



**Testimony of Stephen Lamar
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**Oversight of the Consumer Product Safety Commission
Product Safety in the Holiday Season**

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**Consumer Protection, Product Safety, and Insurance Subcommittee
Senate Commerce Committee**

Good morning.

My name is Steve Lamar and I'm Executive Vice President of American Apparel & Footwear Association (AAFA) – the national trade association of the apparel and footwear industry, and its suppliers. Thank you for providing us this opportunity to appear before you this morning on this important topic.

At the outset, let me state our very strong support for a product safety regulatory system that ensures that only safe and compliant products are designed, produced, marketed, and sold. At AAFA, we take our role in product safety education and advocacy efforts seriously. We view this obligation as key to the success of the industry, not only because such an approach is the right thing to do, but because we are also consumers, parents, and grandparents ourselves. We believe very strongly that we should only wear safe and compliant clothes, shoes, and other products. At the end of my testimony I included additional information about AAFA and some of our product safety initiatives, including our extensive global education efforts.

Although product safety is a year round job, it is appropriate to have this oversight hearing as we enter the holiday season. The focus on consumer spending during the holidays is a natural time to reflect on product safety and compliance. Furthermore, as Congress begins to think through its agenda for the next two years, this is a good opportunity to identify what changes can be made to ensure that our nation's product safety regulatory system is operating effectively. As this is the first oversight Subcommittee hearing on the Consumer Safety Product Commission (CPSC) since passage of the Consumer Product Safety Improvement Act (CPSIA) in 2008 – and with more than two years of industry experience with implementation of this important law - I'd like to focus my remarks on the CPSIA and

offer several recommendations for the Subcommittee to consider in the weeks and months ahead.

The CPSIA was a dramatic overhaul of the nation's product safety regulatory regime. Its passage put a spotlight on product safety concerns, propelling consumers, regulators and businesses to refocus on making product safety a top priority. Among other things, the legislation provided the CPSC – long an underfunded agency - with much-needed resources to carry out product safety enforcement and educational efforts. It mandated the CPSC to work with other agencies like Customs and Border Protection (CBP) to develop risk assessment methodologies to efficiently target and block potentially unsafe imports. It also ensured that all five CPSC leadership positions were filled – for the first time in years – in an effort to secure a renewed dialogue and healthy debate on how to effectively and efficiently approach and enforce safety regulations. Finally, new content and testing requirements have helped companies better understand the chemicals used in children's products and evaluate and improve their quality control processes to ensure that only safe products are sold. It goes without saying that industry, consumer advocacy groups, bloggers, the media, and various other stakeholders across the spectrum have become more engaged than ever in product safety.

Regrettably, the legislation also mandated a series of controversial changes to the nation's product safety rules that have created endless confusion, extensive burdens, huge costs, job losses, and irreparable damage to the business community. In many cases, these adverse consequences have come without improvements in product safety or public health. Among other things, the law mandated very strict lead and phthalate content restrictions. It required certifications of compliance for all consumer products for all safety standards, mandating third party testing for those standards involving children's products (defined as 12 and under). It created a public database of product safety incidents. It authorized enforcement by state attorneys general and created whistleblower provisions. While many of these provisions reflect good intentions, the language of the CPSIA makes many of them difficult, if not impossible, to implement and enforce. Tight deadlines, rigid definitions, retroactively applied standards, requirements that do not reflect risk, and a "one size fits all approach" are all among the many problems that have made CPSIA implementation challenging.

AAFA, as with others in the regulated community, have actively worked the regulatory process to make sure the rules can be understood and implemented. We have had some success in working with the CPSC to use the limited regulatory flexibility that the CPSIA does permit to make some important determinations and offer some clarifying opinions. And while we commend the Commissioners and the staff who have worked tirelessly for more than 28 months to craft regulations that reflect "common sense," many problems either have not or cannot be fixed through the regulatory process. The surrogate for some of these fixes has come in the form of a series of stays of enforcement. And while these stays have provided welcome relief, and should remain in force, they cannot provide a long term solution.

Let me offer one experience – related to the lead substrate standard – to illustrate these points.

