american apparel & footwear association

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Agenda and Priorities for Fiscal Year 2014 Budget
Written Testimony By
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Submitted to the Consumer Product Safety Commission
Hearing Date: June 20, 2012

Chairman Tenenbaum, Commissioners, thank you for holding today's hearing and providing this forum for constructive dialogue.

On behalf of the American Apparel & Footwear Association (AAFA), I appreciate the opportunity to testify today regarding the Consumer Product Safety Commission's Priorities and Strategies for Fiscal Year 2014.

AAFA is the national trade association representing the apparel and footwear industry including its suppliers, manufacturers, retailers, and service providers. Our members produce and sell products that touch every American – clothing and shoes. Our industry accounts for more than four million U.S. employees and more than $340 billion in sales at retail each year.

We are proud of the open and collaborative relationship that we share with the Commission. This past year, in fact, we've had a number of opportunities to work closely with you.

Last November, our members were among the very first groups to tour the Commission's new testing facility in Rockville. This past March, we met with all the Commissioners to discuss ways to reduce the cost of third-party testing. Chairman Tenenbaum spoke to our Product Safety Council in Bethesda in November, and later at a Product Safety Seminar in New York in February. Commissioner Nord spoke to factory managers at our conference in Bangladesh and India last November and to brand owners and suppliers last month in Long Beach, California. Commissioner Northup and Commissioner Adler have also been open and active in AAFA events in previous years. Thanks again to all of you for your active support and participation.

As you know, we are an industry that thrives on product innovation where product safety is a top priority. For both personal and professional reasons, product safety is in the DNA of our industry. Apparel and footwear executives are not only responsible for the reputations of their brands, but they are also parents and grandparents themselves.

It is because of these efforts, the priority we place on product safety, and the relationship we maintain with the Commission, that we are grateful for the opportunity to share our suggestions for the Commission's agenda and priorities for Fiscal Year 2014.

Reducing the Cost of Compliance

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First, with the Consumer Product Safety Improvement Act (CPSIA) still a large part of the Commission's agenda, we encourage continued attention to ways to reduce costs associated with this law. This focus should be a natural part of the Commission's agenda because of H.R. 2715 and is also consistent with the President's Executive Orders relating to the reduction of unnecessary regulatory costs.

With the periodic testing plan taking effect this coming February, our members are focusing on what they need to comply with the standard. As those finishing touches go into effect, our members are still eager to find ways to reduce testing and related regulatory costs. There are many logical and straight forward steps that can be taken with existing authority to improve many aspects of the CPSIA and other regulations. Appended to this testimony is a copy of the comments and other information we submitted in connection with the Commission's exploration of ways to reduce testing burdens pursuant to H.R. 2715. Last week alone several commissioners had meetings on two of these issues: the requirements for a General Certificate of Conformity (GCC) under the Flammable Fabrics Act (FFA) and the need to address inter-lab variability.

We are also pleased to note that the Commission has already taken further steps on one of these suggestions with its proposed rule on 16 CFR 1112 allowing the use of XRF testing for third party certification. We believe this could be a huge benefit for the industry in terms of reducing the cost of third party testing, and a stepping stone for many more improvements in the future. This is a perfect example of looking at an existing regulation and asking, "How can we make this better, more efficient, and more effective **and** still accomplish exactly the same goal that the original standard set out to meet?" We encourage the Commission to continue this mindset moving forward. As technology and methodology improve, so should the regulatory regime.

Increasing the Clarity of Current Regulations

Second, there are many existing regulations outside of the CPSIA that deserve attention and clarification. For example, just last month, within a matter of 24 hours, and separated by a few thousand miles, our industry was given two contradictory points of view to a single question related to the requirements for a GCC under the FFA. This is obviously a point of concern that confuses a lot of companies.

AAFA enjoys working with the Commission to make certain that standards are as comprehensive and understandable as possible even before they are issued. However there are always unforeseen hurdles and last minute confusion that occur and must be addressed.

Take, for example, drawstrings. AAFA actively encourages our membership to understand and comply with their drawstring obligations. Certainly, no one expected any confusion when the Commission approved the federal safety standard for drawstrings last summer under the 15(j) process. But soon after the Commission acted, troubling questions emerged over whether the standard had expanded to include features that did not fit any commonly accepted definition of drawstrings – such as belts on overcoats. We continue to resolve the questions with Commission staff and we appreciate their openness to work with us to make sure a standard is in place that everyone can understand, and therefore implement. We are especially appreciative of the FAQs that were published last week. But we believe this sort of confusion can and should be avoided in the future.

On this note, we would point to a recent recommendation made by the Government Accountability Office (GAO) suggesting that the Commission be more involved in the development of voluntary standards. We agree with this recommendation. The more interaction that the Commission and industry have in the development of standards the better. Where there is open and collaborative dialog there is more of an opportunity for questions to be answered and future confusion to be avoided. We encourage the Commission to continue its efforts to be involved in the creation of voluntary standards and industry discussions.

