



THE CHAIRMAN

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

July 17, 2014

The Honorable John Thune
Ranking Member
Committee on Commerce, Science, and Transportation
United States Senate
560 Dirksen Senate Office Building
Washington, DC 20510-6125

Dear Ranking Member Thune:

Thank you for your letter of June 25, 2014, requesting that I provide a plan to the Senate Committee on Commerce, Science, and Transportation outlining specific actions that I plan to take to ensure that the U.S. Consumer Product Safety Commission (CPSC) implements burden reduction opportunities and a timetable for when those actions will occur.

As an initial matter, please accept my apology for any misunderstanding concerning your original request. Through this response I hope to provide a bit more background on the Commission's many substantive efforts to date regarding burden reduction activities, as well as my personal plan going forward. I hope that this letter addresses your concerns.

PL 112-28 Mandate on Burden Reduction

In your letter, you correctly point out that Public Law 112-28 (enacted August 2011) directed the CPSC to solicit public comments on opportunities to reduce the cost of third party testing. I would note, however, the full statutory mandate was not just to seek comments on reducing third party testing costs, but also to do so "consistent with assuring compliance with any applicable consumer product safety rule, ban, standard or regulation." In other words, PL 112-28 maintained the safety protections of third party testing for children's products mandated in 2008 in the Consumer Product Safety Improvement Act (CPSIA). I mention this additional language in PL 112-28 because assuring compliance with the Commission's safety rules while retaining CPSIA's third party testing requirements remains an essential mandate for the agency – and presents a significantly greater challenge than addressing burden reduction alone.

Burden Reduction Actions to Date

Although PL 112-28 directed the Commission to seek comments on burden reduction approaches, the Commission had already taken some significant steps to address third party testing concerns before passage of this law. For example:

- Determinations Regarding Lead in Children's Products: The Commission, in 2009, determined that ten product categories, including precious gemstones, semiprecious gemstones, natural or cultured pearls, wood, paper, CMYK process printing inks, textiles, natural fibers, manufactured fibers, surgical steel, and various precious metals would never violate our lead rules, thereby obviating the need for third party testing. (16 CFR § 1500.91).
- Component Part Testing: The Commission published a rule permitting finished parts product certifiers to rely on component part testing or voluntary certification by another party to meet the requirements of third party testing and certification. (16 CFR § 1109).
- Retesting Not Required for Minor Changes in ASTM Standards: The Commission determined that manufacturers of children's products otherwise obligated to re-test their products whenever the voluntary standard on which they are promulgated changes would not have to re-test their products if they have current test results showing compliance with the previous version of the standard, and the relevant tests in the two versions of the standard are unchanged or functionally equivalent.
- Use of ASTM F963 Screening Test to Assess Lead Content: CPSC staff allowed the ASTM screening test for heavy metals as an option for lead testing rather than requiring a specific lead test.
- Expanded Use of XRF Technology: CPSC staff significantly increased the number of materials for which XRF technology, a simpler and quicker test than the wet chemistry test, could be used for determining lead content. For example, glass materials, unglazed ceramics and some metals can now be tested with XRF technology. In addition, the agency approved one specific XRF technology for use in determining lead content in paints and surface coatings.
- Expanded Education Outreach Regarding Third Party Testing: CPSC staff, in particular the Small Business Ombudsman, conducted a series of seminars and webinars on the implementation of third party testing requirements, providing significant advice on reduced cost approaches.