Per the CPSIA, the lead restriction applies equally to ANY component of a children's product. Initially, this was interpreted to include all the fabrics, yarns, threads, accessories, and trimmings even though it was commonly understood, and has been known for decades, that there is no lead in textiles and only isolated occurrences of lead in other components, such as buttons, snaps, and zippers. Eventually, and after input from the industry and other stakeholders, the CPSC issued a determination that indeed there is no lead in textiles, regardless of whether the fabric is dyed. And while we were pleased with this determination, please consider the following:

- The determination required the submission of thousands of test results costing hundreds of thousands of dollars. Including the tests that were not submitted, but which companies had to perform because their customers were insisting upon them as a result of their understanding of the CPSIA, the cost rises into the millions.
- The determination was not made until more than six months after the initial retroactive lead standard took effect and several weeks after the second (and current) lead standard took effect.
- Since most garments are not made entirely of just fabric, most garments still have to undergo testing for possible lead in most trimmings, even though tests from pre-CPSIA inventories showed that lead occurred in these components in only 3-5 percent of the time. Moreover, in many of these cases, the positive lead tests occurred with components that present no risk, but which are nonetheless covered. The example often cited is the zipper stop at the bottom of the fly in a child's pair of trousers.
- The determination is not complete. Even though the determination applies to dyed fabrics, it does not apply to certain kinds of after treatment processes, such as prints. Yet some of the print processes excluded by this determination have the same non risk of lead as dyes.
- The determination depends on a component part testing rule to operate effectively. That rule, while proposed, has not yet been finalized.
- Testing relief that companies are currently using to navigate through these rules goes away once the stay of testing and certification has been lifted because a company's own reasonable testing efforts – such as the use of XRF style machines – will be insufficient to meet third party requirements.
- These requirements exist along side other rules that were created by the CPSIA or which were strengthened by the CPSIA. So while the fabric in a child's pajama may not have to meet lead testing rules for fabric, it does have to meet requirements for flammability, lead substrate testing in zippers, lead in paint testing for any coatings, and possibly phthalate testing for the non-stick surfaces on the pads of the feet.

- State rules impose a myriad of additional, and contradictory, requirements that are not preempted by these determinations.

It is for this reason that we have been strong supporters of Congressional initiatives to amend the CPSIA and to ensure the proper implementation of the CPSIA. And because the timetables mandated by the CPSIA are unforgiving, Congressional action is needed immediately.

Many throughout the stakeholder community have identified a number of provisions in the CPSIA that need to be amended through either a “tweaking” or through “major surgery.” It would appear that many in Congress, the Commissioners, and the CPSC professional staff also share this view to different degrees. During the 111th Congress, several hundred Senators and Representatives from both parties and both Chambers have written letters or sponsored legislation that seek amendments to the CPSIA. A provision in last year’s omnibus spending bill asked the Commission for its advice on legislative changes. Commissioner Nord, during her tenure as Acting Chair, forwarded to Congress a list of professional CPSC staff recommendations for CPSIA changes.

Some proposed changes have focused on specific industries – such as books or ATVs or small batch manufacturers. Others have sought to provide broader industry relief, such as provisions that would apply next year’s tighter lead restriction in a prospective manner or which would permit inaccessible components to be exempt from phthalate limits. An incomplete list of other changes needed involve revisiting the definition of children’s product, more flexible testing and certification provisions, stronger preemption to prevent proliferation of contradictory rules at the state level, and clearer mandates for the public database.

This is not an exhaustive list. But it is important to note that, with more than two years of CPSIA implementation and experience, the regulated community and the regulators have both found significant problems with the law. There appears to be a growing consensus that the CPSIA created many unintended consequences that, if left unaddressed, will continue to do damage to the very entities that bear the burden for compliance. Our hope is that Congress can immediately begin work with all stakeholders to fully identify and implement these fixes.

Going forward, I would like to make 8 recommendations. Many of these will require specific legislative changes or clear direction from Congress that the CPSC shall interpret the CPSIA, using its existing authorities, with more flexibility. All these suggestions are intended to strengthen product safety and public health.