Increasing the Transparency of Enforcement on Current Regulations

Third, as you may recall from AAFA testimony at this hearing last year, non-compliant, unsafe sleepwear was a large concern for our industry. It remains so. We are very grateful for the open and sincere support we received from the Commission on getting flammable and dangerous sleepwear off the market. The Commission has reissued a letter re-stating its stance on sleepwear, specifically loungewear, declaring that companies cannot avoid the sleepwear safety standards by calling their pajamas loungewear or something else. We have also seen three sleepwear recalls but believe more can be done to make certain there is a predictable and level regulatory regime that all industry stakeholders can understand and follow.

Perhaps what we need is a different approach. The sleepwear rules are quite clear as to what is allowed and what is not. But season after season the industry – which is trying to comply – continue to see apparently non-compliant products remain on the shelves. If the sleepwear rules have been relaxed through enforcement, perhaps we need to codify those relaxed rules in updated regulations. Or maybe Commission staff can advise in detail why an apparently non-compliant product is compliant after all. With this information, the Commission and the industry can develop a better partnership to ensure fair and predictable compliance with this long-standing regulation.

Working with States to Harmonize all Regulations

Fourth, is an issue that becomes more pressing with each passing month - the need for national and international collaboration in product safety standards. The Commission has discussed harmonization opportunities with Canada and Mexico, and is in the process of working with the EU and China to expand these efforts. Just as important, and as we have previously discussed, the harmonization efforts need to begin in the United States. We need to make sure the individual states have a common and consistent approach to product safety. That's currently not the case. The proliferation of conflicting and contradictory product safety standards among the states is quite likely the biggest product safety challenge of our time. We believe the Commission has a lot of tools in its toolbox – such as pre-emption or moral suasion – through which it can foster a more unified national approach to product safety. We would hope the Commission can focus some of its limited resources to this priority issue.

Building Industry-Commission Collaboration

Finally, while we have mentioned it several times already in this testimony and in all of our interactions with the Commission, we want to stress the importance of the Commission using AAFA, as well as all associations at this table, and around the country as a resource when developing not only standards, but guidance documents and educational events as well. As you know, we have an active program and are planning a

series of events and providing tools for the coming year. We believe it is integral to our mission to help educate the industry on its domestic and international product safety compliance obligations. AAFA and its members truly appreciate the opportunity to work with the Commission and we look forward to continuing that relationship through Fiscal Year 2014 and beyond.

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In conclusion, let me stress again how delighted we are to have such a positive relationship with the Commission. We know that there are still a number of challenges ahead and we believe there are many opportunities for further collaboration. We look forward to continuing to strengthen our partnership for the benefit of consumer product safety and public health.

I look forward to taking your questions.

Thank you.

January 23, 2012
Office of the Secretary
Consumer Product Safety Commission
Room 502
4330 East West Highway
Bethesda, Maryland, 20814

REF: Seeking public comment on 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.
Docket No. CPSC-2011-0081

On behalf of American Apparel & Footwear Association (AAFA) I am writing in response to the request for comments by the Consumer Product Safety Commission (CPSC) on the above-captioned issue.

AAFA is the national trade association representing the apparel and footwear industry including its suppliers, manufacturers, retailers and service providers. Our members produce and sell products that touch every American – clothing and shoes. Our industry accounts for more than one million U.S. employees and more than $340 billion in retail sales each year.

To achieve the goal of providing consumers with the safest products available, AAFA has established longstanding and active relationships with the CPSC and other product safety stakeholders. Through these alliances, we have educated the industry on the development and implementation of new product safety standards, while at the same time informing the CPSC of the many concerns of the industry regarding product safety initiatives and activities. It is with our continued cooperation and the advancement of product safety at heart that we submit these comments on ways to reduce the cost and burden of the third party testing requirements.

BACKGROUND

When the *Consumer Product Safety Improvement Act* (CPSIA)[1] was signed into law by President George W. Bush on August 14, 2008, it required the implementation of a Testing and Certification program for all children's products subject to a children's product safety rule under the Consumer Product Safety Commission (CPSC). This included initial third party testing and a periodic testing program. The implementation of the third party testing was stayed several times, rightfully so, in order to ensure a successful implementation that protected the nation's children while imposing the least possible burden on industry. Congress realized that the original legislation had left the CPSC with its hands tied and unable to grant much needed relief to American industries with no reduction in safety. In the interest of addressing this unintended consequence, Congress passed H.R. 2715[2] in order to provide the CPSC with the authority to provide the necessary reprieve. On August 1, 2011 H.R. 2715 passed the House with a vote of 421-2 and passed the Senate unanimously, and was enacted into law on August 12 after being signed by President Barack Obama.

H.R. 2715, among many other things, required the CPSC to issue a request for comments on ways that it could use its newly granted authority to reduce the burden of third party testing, and cited several of its own suggestions in the process. In accordance with H.R. 2715, the CPSC issued this request for comments in the *Federal Register*, seeking suggested ways to reduce the cost of third party testing requirements consistent with assuring compliance with any applicable consumer product safety rules, bans, standards, or regulations.