In addition, CPSC staff moved quickly to implement specific provisions in PL 112-28, some of which had been sought by CPSC to provide third party testing relief. For example:

- Random Sample Test Requirement Changed to Representative Sample: Prior to passage of PL 112-28, the CPSIA directed the CPSC to require samples selected for periodic testing to be chosen using random sampling techniques. A number of companies found using random sampling techniques to be excessively burdensome. In response, Congress amended section 14(i)(2)(B)(ii) of the Act to permit the testing of representative samples. The Commission, accordingly, modified its rule on third party testing. (16 CFR §1107(f)).
- Small Batch Manufacturers Not Required to Conduct Some Third Party Tests: PL 112-28 gives the Commission the flexibility to exempt small batch manufacturers from third party tests for some covered products. Accordingly, the Commission established the Small Batch Manufacturers Registry, which is an online mechanism by which Small Batch Manufacturers can identify themselves to obtain third party testing relief.¹
- Third Party Testing for Lead in ATVs, Bicycles, and Books Limited: PL 112-28 exempted ATVs from meeting the lead requirements imposed by CPSIA. It also exempted the metal

¹ See <http://www.cpsc.gov/en/Business--Manufacturing/Small-Business-Resources/Small-Batch-Manufacturers-and-Third-Party-/>.

component parts of bicycles and ordinary books from the requirement for third party testing for lead content.

- **Only Accessible Component Parts Required to be Tested for Phthalates:** PL 112-28 limited third party testing for phthalates to plastic parts accessible to a child through normal or reasonably foreseeable use and abuse. Accordingly, the Commission modified its rule to make this change. (16 CFR § 1199).
- **Functional Purpose Exemption Established:** PL 112-28 established a protocol by which petitioners may request a functional purpose exception for a product, class of product, material, or component part because it is not practicable or not technologically feasible to meet the 100 ppm lead content limit. Accordingly, the Commission modified its rule to make this change. (16 CFR § 1500.90).

I mention the above steps to point out that both the CPSC and the Congress have been active over the years in addressing the burdens of third party testing, especially on small manufacturers. I also note that most of the above listed actions occurred with minimal scientific investigation. Unfortunately, most further burden reduction actions, to be useful, seem to require significant research at substantial cost. Given the technical challenges regarding the development of additional options, it is not surprising that further burden reduction actions have not yet occurred. But I assure you that the Commission is working diligently on all possible burden reduction solutions that are consistent with the statute.

CPSC's Investigation of Potential Further Burden Reduction Actions: Technical and Resource Challenges

On November 8, 2011, pursuant to PL 112-28, the Commission published a Request for Comments (RFC) in the Federal Register (76 Fed. Reg. 69596) soliciting input from the public regarding opportunities to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rule, ban, standard, or regulation. In addition, CPSC staff reviewed the Commission's rules on third party testing to see whether any modifications of the rules might provide regulatory relief, met separately with each Commissioner's office, and solicited input from all CPSC staff to make sure that helpful ideas from any source would be considered. The result of this intensive months-long inquiry was a 117-page report titled "Staff Briefing Package on Consideration of Opportunities to Reduce Third Party Testing Costs Consistent with Assuring the Compliance of Children's Products," submitted for Commission review on August 29, 2012.² Having explored numerous possible approaches, the staff noted the substantial technical and resource challenges surrounding most of the proposals they considered worthy of further consideration:

The recommendations require additional consideration and the devotion of Commission resources to implement. Some recommendations, if implemented, likely would affect only a few children's product certifiers, while others potentially would have a broader effect. Some recommendations may, upon further study, be ineffective in reducing manufacturers' third party costs. Other recommendations may be impracticable. Staff's approach in its review of the ideas was to provide enough information to assist the Commission in the

² <https://www.cpsc.gov/PageFiles/129398/reduce3pt.pdf>

determination of whether to approve the resource allocation necessary to pursue these recommendations further.³

In other words, staff's comprehensive review of possible third party burden reduction measures produced almost no candidates for immediate implementation. Moreover, most, if not all, of the proposals require further investigation and resource expenditures, some potentially quite expensive – with no guarantee that they would bring significant (or any) burden reduction benefit. I mention resources because CPSC is one of the most resource-constrained of the federal health and safety agencies. And, I note that however important burden reduction projects are to the CPSC – and they are quite important – their placement in the agency's regulatory priorities must be balanced against our safety mission and available resources. They must compete for staff time and resources with projects carrying congressionally mandated deadlines such as the development of standards for durable infant products under the "Danny Keysar Child Product Safety Notification Act"⁴ and the amendment of the Commission's All-Terrain Vehicle Standard.⁵ They must also compete with critical ongoing safety projects, such as recreational off-highway vehicles (ROVs), upholstered furniture flammability, television/furniture tip-overs, portable generator asphyxiations, and drowning prevention – a number of which involve gruesome fatalities (often to young children) and horrific, life-altering injuries.

