market. Notably, the ECADA's exclusion for used children's products is appropriately broader than that contained in the Consumer Product Safety Enhancement Act of 2010 (CPSEA) bill.

While I applaud the Subcommittee's movement toward more risk-based regulation, I believe it could have gone farther toward rational regulation by requiring children's products not warranting reduction to 100 ppm of lead under the new ECADA standard to reduce only to 600 ppm. A compelling case with a scientific basis was never made to justify setting a lead limit of even 600 ppm for all children's products. Rather, a large number of products recalled due to lead in paint – a product on which the CPSC has long imposed a very low lead content limit – created a reactionary political climate. The CPSIA was further fueled by advocacy groups whose only goal is to eliminate all lead from all products, without regard for the relative risk or the economic and other costs. Facing these tail winds, Congress ignored the fact that the well recognized health experts at the NIH and CDC have never found any danger in lead that is not "absorbable" in greater than minimal amounts. I hope that as the diminished, but continuing, economic harm that will flow from the mandatory lead levels maintained by the ECADA become clear, Congress will revisit the issue and allow science to prevail over the emotional appeal of a vocal minority.

#### The Functional Purpose Exception

I opposed the functional purpose exception to the CPSIA's lead limits when it was offered as part of the CPSEA, and I continue to prefer a meaningful *de minimis* exemption for all products that do not expose children to the risk of absorbing lead in harmful quantities. The functional

purpose exception creates a procedure that is costly and time consuming for both manufacturers and the Commission. A company seeking the exception could make the required showing only with the assistance of expensive scientific and legal experts. The exception would therefore not be available to small businesses with limited resources. It is also unlikely that the Commission, which is not budgeted or staffed to provide this service, would be able to handle the expected volume of petitions in a timely fashion. Such delay could well exceed the time a company could afford to idle production capacity for the subject product, and for smaller companies, would likely exceed the time they could remain in business in the absence of production and sales. Moreover, a company's decision whether to incur such expense and delay would be influenced by the perceived likelihood of success. Given the Commission's current membership, the likelihood in most cases would be low. Indeed, a Commission with even a minimum of flexibility would have construed the CPSIA's absorbability exception as permitting *de minimis* amounts of lead. This Commission's failure to do so removes all hope that it would provide any relief through a functional purpose exception.

But accepting that the bill will contain the functional purpose exception, I ask that the Committee consider making a few changes. The bill, as currently drafted, would permit the Commission to grant the exception to a product, material or component part when three factors are present: (1) manufacture by removing or making the lead inaccessible is not practicable or technologically feasible; (2) a low risk of mouthing or ingestion; and (3) no measurable adverse effect on public health or safety. I believe the third factor alone should always be sufficient to warrant an exception. If a lead containing product, material or component part can be shown not to create a measurable adverse effect on public health or safety, then the benefit of removing the lead could never outweigh the cost. In addition, the CPSC's sole mission is to protect public health and safety. Where no risk to either is present, the basis for the CPSC's authority to regulate commerce is absent.

I also believe that the first two factors should alone be sufficient to grant the exception. Whenever they are satisfied, the absence of a measurable adverse effect on public health or safety can be assumed. This is because, as previously noted, lead is not absorbed in harmful quantities through the mere licking of objects. The Commission would, in any event, retain the authority to set lower lead limits for specific products where a particular risk is identified.

This approach could be effectuated in the bill through the following changes to the new text added to 15 U.S.C. § 1278a(b)(1), by Section 3(c) of the bill: place the word "and" between subparts (1)(A)(i) and (1)(A)(ii); and place the word "or" between subparts (1)(A)(ii) and (1)(A)(iii).

Finally, I suggest that the "Limitation on Exception" provision of the functional purpose exception be removed. Granting the Commission discretion to condition the exception on a manufacturer meeting a minimum lead level above that fixed by statute or to impose a time limit on the exception, renders an exception of already dubious value virtually worthless. Where a manufacturer has already made a showing that a product has no measurable adverse effect on public health or safety, there can be no "public health or safety" reason to condition the exception. Moreover, given the record of the current Commission, the substantial risk that this Commission would nonetheless apply such limitations under this new authority would further

reduce manufacturers' incentive to incur the cost and productivity disruption of seeking the exception. While the optics of creating a functional purpose exception to alleviate the economic harm caused by the CPSIA may be appealing, it would be better to omit it entirely than to provide one that offers no real hope of relief.