AAFA RECOMMENDATIONS

[1] CPSIA (http://www.cpsc.gov/cpsia.pdf)
[2] H.R. 2715 (http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.2715:)

H.R. 2715 created seven categories for ways that third party testing burdens can be reduced. In an effort to organize our comments we will be listing those seven categories and placing each suggestion into its related area. Listed below are the categories laid out by H.R. 2715 on which AAFA offers comments:

The extent to which modification of the certification requirements may have the effect of reducing redundant third party testing by or on behalf of two or more importers of a product that is substantially similar or identical in all material respects.

AAFA Recommendation: Make clear that an item that is exempt from testing does not require a GCC.

The CPSC should make clear, with a guidance document, that no certification is required when an item is exempt from testing, including but not limited to items exempt under the *Flammable Fabrics Act* (FFA). Based on past CPSC guidance and language, AAFA believes that, in the case of the FFA, if a garment is exempt from testing then there should be no requirement to submit a GCC. The burden of paperwork has been one that has always coincided with the burden of testing, and making a clear and concise statement that will eliminate a large paperwork burden as well as relieve a lot of confusion for manufacturers and retailers alike and will go a long way in bringing clarity to the testing regime.

Such an approach is consistent with several documents that the CPSC has released over the past several years. First, the CPSC's *Statement of Policy: Testing and Certification of Lead Content in Children's Products,* which was issued by the CPSC to provide guidance on the testing and certification of children's products for compliance with the lead content limits established in the CPSIA. In this statement, the CPSC declared that it, "found that certain products, by their nature, will never exceed the lead content limit so those products do not need to be tested and *do not need certifications* to show that they comply with the law." (emphasis added) After listing the products, of which many natural and synthetic fibers are included, it goes on to state, "The products on this list are all things the Commission has determined do not contain lead over 100 ppm, which is within the allowable 300 ppm limit. Thus, they will comply with the law (and must always comply) and, therefore, *do not need testing and certification*."[3] (emphasis added)

The second document is the *Statement of Policy: Testing of Component Parts With Respect To Section 108 of the Consumer Product Safety Improvement Act*. This statement was created in order to provide guidance on complying with the Phthalate standard required by the CPSIA. This statement contains a list, which again includes many natural and synthetic fibers, that are, "Examples of materials that do not normally contain phthalates and, therefore *might not require testing or certification*."[4] (emphasis added)

Lastly, the CPSC Small Business Ombudsman published a set of Frequently Asked Questions (FAQ) that includes the question, "If all of the component parts of my product are inaccessible or else satisfy the lead determinations, am I still required to issue a children's product certificate?" In the response, the Ombudsman describes that, "If, however, your children's product is wholly composed of components that satisfy the determinations and/or satisfy the determinations on inaccessibility, and there are no other applicable children's product safety rules, then *you do not have to issue a children's product certificate*"[5] (emphasis added)
Based on these three documents, we believe there is significant evidence that the CPSC has supported the position that no certification is required when testing is not required, and we request that the CPSC make approve this position specifically with respect to the FFA.

The extent to which evidence of conformity with other national or international governmental standards may provide assurance of conformity to consumer product safety rules, bans, standards, or regulations applicable under this Act.

AAFA Recommendation: Interpret the definition of a child care article to exclude sleepwear.

[3] http://www.cpsc.gov/about/cpsia/leadpolicy.pdf
[4] http://www.cpsc.gov/about/cpsia/componenttestingpolicy.pdf
[5] http://www.cpsc.gov/info/toysafety/leadfaq.html#assurances

CPSC staff has issued several documents since enactment of the CPSIA that include sleepwear in the definition of child care articles - guidance by the CPSC General Counsel in 2008[6] and a letter on loungewear enforcement at the end of 2011.[7] The practical result of these decisions is that sleepwear (and presumably related garments including loungewear) is subject to testing and certification requirements for certain phthalates. AAFA believes inclusion of sleepwear in this definition is incorrect and that such a decision leads to unnecessary testing costs for phthalates in this category of garments.

The *Merriam-Webster* definition of "facilitate" is "to make easier: to help bring about"[8]. Children's sleepwear, under this definition, is not intended to facilitate sleep and therefore should not be included in the definition of a child care article under the requirements for phthalate testing. Although one may be tempted to reach the conclusion that sleepwear facilitates sleep because the word "sleepwear" contains the word "sleep," sleepwear in itself does not facilitate sleep in any manner. It is axiomatic that other articles of clothing, such as playwear, do not facilitate being awake. Likewise, it is difficult, if not impossible, to reach a conclusion that sleepwear facilitates being asleep. Indeed, most individuals can probably find multiple examples where they had difficulty falling asleep wearing sleepwear or difficulty staying awake while wearing other garments.

We note that the CPSC itself, with respect to flammability of children's sleepwear, the CSPC has developed policies that reflect a risk analysis that go beyond the simple name of the garment. For more than 15 years, the CPSC has considered loungewear to be sleepwear even the children can do more than sleeping in loungewear. Likewise, the CPSC exempts underwear from the sleepwear standard even though children can sleep in their underwear. The point here is that an examination of the risk profile of the garment itself, not a narrow fixation on the name, should determine whether the article is included in the standard and subject to testing.