CPSC's Ongoing Burden Reduction Activities

Given the technical challenges and the resource constraints associated with burden reduction, I believe the Commission has made good progress on the issue. As a starting point, I note that the Commission, on October 12, 2012, having carefully reviewed the various proposals proffered by staff, voted to approve work by staff, resources permitting, on the following nine projects:

- International Standards Equivalency to Children's Product Safety Rules: Draft a Request for Information (RFI) for publication in the Federal Register to determine which, if any, tests in international standards were equivalent to tests in comparable CPSC-administered Children's Product Safety Rules.
- Determinations Regarding Heavy Metals: Draft a Request for Information (RFI) for publication in the Federal Register regarding whether there are materials that qualify for a determination, under the Commission's existing determinations process, that do not, and will not, contain higher-than-allowed concentrations of any of the eight heavy metals specified in Section 4.3.5 of ASTM F963-11 (The elements are antimony, arsenic, barium, cadmium, chromium, lead, mercury, and selenium).
- Determinations Regarding Phthalates: Draft a Request for Information (RFI) for publication in the Federal Register regarding whether there are materials that qualify for a determination, under the Commission's existing determinations process, that do not, and will not, contain prohibited phthalates, and thus are not subject to third party testing.

³ Id., at 3.

⁴ Section 104 of the Consumer Product Safety Improvement Act. Under this Act, the CPSC must adopt two mandatory rules on durable infant goods every six months.

⁵ Section 42 of Consumer Product Safety Act. See 15 USC § 2089.

- Fourier Transform Infrared Spectroscopy (FTIR): Investigate whether Fourier Transform Infrared Spectroscopy (FTIR) can be effective as a screening technology for determining that a plastic component part contains no phthalates.
- Determinations Regarding Adhesives in Manufactured Woods: Draft a Request for Information (RFI) for publication in the Federal Register regarding whether there are any adhesives used in manufactured woods that can be determined not to contain lead in amounts above 100 ppm, and thus are not subject to third party testing.
- Determinations Regarding Synthetic Food Additives: Draft a Request for Information (RFI) for publication in the Federal Register regarding whether the process by which materials are determined not to contain lead in amounts above 100 ppm can be expanded to include synthetic food additives.
- Guidance Regarding Periodic Testing and Periodic Testing Plans: Draft guidance in the form of a Frequently Asked Question or similar format to clarify that manufacturers who do not engage in ongoing or continued production of a previously third-party certified product – such as an importer or a manufacturer with short production runs – are not required to conduct periodic testing as defined in 16 CFR § 1107. The Commission further directed staff to clarify that those manufacturers who do not engage in periodic testing for the reasons previously stated are not required to create a periodic testing plan.
- Accreditation of Certain Certification Bodies: Develop a staff technical report for Commission consideration on the feasibility of CPSC-acceptance of certification bodies to perform third party testing of children's products as a basis for issuing Children's Product Certificates (CPC), and to undertake activities to ensure that continuing production maintains compliance with certification requirements as a basis for increasing the maximum periodic testing interval from one to two years.
- Staff Findings Regarding Production Volume and Periodic Testing: Report to the Commission whether, and if so, on what basis, staff would be able to make findings whether including a "low-volume" exemption would be consistent with assuring compliance with all children's product safety rules, regulations, standards or bans.