1) Ensure that all product safety decisions are based on risk and supported by data

The CPSIA makes a number of product safety mandates that simply do not reflect risk. Prohibitions against lead in the spokes of a child’s bicycle is just one obvious example. Not only does this contradict common sense but it undermines an effective product safety regime and creates confusion among the regulated community and consumers alike. If all products, regardless of the risk, are deemed

equally hazardous, valuable resources and time will be spent validating and regulating already safe products. Businesses will not understand which hazards they are trying to prevent if the regulations appear arbitrary, as they currently do under the CPSIA. Moreover, consumers will become so overwhelmed by product safety warnings that they will tune out when real and legitimate concerns do appear. A better approach would be to focus time and energy on those products, components, and materials that do present risk of injury, harm, or death. Then, based on the fact pattern behind that risk, we can construct a regulatory regime to erase or mitigate the hazard. In this vein, the public database scheduled to go live in only a few months raises significant problems because it will inundate the public with erroneous and unsubstantiated claims instead of legitimate product safety problems.

2) Give the CPSC more flexibility to interpret CPSIA

At numerous points during the past two years, the regulated community has heard that the CPSIA ties the CPSC's hands. In these cases, the professional staff, and even Commissioners, agreed that a particular outcome is not correct but pointed to the law as the source of their helplessness to address the issue. In some cases, the agency has resorted to contorted opinions or guidance that, although well intended, have often complicated the business community's understanding of the law. The CPSC should be able to respond, quickly, to imminent threats and respond smartly and appropriately to longer term and fact based concerns. In all cases, the rules should be easy to understand so they can be effortlessly implemented and communicated up and down the supply chain. Currently, CPSIA, as interpreted by many at the CPSC and others, does not allow this flexibility.

3) Ensure that new regulations do not contradict existing ones.

The CPSIA mandates new testing and certification requirements that alter existing regulations that pre-date the CPSIA, that have worked extremely well and which the industry understands. For many of these standards (including those addressing flammability, small parts, and sharp points and edges), pre-existing quality control programs and regulations were crafted in such a way that they did not hinder the ability of companies to make safe and compliant products. But because the new CPSIA mandates do not efficiently plug into the existing regulatory requirements, considerable confusion has been created with regard to these regulations. This will only be exacerbated as the now delayed 15-month rule and the new third party testing requirements begin to take effect. On a similar note, incomplete preemption language in the CPSIA means that federal rules and state rules often work at cross purposes.

4) Ensure prospective application of all rules

The CPSIA imposed new lead and phthalate requirements in a retroactive manner. This caused untold chaos, confusion, and costs as companies were forced to cancel orders, reformulate products, and destroy inventory. Regrettably, the CPSIA's retroactive mandates continue to create chaos. For example, some products lawfully

produced today under the CPSIA 300ppm standard will become banned hazardous substances if they are sold after August 14, 2011 when the standard drops to 100ppm (and is applied retroactively). Regulations should take effect prospectively, and implemented only after the Commission publishes clear and comprehensive regulatory guidance. The retroactive application of regulations unfairly punishes businesses for making products in good faith, especially when they were made in compliance with a previous product safety standard. It also goes against sound business practices which build product safety requirements into the design at the beginning of the production process rather than treat them as an afterthought at the end.

5) Establish deadlines that permit and encourage compliance.

The CPSIA's mandate to the CPSC to undertake dozens of rulemakings in a short period of time has been challenging for both the agency and industry. In many cases, the changes were tied to specific deadlines that have proved hopelessly unrealistic. A proposed 15-month rule, which was supposed to provide some relief in the form of component part testing, is now more than a year late and has been delayed indefinitely. Other deadlines have had to be delayed or stayed. Rather than rely on strict deadlines, the CPSIA should recognize that well thought out and implementable product safety rules take time. A single garment can take nearly a year to travel down the supply chain. New regulations must give industry enough time to adapt these long supply chains so all parties can understand and clearly communicate changes to all their partners involved in production. Furthermore, time is necessary so the regulatory agency can work with the affected industry to properly develop and implement the regulations.

6) Publicize all pending regulatory developments

The regulated community continues to have a difficult time understanding when various rules and regulations are due to be developed under the CPSIA. The agency is currently in the process of lifting of the stay of enforcement of testing and certification for the children's product safety standards. Yet this is being done in a manner that is catching many by surprise. Product safety standards that work best are those that are created through a transparent and predictable process, especially when they involved technical testing and certification protocols. The product safety community involves a range of stakeholders, all of whom need to participate. If one group appears shut out, the final result may not be credible or accepted by all. This, in the long run, leads to a product safety regime that is not sustainable.