The context of the child care phthalate ban is also critical to understanding why it is inappropriate to include sleepwear in the definition of child care articles. In that ban, Congress defined child care articles as those that are intended by the manufacturer to "facilitate sleep or the feeding of children age 3 and younger, or to help such children with sucking or teething."[9] The concept of facilitating sleep in this context involves articles that children suck in order to fall asleep, such as a pacifier. The common denominator of these actions is mouthing article that might contain one of the banned phthalates. Clearly, sleepwear, by any examination, is not an article intended to be associated with mouthing. Moreover, the feature in sleepwear that was cited by the General Counsel in her letter in 2008, and which is likewise the only feature ever noted by CPSC staff, is the non-slip pad that is sometimes found on the bottom of kids' footed pajamas. Such non-slip pads are specifically intended to facilitate walking, further distancing such garments from the sleep facilitation context.

Further, the phthalate ban in the CPSIA is ultimately based on a nearly identical ban that was enacted in the European Union (EU). Using virtually identical terms, the EU has issued guidance on child care articles, explaining that it does not consider sleepwear to facilitate sleep. The EU guidance states, "The main purpose of pyjamas is to dress children when sleeping and not to facilitate sleep. Pyjamas should therefore be regarded as textiles and, like other textiles, do not fall under the scope of the Directive."[10] We understand that Canada, working with the industry and stakeholders, is working on a similar approach.

AAFA Recommendation: More aggressive use of CPSC preemption to ensure better alignment among different regulatory regimes.

A large and ever expanding issue that is affecting all US industries is the drastic increase in state implementation of individual product safety regulations. Whether it is reporting or labeling there has been an emergence of many separate regulations which differ drastically, and in many cases contradict one another. It is becoming increasingly difficult and nearly impossible for a company who has all the necessary resources, much less smaller businesses, to comply with each and every regulation. We are only in the beginning stages of what appears to be a wave of state regulations that ignore and circumvent what

[6] http://www.cpsc.gov/library/foia/advisory/321.pdf
[7] http://www.cpsc.gov/cpscpub/prerel/prhtml12/12072.html?tab=news
[8] http://www.merriam-webster.com/dictionary/facilitate
[9] See section 108 of the CPSIA. http://www.cpsc.gov/cpsia.pdf
[10] http://ec.europa.eu/enterprise/sectors/toys/files/gd008_en.pdf

Congress did when it enacted the CPSIA and what the CPSC has done in interpreting and implementing the CPSIA.

The Commission has spoken at great length on the goals of harmonizing international regulations, especially with Canada and Mexico, and we strongly encourage the CPSC to continue these efforts, but as it stands we are losing the harmonization fight within our own country. Current and planned regulations are numerous and growing including: Washington State's Children's Safe Product Act; Illinois Lead Labeling Law; California's Proposition 65 and Green Chemistry Acts; the individual, and substantially different cadmium bans in California, Connecticut, Illinois, Maryland, Minnesota, and Washington; Wisconsin and New York's drawstring regulations; and much more. It is becoming a minefield of compliance issues and companies are having trouble avoiding violating one regulation in an attempt to comply with another. In the process, testing costs are increasing. As we continue to grow and integrate into a global marketplace the US regulatory marketplace is become more and more fragmented and disconnected. The CPSC needs to be more aggressive in using its authority to work with local and state legislators and regulators to ensure that all new regulations created are in sync with national regulations and that testing requirements flow from federal requirements to minimize testing costs.

AAFA Recommendation: Third party testing requirements specified in the Consumer Product Safety Act (CPSA), as amended by the Consumer Product Safety Improvement Act (CPSIA), do not extend to children's products subject to general product safety requirements like 16 CFR 1610.

When Congress wrote the CPSIA, it made a clear effort to differentiate between general product safety standards and children's product safety standards. For example, Section 14(a)(3) of the CPSIA includes a timeline to accredit third party conformity assessment bodies to test children's products for compliance with lead paint, cribs and pacifiers standards, small parts, children's metal jewelry standard, baby bouncers standard, walkers and jumpers standard, and all other children's product safety rules. Logically, "other" children's product safety rules include standards specifically targeting children's products like those for toys or bicycle helmets, or the ban on phthalates in child care articles. These *children's* product safety standards can be differentiated from product safety standards applicable to all consumer products such as the *Flammable Fabrics Act* (FFA).

The CPSC took a step in the right direction by reserving Subpart B in *16 CFR 1107 Testing and Labeling Pertaining to Product Certification*[11], but there are still many areas where the CPSC has created overly burdensome testing and paperwork requirements in regards to general product safety rules. By applying third party testing under the CPSIA to a general product safety rule (such as 16 CFR 1610) it is requiring redundant testing that does not increase the safety of the product. The CPSC is also creating contradictory requirements in several areas such as the periodic testing plan, which is already incorporated in the FFA and requires periodic testing every 5 years, and the remedial action plan.

Application of third party testing to the portion of children's products covered by the FFA also bifurcates the FFA into a double standard, creating confusion and adding costs. Before this decision, companies could follow one set of testing rules for this standard. Now, companies have to understand two separate set of testing rules for the same standard (notwithstanding the fact that the underlying testing procedures in the FFA are still intact).