In addition to these nine burden reduction projects, the Commission, on May 9, 2014, as part of its mid-year budget review, approved an amendment that I authored that added a further Determinations project:

- Determinations Regarding Unfinished Wood and Other Natural Materials: Investigate whether unfinished wood or other natural materials do not, and will not, contain any of the specified heavy metals in levels that exceed allowable limits in ASTM F963.

I note that five of the approved actions involve investigating whether the Commission can make determinations regarding certain products or product components. There is good reason for this. Along with CPSC staff, I have endeavored to meet with and listen to a great number of manufacturers, especially those who run small, even tiny, businesses. Overwhelmingly, they have told us that most proposals that retain third party testing will not provide significant regulatory relief. Instead, they point to the August 2009 action taken by the Commission in which we determined that certain products did not require third party testing for lead because they would never contain violative amounts of this heavy metal. This, they claim, is the most desirable path to take. They ask that the Commission expand the determinations list of products exempt from lead

testing and that we expand our determinations list to include products found never to violate our phthalates rule or our heavy metal requirements in ASTM F963.

The Commission’s Plan

Set forth below is the Commission’s plan – which I support – for implementing our burden reduction projects. Not all of the projects have due dates because there first must be a reasoned decision based on adequate evidence that they hold sufficient technical promise to be placed in the Commission’s Operating Plan. For the most part, the projects that will lead to Commission determinations have received the greatest attention, but progress even on these has often encountered unexpected technical challenges. For example, during the Commission’s all-day forum on burden reduction on April 3, 2014, several industry stakeholders advocated that the Commission exempt rigid plastics with a Shore Hardness of 90 or greater from third party testing requirements for phthalates. Unfortunately, Commission staff has discovered that a number of products with this hardness factor contain statutorily prohibited phthalates at concentrations above the allowed limit.

Given existing technical challenges and limited Commission resources, I am comfortable with the Commission’s work plan. I note that the vote on May 6, 2014 to which you refer in your letter did not reject the idea of a plan. As set forth below, we have a plan. What I opposed in that vote was a proposal for a plan that I felt would elevate burden reduction projects above a number of higher priority safety projects that either have already been included in our Operating Plan or that await placement depending on available resources. Having said that, let me be clear: where burden reduction projects have shown technical promise, they have been approved with reasonable dispatch. Under either my leadership as Acting Chairman or as a Commissioner, I expect this to continue.

Project	Description	Status
International Standards Equivalency to Children’s Product Safety Rules	Draft policy on determination of which, if any, tests in international standards are equivalent to CPSC children’s product rules to permit rules harmonization.	Draft policy due 4 th Quarter, FY 2014.
Determinations Regarding Heavy Metals	Investigate whether heavy metals specified in ASTM F963 (antimony, arsenic, barium, cadmium, chromium, lead mercury, and selenium) in certain products or product components can be determined never to violate applicable CPSC standards.	Comments from public on CPSC Workshop due by July 16, 2014. Staff review of comments to follow. Depending on comments received, and resources allocated, staff could develop a Briefing Package in FY2015.

Project	Description	Status
Determinations Regarding Phthalates	Investigate whether certain products or product components can be determined never to contain violative levels of prohibited phthalates.	Comments from public due by July 16, 2014. Staff review of comments to follow. Depending on comments received, staff could develop a Briefing Package in FY2015.
Fourier Transform Infrared Spectroscopy (FTIR)	Investigate whether FTIR can be effective as a screening technology for determining that a plastic component part contains no phthalates.	Staff continues to monitor technology developments and will provide status reports on activities as significant new developments occur.
Determinations Regarding Adhesives in Manufactured Woods	Staff directed to investigate whether any adhesives in manufactured woods can be determined not to contain lead in amounts above 100 ppm.	Staff review pending, as resources permit. The CPSC Workshop on Burden Reduction included lead content as an item.
Determinations Regarding Synthetic Food Additives	Investigate whether the process by which materials are determined not to contain lead in amounts above 100 ppm can be expanded to include synthetic food additives.	Staff review pending, as resources permit. The CPSC Workshop on Burden Reduction included lead content as an item.
Guidance Regarding Periodic Testing and Periodic Testing Plans	Staff directed to draft guidance to clarify that manufacturers who do not engage in ongoing or continued production of a previously certified product are not required to conduct periodic testing as defined in section 1107. Moreover, manufacturers who do not have to do periodic testing need not create a periodic testing plan	Draft guidance policy developed and submitted for 6(b)(6) clearance. Due to Commission by 4 th Quarter, FY 2014.
Accreditation of Certain Certification Bodies	Develop a staff technical report for Commission consideration of feasibility of CPSC-acceptance of certification bodies to perform third party testing as a basis for issuing Children's Product Certificates, and to undertake activities to ensure that continuing production maintains compliance with certification requirements as a basis for increasing the maximum periodic testing interval from 1 to 2 years.	Staff review pending, as resources permit.

