The Past, Present, and Future of the Consumer Product Safety Commission

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Anne M. Northup is a commissioner at the Consumer Product Safety Commission—a position she has held since 2009. From 1997–2006, she represented the Third Congressional District of Kentucky in the United States House of Representatives. Throughout her tenure in Congress, Ms. Northup was recognized for her straightforward, honest style in taking on tough issues. She is pro-trade, pro-economic expansion and focused on issues that create a better environment for competition, growth and worldwide commerce. Prior to her tenure in Congress, she served in the Kentucky House of Representatives from 1987–1996.

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On Dec. 31, 2011, the Consumer Product Safety Commission will lift its stay of enforcement on the requirement that most children’s products be third-party tested and certified for compliance with lead, phthalates, and/or ASTM F 963 toy safety standards. As a result, over three years after passage of the Consumer Product Safety Improvement Act, children’s product manufacturers and importers will begin to bear “the greatest burden imposed by the Act,” says CPSC Commissioner Anne M. Northup in this BNA Insight. “However, in my opinion, and with the hindsight of two-and-a-half years, it has become clear that third-party testing will impose enormous costs without a proportionate justifying benefit, and that the CPSC’s exercise of new enforcement authority and cooperation with the U.S. Customs and Border Patrol (CBP) is a better and more cost-effective approach to ensuring the safety of children’s products sold in the United States,” the author says.

The Best Approach to Ensuring the Safety Of Children’s Products Sold in the United States

The CPSIA was enacted in 2008 in response to a media storm over a large number of Chinese manufactured children’s toys that were recalled due to lead in paint that exceeded a standard in place since 1970. No child was injured by lead paint in the toys, and the offending manufacturers were soundly rebuked under existing law, through mandatory recalls, the imposition of the largest penalty in the history of the CPSC, and a $30 million dollar class action lawsuit settlement for one manufacturer.

The news of the recalls created a political climate suited to the fulfillment of a long held goal of consumer advocates: the reduction in the lead content of children’s products virtually to zero, the elimination of phthalates without any known risk to children, and the requirement that all children’s products be tested by third-party laboratories to ensure compliance with these and all other applicable safety standards. Thus, the CPSIA requires, with limited exceptions, that before a children’s product enters commerce, sufficient samples of every component must be individually tested...
by a third-party laboratory and certified as free from lead and phthalates, and compliant with all other applicable product safety rules. The CPSIA also required the Commission to establish protocols and standards for ensuring that after the initial third-party testing, children's products are subject to additional testing during production. The Commission carried out this mandate through the recent promulgation of 16 C.F.R. § 1107, which requires the additional third-party testing of a certified children's product to ensure continued compliance with all applicable safety standards, both when there is a material change in the product, and periodically during production even in the absence of a reason to believe a certified product is no longer compliant. The rule's prescriptive mandates insinuate the Commission deeply into the production process of any company that manufactures a children's product for the United States market.

Specifically, the rule requires manufacturers that cannot test their children's products in an ISO/IEC 17025:2005 accredited in-house laboratory to undertake a complex analysis and formulate either a periodic testing plan or a production testing plan for each product manufactured at each manufacturing site. Manufacturers that make multiple products at a single site or that frequently change the product manufactured at a site will need to continually formulate and update their periodic testing and production testing plans, potentially as often as every day. They also must "document the production testing methods used to ensure continued compliance and the basis for determining that the production testing plan provides a high degree of assurance that the product being manufactured continues to comply with all applicable children's product safety rules." Businesses have told us that documenting their complicated production processes will be costly, burdensome and simply impossible for some smaller scale companies.

**Problem of Noncompliant Children's Products**

The problem of noncompliant and potentially dangerous children's products reaching American shores is real and must be addressed. Advocates for third-party testing characterize it as a "prevention" model that is superior to what they view as the Commission's traditional "detection" model, because dangerous products won't enter commerce in the first place. I believe this is a false distinction. Preventing the manufacture and importation of noncompliant children's products has always been and remains the focus of the CPSC's efforts. The policy disagreement is over the most cost-effective means of doing so. Mandating third-party testing is based on the out-of-date paradigm that government can and should dictate the precise decisions and actions by the private sector necessary to achieve policy outcomes, irrespective of cost.

A more forward thinking and effective approach to ensuring the compliance of overseas manufacturers is to enhance the CPSC's partnership with CPB and our use of emerging risk assessment management technology at ports to better target potentially noncompliant products for inspection and prevent them from entering the stream of commerce. Recent technological and organizational advances have markedly improved the efficacy of these enforcement tools, increasing substantially the likelihood that noncompliant products will be detected and destroyed.

In addition, modern production processes and quality assurance systems enable manufacturers to produce uniform compliant products without the need for confirming third-party tests. As a result, overseas manufacturers wishing to remain profitably in business will take appropriate steps on their own to ensure compliance, irrespective of prescriptive government mandates regarding the proper means for doing so. And, of course, those without a commitment to an ongoing enterprise who wish to make a fast profit without regard for public safety will not comply with third-party testing requirements in any event.