Furthermore, requiring manufacturers to go beyond the testing requirements laid out in 16 CFR 1610 to demonstrate compliance in effect amends the FFA regulation violating the requirements laid out in Section 4(b) of the FFA regarding the proper way in which the FFA is to be amended. Any amendment to an FFA standard, "shall be *based on findings*" that the amendment, "*is needed* to adequately protect the public against unreasonable risk of the occurrence of fire leading to death, injury, or significant property damage, *is reasonable*, technologically practicable, and *appropriate*" [12](emphasis added). The CPSC has *not* demonstrated that third party testing is needed, and the burden companies subsequently take on is *not* reasonable; therefore, the CPSC has not made any findings that amending 16 CFR 1610's testing requirements is appropriate.

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[11] http://www.cpsc.gov/businfo/frnotices/fr12/certfinal.pdf
[12] SEC. 4. [15 U.S.C. § 1193] (b) (http://www.cpsc.gov/businfo/ffatext.html#sec4)

Nothing in the FFA suggests there needs to be such a differentiation between adult and children's clothing. Moreover, the CPSIA offers little to suggest that such a differentiation was intended for the FFA. There is no evidence that Congress wanted to apply the third party testing requirements to children's products subject to general product safety standards. In addition, when Congress created the age distinction in the CPSIA, it was addressing a concept known as the so-called "family toy chest" where toys are simultaneously shared among different age groups. In contrast, clothes are not shared among different children's age groups, but are instead handed down as younger children age.

The extent to which technology, other than the technology already approved by the Commission, exists for third party conformity assessment bodies to test or to screen for testing consumer products subject to a third party testing requirement.

AAFA Recommendation: Build into the 100ppm limit a tolerance factor to accommodate inter-lab variability, based upon a correlation exercise among all CPSIA-certified labs.

The CPSC should incorporate a *tolerance factor* into the 100ppm lead limit to accommodate inter-laboratory variability. The variability of inter-laboratory testing for lead in substrate and paint at the 100ppm level is not a new issue, and is one that the CPSC has received hundreds of thousands of data points from AAFA, our members, and several other sources including their own findings released in their briefing package on the *Technological Feasibility of 100 ppm for Lead Content*.[13] In the briefing package, the staff recognized and discussed the existence of material and testing variability. There have also been several studies of over 100 different laboratories performed by the Institute for Interlaboratory Studies on the *Results of Proficiency Test Total lead in Paint*.[14] In one report published in 2010, the Institute found that when testing a component at 360ppm there was an acceptable level of error of 78ppm with outliers ranging from 110ppm below to 212ppm above. In a 2011 report the Institute made the determination that, "Total lead determination on this sample, at a concentration level of 106mg/kg, may be somewhat problematic." AAFA members are also involved with the work that the CPSC has received from the Global Apparel, Footwear and Textile Initiative (GAFTI), which is working to pinpoint the causes of the testing variability.

With all this data it is hard to ignore the existence and influence of inter-lab variability and while industry is striving to minimize its effects, it is impossible to eliminate all variability at the 100 ppm level. It is with this reasoning that we suggest the CPSC implementing a *tolerance factor* for the 100ppm lead limit. Such a factor would not change the lead limit – which would stay at 100ppm – but would accommodate for the inevitable variability that will always occur in testing, contributing to a net reduction in testing costs.

We also recommend that the CPSC should have, as an ongoing component of certifying laboratories, a regular correlation exercise by laboratory location to ensure that the *tolerance factor* level of a substance is reasonable and practicable based on the testing capabilities and accuracies of the CPSIA-certified laboratories.

Companies should have a very high degree of certainty that the *tolerance* level will never be violated by test results that a particular lab might achieve because of poor laboratory correlation. This practice will provide both the CPSC and all industries with the assurance that their tests are being performed correctly and the results are as accurate as possible.

AAFA Recommendation: Allow Third Party XRF testing to be used to screen products before requiring far more expensive chemical testing.

The advantages and disadvantages of XRF testing are well known by the CPSC who has hosted many hearing and discussions over the possible uses of XRF to benefit small batch manufacturers. The hindering factor of XRF testing continues to be that it has not always been reliable enough to give accurate readings under 100ppm lead level. While XRF technology is quickly improving and becoming

[13] http://www.cpsc.gov/library/foia/foia11/brief/lead100tech.pdf
[14] http://www.iisnl.com/home_en.html

more accurate it is still not capable of being 100 percent reliable for an accurate result. It has, however, shown to be very capable for determining if a product requires further testing.

We believe that the CPSC has received enough scientific evidence to allow for XRF testing to be used as a screening process for further testing. By allowing a third party lab to accept XRF results for lead under 40ppm the CPSC could drastically reduce the cost of third party testing by reducing the need for further wet chemistry testing while still maintaining the high degree of assurance of compliance.

Other techniques for lowering the cost of third party testing consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations.

AAFA Recommendation: Fix the determination of fabric as a barrier for inaccessible parts.