7) Avoid "One Size Fits All Approaches"

One major problem is that the CPSIA treats all products, components, and companies equally, even though there are different risks involved. Product safety rules that were in effect before the CPSIA recognized these differences by tailoring the rules to those products and consumers where the risk of injury or death are greatest. Similarly, while all companies, regardless of size, should be subject to product safety rules, different sized companies can demonstrate compliance using

different methods. Not recognizing these differences continues to be one of the major flaws of the CPSIA.

8) There is more to the CPSC than CPSIA

The CPSC should be commended for the enormous amount of work they are doing in implementing the CPSIA. But we are concerned that the resources and time spent on implementing the CPSIA has detracted from other important product safety initiatives, including enforcement of existing standards. Giving the CPSC flexibility to properly implement product safety priorities in the CPSIA will inevitably free up time for the agency to focus resources on the rest of its product safety mission.

Conclusion

Over the past two years, AAFA and others have worked closely with the CPSC to implement the CPSIA and we applaud the agency's efforts to work with and educate industry during the rulemaking process.

The most effective product safety system we can have is one that recognizes that the regulated companies are active partners of the CPSC. But if these companies are constantly subjected to burdensome, costly, and, in some cases, silly requirements, that partnership is severely strained and the public's interests are not served. Ultimately, product safety takes a black eye.

Mr. Chairman, the CPSC and the regulated community have come a long way since Congress passed the CPSIA. Thanks to your leadership we now have five Commissioners and an agency that is more fully funded. The CPSIA was indeed a "wake-up" call for the agency and for many in the business community to tighten their own product safety regimes. But the CPSIA also created extraordinary problems for companies who were already doing the right thing in ensuring product safety. In many cases, those problems came with little gain for public safety.

With an eye to maximizing public health and safety, it is our hope that with a legislative amendment, Congressional oversight and continued dialogue between the agency, industry and other product safety stakeholders, we can create a stable, predictable, risk-based regulatory environment.

Thank you again for providing us this opportunity to testify. I am available to take questions.

Appendix

Background on AAFA Product Safety Initiatives

AAFA is the national trade association for the apparel and footwear industries, and their suppliers. Our members own, produce for, or market hundreds and hundreds of brands of clothing and footwear. AAFA has about 400 member companies who own, produce for, or market more than 700 brands of clothing, footwear, and other fashion products. Nearly all stakeholders in the industry supply chain are represented in our membership, including large, medium, small, and micro businesses; retailers of all sizes; designers; manufacturers; importers; wholesalers; private label; brand owners; and suppliers of inputs and services. AAFA members produce and sell in virtually every country in the world.

Educating the apparel and footwear industry supply chain on product safety compliance initiatives has been a top priority for AAFA for decades. The AAFA Product Safety Council, which addresses specifically with product safety issues, is one of our more active Committees. It now boasts over 400 members. AAFA uses the Product Safety Council to distribute information, develop industry positions, create best practices, and keep members up to date on the ever changing product safety landscape.

AAFA is an active participant in legislative and regulatory initiatives involving product safety. Since the passage of the CPSIA, AAFA has participated in numerous regulatory proceedings focused on the apparel and footwear industries, or affecting the broader regulated community.

Over the past two years alone, AAFA has conducted nearly a hundred webinars, briefings, conferences and trainings, throughout the United States and on four continents on the CPSIA, restricted substances, and other product safety topics. Just last month, AAFA conducted a CPSIA training session with over 200 factory and compliance personnel in Ho Chi Minh City, Vietnam. AAFA will be returning to China in April of 2011 for our 6th compliance program in that country.

Since 2007 AAFA has published a free, publicly available, peer-reviewed, industry-wide Restricted Substances List (RSL) that helps companies understand international product safety standards and implement a chemical management program. The RSL is updated once every six months to ensure the most current information is available for companies in a manner that is digestible and easy to implement. The 7th release of the RSL was most recently published in Vietnamese to coincide with the recent product safety seminar held in Vietnam. Future editions will be published in other languages, including Spanish and Chinese. The RSL is available on the AAFA website – www.apparelandfootwear.org – where AAFA staff also post extensive product safety compliance information on the CPSIA and other product safety initiatives, such as REACH and individual state laws, including California Proposition 65. Keeping this information updated is a never ending challenge, particularly in the past several years in light of the rapidly changing regulatory environment.