Third-party testing is very expensive for all manufacturers and importers, but its cost burden is insurmountable for many small businesses. According to the CPSC's economists, the costs of testing alone—excluding the costs of samples consumed in destructive tests, the costs of shipping the samples to the testing laboratories, and any related administrative and record keeping activity—is expected to consume over 11 percent of a small manufacturer's revenue. Given that a typical profit is only about five percent of revenue, it is reasonable to expect a large number of small business closures resulting from the third-party testing requirement. They cannot simply raise their prices and remain competitive.

Commission economists predict that in response to the "significant increase in their costs due to the final rule," manufacturers will redesign their products to reduce the features and component parts, reduce the number of children's products they offer, exit the children's product market, or go out of business completely. The costs associated with the new rule are also expected to be a "barrier that inhibits new firms from entering the children's product market," including, in particular, ones serving a niche market, such as products for children with disabilities. Safety- and performance-related innovation will also be stymied, as manufacturers "delay implementing some improvements to a product's design or manufacturing process in order to avoid the costs of third party testing."

The requirement that all children's products be tested at a third-party lab, regardless of risk, also 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, but who nonetheless must pay the most for third-party testing. In the latter regard, there are entire industries that 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.

**Crippling Costs of Third-Party Testing**

While the crippling costs of third-party testing are unquestionable, its benefits are speculative and likely overstated. Some argue that third-party testing before sale will result in fewer recalls. But most recalled products contain design or manufacturing defects that are unrelated to the Commission's product- and material-specific safety standards. Moreover, given the Commission's decision to reduce the lead in the substrate of children's products well below a level presenting any risk to health, recalls of products violating the new standard will not even necessarily protect against a real risk of injury.
Additionally, the manufacturers most likely to honor the third-party testing requirement are also the least likely to produce noncompliant products. Good corporate citizens wishing to maintain their market reputation have already improved their internal mechanisms to ensure compliance regardless of third-party testing requirements, but will also incur the cost of third-party testing consistent with their commitment to follow the law. Indeed, the CPSIA’s micromanagement of a company’s testing, certification and tracking of each and every component of a product will be less helpful than the sophisticated internal controls manufacturers are currently using and continue to develop and perfect.

For instance, we have learned that since the discovery in 2007 that the lead paint in certain violative products was introduced through inadequately supervised component suppliers, manufacturers have reduced their number of suppliers, and now undertake more frequent internal testing. Component suppliers, in turn, take more care to ensure compliance because they are aware that manufacturers will not risk continuing to use a supplier who fails even once to provide compliant components.

In contrast, 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. 16 C.F.R. § 1107, when effective, will require a manufacturer to retest and issue a new finished product certificate every time a new batch of paint is used on any component of a product. Manufacturers wishing to avoid that burden will simply ignore component supplier changes and continue to use the results of older tests to support existing certifications. The CPSC does not have the resources to police manufacturers’ internal recording and tracking of each and every component of a product will be less helpful than the sophisticated internal controls manufacturers are currently using and continue to develop and perfect.

The CPSIA also increased the incentive for compliance by increasing the maximum civil penalty amounts from $8,000 to $100,000 for each “knowing” violation and from $1,825 million to $15 million for any related series of violations. As a result, the average out of court settlement reached by the CPSC for violations of its statutes increased 61 percent between 2008 and 2009, and another 43 percent in 2010 over the amounts collected in 2009. The CPSC also can now more easily seek criminal penalties, and can require a company recalling a product to give a refund, replacement and/or repair, rather than allowing companies to select the remedy they prefer.

It is well recognized that these difficult economic times call for a regulatory regime that carefully balances the costs and benefits of executive agency action. And consumer product regulation, in particular, must take into account the desire of American families for a dynamic marketplace with new and more interesting products that are also safe and affordable. The requirement that all children’s product manufacturers repeatedly third-party test every component of their products is a tremendously costly and not very effective means to prevent violative products from entering commerce. It also threatens to drastically reduce the availability of children’s products for parents of modest means. Public and private resources should therefore instead be redirected toward the alternative production processes and enforcement methods that can achieve the same goal much more efficiently.

More Effective Uses of Taxpayer Dollars

Today, the Commission also has enforcement tools vastly improved over those available even a few years ago. These are a more effective use of taxpayer dollars to ensure compliance with safety standards than is policing all children’s product manufacturers for certifications to mandatory third-party tests. The Commission now has authority to confiscate and destroy at the border products that violate federal safety standards. Since the advent of our agency’s Import Surveillance Division in 2008, we have continued to increase the number of full-time CPSC investigators posted at key U.S. ports. We have also expanded cooperation with CBP to maximize the number of products screened at all U.S. ports. Today, the Commission intercepts noncompliant toys through more extensive border control efforts; application of X-ray technology; and computer databases that search ship manifests before they reach port, flagging for inspection previous offenders and first-time shippers. Using this more detailed and timely information, and through closer cooperation with CBP, the CPSC seized and denied entry to 49 percent more shipments of noncompliant products in 2010 than in 2009.

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