The CPSC must fix the determination on inaccessibility and fabric barriers that renders it useless for footwear and clothing. In their guidance to industry on "Inaccessible Component Parts for Children's Products Containing Lead" the CPSC correctly stated that, "unlike other children's products that have lead-containing components that are accessible, children will not touch the lead containing component with the hands or fingers if the component is enclosed or encased in fabric." The CPSC also mentioned that "The Commission believes that, in general, fabric coverings may be considered barriers to physical contact with underlying materials…"[15] Unfortunately, the CPSC then used the definition of "a toy that can be placed in a child's mouth" for the phthalate ban under the CPSIA[16] to formulate their guidance for inaccessibility of a fabric barrier. The problem with this, as with many other regulations the apparel and footwear industries are subject to, is that apparel and footwear are not toys. While being worn as intended it is impossible for a child to swallow an article of clothing or a shoe and therefore the one-size-fits-all definition of an inaccessible toy does not apply to these categories.

Due to this incorrect assumption, the CPSC declared that, "For fabric-covered children's products, an additional test to determine whether any part **in one dimension** is smaller than 5 centimeters should be performed to see if it can be placed in the mouth. If mouthing or swallowing of a component part could occur, the material beneath the fabric covering is considered to be accessible to a child." This requirement renders this determination useless for our industry. It is impossible for any apparel or footwear article to be greater than five centimeters **in all dimensions**, which in turn makes this exemption, which was created amid commission support with the apparel industry in mind, invalid for any product created by an apparel or footwear manufacturer.

Determining that fabric is a proper inaccessibility barrier – as practical experience suggests – would lower testing costs in the apparel and footwear industry by eliminating testing requirements for certain components that will be covered by fabric once the article is made.

AAFA Recommendation: Fix the boundaries of lead in fabric determination (prints, screen prints, etc.).

On August 26, 2009, the CPSC published in the *Federal Register* their finding that textiles (dyed or undyed) cannot possibly contain lead. In its explanation of the ruling the CPSC stated that,

> "We also examined the dyes used on textiles. [Refs. 1 and 3]. Dyes are organic chemicals that can be dissolved and made soluble in water or another carrier so they can penetrate into the fiber. Dyes can be used in solutions or as a paste for printing. Commercial dyes are classified by chemical composition or method of application. Many dyes are fiber specific. For example, disperse dyes are used for dyeing polyester, and direct dyes are used for cellulosic fibers. Dyes can be applied to textiles at the fiber, yarn, fabric, or finished product stage. Dye colorants are not lead based. Although not typical, some dye baths may contain

[15] http://www.cpsc.gov/about/cpsia/inaccessiblefr.pdf
[16] CPSIA §108(e)(2)(B)

> lead. However, even if the dye bath contains lead, the colorant that is retained by the finished textile after the rinsing process would not contain lead above a non-detectable lead level. In contrast to dyes, pigments are either organic or inorganic. Pigments are insoluble in water, are applied to the surface of textile materials, and are held there by a resinous binder. Binders used with pigments for textiles are non-lead based. Processes that are lead-based are used for some industrial textiles that require a greater level of colorfastness or durability, but are not typically intended for apparel textiles. Although most pigments do not contain lead, there may be some lead based paints and pigments on non-textile materials that may be directly incorporated into textile products or added to the surface of textiles, such as decals, transfers, and screen printing."[17]

The CPSC determination goes further in including the term "prints" with the term "screen prints" as operations that are not inherently lead free. While we believe the CPSC was focusing more on the term "screen prints," the inclusion of the term "prints" has captured many inherently lead free operations. The resulting confusion has been costly and caused much unnecessary testing.

While we still believe that even when using any form of pigment dye, apparel items will not contain lead over the 100ppm limit, and that basing a determination on apparel off of an industrial application is an unfair and unreasonable conclusion, we do understand the Commission's concern with some forms of screen printed items. This being said, the CPSC caused much unnecessary confusion when it excluded from "Textiles", under new paragraph § 1500.91(d)(7), any textiles that are, "after-treatment applications, including screen prints, transfers, decals, or other prints."[18] There is a distinct difference between screen prints and "other prints", which includes several forms of dyeing that fall distinctly under the category of exempted items. We ask that the CPSC relieve this confusion by revising the determination to make clear that "other prints" are determined to be lead free unless specifically identified otherwise.

AAFA Recommendation: Provide a small batch exemption for all manufactures producing a small batch.

We believe that the CPSC has the authority to provide a small batch exemption from third party testing for large manufacturers producing a small batch. In their guidance to industry on the small batch exemption, the CPSC explains that while all manufacturers are required to third party test for certain children's products, such as pacifiers, toddler beds, and cribs, small batch manufacturers are not required to do so for other types of children's products, which include electronically operated toys, mattresses, and namely, children's apparel.[19]

"Small batch manufacturers", in this context, are defined by H.R. 2715 and by the CPSC as, "a manufacturer that had no more than $1,000,000 in total gross revenue from sales of all consumer products in the previous calendar year", and manufactures less than 7,500 units of the product qualifying for the small batch exemption. The spirit of the exemption would appear to be to reduce the burden of third party testing when a small batch of products is being manufactured. However, as it currently stands, the exemption only applies to manufacturers whose total gross revenue is less than $1 million for all their products. Many manufacturers, while they may have a total gross revenue exceeding $1 million, have certain product lines that consist of very small batches. To require third party testing on these small batches of products can incur prohibitive costs and reduce the ability of the manufacturer to create those product batches that is identical to those experienced by small batch manufacturers. Regardless of whether a manufacturer is large or small, requiring an expensive third party testing process on, for example, a 100-item specific product batch, takes away a large chunk of the small revenue received from this small product batch, and goes against the spirit of the exemption not to mention the spirit of American ingenuity. Requiring third party testing on such small production batches will severely hinder a large company's ability to test new markets and create new and innovative products that could advance America's technology and global competitiveness.