### Reduction in Third-Party Testing

The imposition of third-party testing, certification and tracking requirements on all children's products, without regard for their degree or likelihood of risk, was perhaps the greatest unjustified burden of the CPSIA. This is because the sophisticated internal controls manufacturers now use to determine compliance and our own improved enforcement methods obviate the need for complex, third-party testing and certification to ensure compliance with the law. Indeed, by requiring all manufacturers of children's products to send their products to be tested at a third-party lab, regardless of risk, the CPSIA 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. 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 ECADA accounts for these facts by mandating third-party testing only for products, materials and standards that are known to present a significant risk of serious injury or death to the most vulnerable populations. Otherwise, the Commission may require third-party initial certification or continued compliance testing only after determining that the benefits from requiring third-party testing justify the costs, and must tailor the rule to impose the least possible burden. These requirements will prevent the CPSIA's consequence of imposing great costs, both economic and intangible, on the economy, businesses and consumers that far outweighed any minimal improvement in safety that was achieved by the CPSIA's expansive third-party testing provisions.

As the Committee may be aware, the CPSC has already accredited labs under the CPSIA to third-party test rugs and carpets, vinyl, clothing textiles and mattresses intended for use by children to the general consumer product safety standards promulgated under the Flammable Fabrics Act (FFA). I do not believe Congress intended the Commission's longstanding FFA regulations applicable to those products to be treated as "children's product safety rules" requiring third-party testing under the CPSIA. It appears that ECADA § 4 retroactively corrects the CPSC's misconstruction of the CPSIA by precluding the Commission from requiring third-party testing to these general consumer product safety rules until it has satisfied the requirements set forth at 15 U.S.C. § 2063(b)(3), as amended by the ECADA. But the Committee may wish to clarify this point by more clearly stating that the requirements of 15 U.S.C. § 2063(b)(3), as amended, apply retroactively to any rules, regulations, standards and bans to which third-party labs have already been accredited to test under the CPSIA, and that are not included among the children's product safety rules described in 15 U.S.C. § 2063(a)(3)(B), as amended by the ECADA.

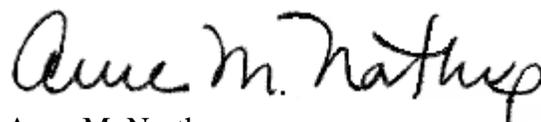
### New Requirements for the Public Database

I am very pleased with the ECADA's changes to the publicly available consumer product safety information database. This Commission's overbroad definition of "consumers" is appropriately narrowed to persons who suffer harm or risk of harm related to the use of a product, and those closely affiliated with them; and "public safety entities" would mean only those officials engaged in emergency first response and law enforcement. No longer would the accuracy of the database be potentially compromised by reports submitted by consumer advocacy groups, trade associations and product's liability attorneys.

In addition, the new requirement that all submitters include the name and contact information of the person who suffered the harm or risk of harm, would allow manufacturers and the Commission to investigate and verify incident reports. Moreover, unlike under this Commission's current regulations, information asserted to be materially inaccurate could not be posted until the Commission determines its accuracy. Manufacturers also have a new option under the ECADA to request additional information when a report provides inadequate information to identify the specific product. This change addresses the difficulty manufacturers have had under the CPSIA database regulation to determine which of many potential models of a particular product is alleged to have caused harm. Under the ECADA, only products that are specifically identified may be the subject of public reports.

On balance, I strongly applaud the Subcommittee's efforts to resolve the substantial problems caused by the CPSIA, and I look forward to continued progress before the Full Committee. The bill makes great strides toward correcting many significant flaws of the CPSIA, including its overregulation of lead, imposition of huge and unnecessary third-party testing costs, and mandate to create a public database using language this Commission construed to invite a searchable, government sanctioned blog filled with inaccurate and unverifiable information. I therefore support passage of the ECADA and look forward to the day when all of the CPSC's resources can once again be directed to protecting the public from unsafe consumer products.

Sincerely,

A handwritten signature in black ink that reads "Anne M. Northup". The signature is written in a cursive, flowing style.

Anne M. Northup  
Commissioner