Project	Description	Status
Staff Findings Regarding Production Volume and Periodic Testing	Investigate whether to include a “low-volume” exemption from periodic testing requirements for a maximum of three years consistent with assuring compliance with all applicable children’s product safety rules, regulations, standards, or bans.	Staff review pending, as resources permit.
Determinations Regarding Unfinished Wood and Other Natural Materials	Staff directed to investigate whether unfinished wood or other natural materials do not and will not contain any of the specified heavy metals in levels that exceed allowable limits in ASTM F963.	A contract task order has been issued to contractor for cost proposal. Staff report anticipated in FY2015, depending on the completion of the contract task and resource allocation.

Possible Legislation

You point out in your letter that Congress, in Section 2(a)(3)(C) of PL 112-28, stated that if the Commission determined that it lacked the authority to implement an opportunity for reducing the costs of third party testing consistent with assuring compliance with the applicable consumer product safety rules, bans standards, and regulations, it should transmit a report to Congress reviewing those opportunities, along with any recommendations for any legislation to permit such implementation. To date, I have seen no legislative opportunities for burden reduction that would continue third party testing consistent with assuring compliance with the applicable consumer product safety rules, bans standards, and regulations. Recently, however, I learned of one possible approach regarding determinations for phthalates that might require legislative action.

The concept is simple: when the Commission made its determinations regarding lead in 2009, the agency listed those products and product components that its technical staff had concluded would not ever contain prohibited amounts of lead. This was a list of exceptions from a general standard because lead, as a naturally occurring element, had to be ruled out as a component of products on an ongoing basis. Phthalates, by contrast, are a man-made material not occurring naturally in the environment and intentionally used in products. So, a possibly preferable approach would be to list those products that might contain phthalates or are most likely to be contaminated by phthalates in the production process and exempt all others. This would provide much broader relief than exhaustively listing the thousands of products that will never contain phthalates.

Let me mention a few caveats. As with other burden reduction ideas, significantly more research and resources would be required for the agency to undertake such an action if the idea were to prove useful. In addition, statutory flexibility would be needed to allow CPSC to place a product on the list if it was later determined to contain prohibited phthalates even if it was not on the initial

list. Also, as the Commission has not received the final Chronic Hazards Advisory Panel report on phthalates, I do not know how that might affect this concept. All of this said, I do find the proposal worthy of additional thought.

Should I decide, in consultation with the agency's career scientific staff that this suggestion is a good one and that we require Congressional assistance, I shall seek my colleagues' support for making an official request to Congress.

Thank you again for your letter on this important issue. Please forward my appreciation to your staff for their courtesy to me. Should you or your staff have any questions, please do not hesitate to contact me or Jenilee Keefe Singer, Acting Director of Legislative Affairs, by telephone at (301) 504-7488 or by e-mail at jksinger@cpsc.gov.

Sincerely,

A handwritten signature in black ink that reads "Robert Adler". The signature is written in a cursive, slightly slanted style.

Robert S. Adler
Acting Chairman

cc: Chairman John D. Rockefeller IV