We believe that the CPSC can fashion a small batch exemption for larger companies – akin to the small batch exemption from H.R. 2715. We understand the exemption in H.R. 2715 only applies to small batch

[17] http://www.cpsc.gov/businfo/frnotices/frog/leadcontent.pdf
[18] http://www.cpsc.gov/businfo/frnotices/frog/leadcontent.pdf
[19] http://www.cpsc.gov/info/toysafety/smallbatch.html

manufacturers but the authority also given to them by H.R. 2715 to create a testing exemption for a batch of products for which the cost of testing would otherwise be prohibitive and ineffective.

AAFA Recommendation: Apply the inaccessibility exemption that pertains to lead in substrate to also apply to lead in paint.

Section 101(b) (2) (A) of the CPSIA states that, "[a] component part is not accessible under this subparagraph if such component part is not physically exposed by reason of a sealed covering or casing and does not become physically exposed through reasonably foreseeable use and abuse of the product."[20] The CPSC has made several determinations and provided extensive guidance in terms of inaccessibility for lead in substrate, which continue to dictate whether third party testing is required. However, the CPSC has still never applied this exemption to lead in paint. In terms of inaccessibility and the absorption of lead, there is no difference between lead in paint and lead in substrate when a CPSC accepted barrier is involved.

The perfect example of this situation is a component inside of a children's shoe. One of the most popular forms of children's shoes is one that contains painted figures of a child's favorite TV show or movie characters on the side of the shoe, which is then covered over by a clear plastic coating to maintain a smooth feel of the shoe. These shoes are just as protected and just as safe as any product that falls under the inaccessibility exemption for lead in substrate, but they are still required to perform expensive third party testing due to the omission of an inaccessibility exemption for lead in paint.

Because the determination that children's products bearing lead-containing paint are hazardous was made by CPSC in a regulation, not by Congress in a statute, CPSC has the authority to change the determination. The CPSIA did revise the regulation's numeric threshold (changing 0.06% to 0.009%); but CPSC could still revise its regulation to state that children's products bearing paint with the specified amount of lead "in accessible components" are banned hazardous substances. These items are just as deserving of relief from the burden of third party testing as those that enjoy relief from phthalates and lead in substrate, and the CPSC has the authority and understanding to provide this relief without any reduction in product safety.

AAFA Recommendation: The CPSIA should not require that all periodic continuing testing of children's products needs be done by a third-party lab.

Section 102(a)(2) of the CPSIA states that,

> "Effective on the dates provided in paragraph (3), before importing for consumption or warehousing or distributing in commerce any children's product that is subject to a children's product safety rule, every manufacturer of such children's product" which must be based on, "sufficient samples of the children's product, or samples that are identical in all material respects to the product, to a third party conformity assessment body accredited under paragraph (3) to be tested for compliance with such children's product safety rule."

This is the section of the CPSIA on which all third party testing requirements are based.

Section 102(b)(d)(2) states that the CPSC should:

> "(A) initiate a program by which a manufacturer or private labeler may label a consumer product as complying with the certification requirements of subsection (a); and
>
> '(B) establish protocols and standards—
>
> '(i) for ensuring that a children's product tested for compliance with an applicable children's product safety rule is subject to testing periodically and when there has been a material change in the product's design or manufacturing process, including the sourcing of component parts;

[20] http://www.cpsc.gov/about/cpsia/inaccessiblefr.pdf

'(ii) for the testing of random samples to ensure continued compliance;

'(iii) for verifying that a children's product tested by a conformity assessment body complies with applicable children's product safety rules; and

'(iv) for safeguarding against the exercise of undue influence on a third party conformity assessment body by a manufacturer or private labeler."[21]

This is the one and only section of the CPSIA that dictates on what a periodic testing plan should be based. There is no language in 102(b)(d)(2) that states all of this must be done by a third party testing lab. Each and every one of these requirements can be met by an individual company that is able to perform its own periodic in-house testing. By following the language of the law and removing the requirements for periodic testing to be performed by a third party testing lab the CPSC can drastically reduce the cost of testing without in anyway compromising the safety and integrity of a children's product. To clarify, this does not remove the requirement that third party testing is not done. It only removes the requirement – which is not found in statute – that *periodic* testing be performed by a third party.

AAFA Recommendation: The decision to eliminate the three temporary phthalates from being banned needs to be expedited or the test requirement need to be stayed until a final determination is made.

AAFA members have been on the front lines of removing the harmful phthalates from any and all accessories and items that may include them, but as the CPSC knows, phthalate testing is extraordinarily expensive. While the Chronic Hazard Advisory Panel (CHAP) is working very diligently and attentively to ensure that the correct studies, facts and sciences are used while determining the risks involved with the three phthalates being studied, companies are left wondering when a decision will be made and how long it will be before any alternatives for those phthalates are temporarily banned for study as well. By working with industry to come to a final decision on the three phthalates the CPSC could cause millions of dollars in savings in testing while at the same time giving industry the assurance that there is a safe alternative to the banned phthalates.

AAFA Recommendation: Risk potential and level of risk should be taken into consideration. Evaluations should be reasonable.

All product safety regulations should be designed to mitigate and protect against specific risks and be clearly supported by the data and facts. Understanding new safety regulations involves understanding how they will address the specific hazard. Without that, the standards seem arbitrary and that perception will undermine the standards' effectiveness and acceptance. The footwear and apparel industry is still chafing under many of the CPSIA rules that appear designed to address product safety concerns with toys. The same risks that apply to toys do not apply to apparel and therefore it is unjust to apply the same regulations.

It is important to also use risk potential when doing a retrospective review. If an unintended consequence is the result of a broad regulation that shows no evidence of mitigating risk it should be examined, and if determined to have shown no history of risk it should be removed or exempted from the rule. Many of the suggestions listed here today were never considered to be a feasible outcome of the requirements created by Congress in the passing of the CPSIA. While some unexpected risks can be prevented by the CPSIA, many more nonexistent risks were created by it. These nonexistent risks, many of which are listed in these comments, have cost millions of dollars to American companies without providing any increase in safety or protection for our nation's youth.

CONCLUSION

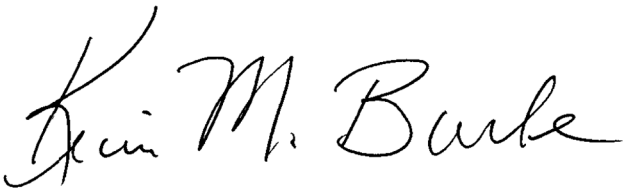
AAFA and its members share the CPSC's goal of improving product safety and public health, particularly for our most vulnerable citizens. We are pleased to have the opportunity to work closely with the CPSC

[21] CPSIA102(b)(d)(2)

moving forward on the reduction of third party testing burdens along with several other key issues that face the CPSC. We are mindful of the many challenges related to the CPSIA and to the on-going work of the CPSC. We believe there are many opportunities for further collaboration between AAFA and the CPSC, and we look forward to working with you to create a stable, predictable, risk-based regulatory environment that can be clearly understood, followed and complied with.

Thank you for your time and consideration in this matter. Please contact Michael McDonald at 703-797-9052 or by e-mail at mmcdonald@wewear.org if you have any questions or would like additional information.

Please accept my best regards,



Kevin M. Burke
President and CEO

- ☐ An Item that is Exempt from Testing Should not Require a General Certificate of Conformity
- ☐ The Definition of a Child Care Article Should Exclude Sleepwear
- ☐ Use a More Aggressive CPSC Preemption to Ensure Better Alignment Among Different Regulatory Regimes
- ☐ Third Party Testing Requirements by CPSIA, Should not Extend to Children's Products
- ☐ A Tolerance Factor is Needed to Accommodate Inter-Lab Variability
- ☐ Allow Third Party XRF Testing to Screen Products for Compliance
- ☐ Fix the Determination of Fabric as a Barrier for Inaccessible Parts
- ☐ Fix the Boundaries of Lead in Fabric Determination
- ☐ Provide a Small Batch Exemption for Larger Manufactures Producing a Small Batch
- ☐ Apply an Inaccessibility Exemption That Pertains to Lead in Paint
- ☐ The CPSIA Does not Require That all Periodic Testing Of Children's Products Needs to be Done by a Third-Party Lab
- ☐ Expedite the Elimination of the Three Temporary Phthalates from Being Banned
- ☐ Risk Potential and Level of Risk Should Always be Taken into Consideration and Evaluations Should be Reasonable

An Item that is Exempt From Testing Should not Require a General Certificate of Conformity

BACKGROUND	There have been several documents released by the CPSC on the issue of exempt product testing. 1.) CPSC's *Statement of Policy: Testing and Certification of Lead Content in Children's Products,* which states that "certain products, by their nature, will never exceed the lead content limit so those products do not need to be tested and do not need certifications to show that they comply." 2.) *Statement of Policy: Testing of Component Parts With Respect to Section 108 of the Consumer Product Safety Improvement Act*, which provides guidance on complying with the Phthalate standard required by the CPSIA, and a list which includes many natural and synthetic fibers that do not contain phthalates, and therefore "might not require testing or certification." 3.)FAQ provided by the Small Business Ombudsman that includes the question, "If all of the component parts of my product are inaccessible or else satisfy the lead determinations, am I still required to issue a children's product certificate?" In the response, the Ombudsman describes that, "If, however, your children's product is wholly composed of components that satisfy the determinations and/or satisfy the determinations on inaccessibility, and there are no other applicable children's product safety rules, then you do not have to issue a children's product certificate"
PROBLEM	Each time a manufacturer or private labeler has to create a GCC it is a cost and a burden on their time. Also, the mixed guidance that industry has received from the CPSC has companies confused regarding the requirements for filing a GCC. This problem has not only occurred as a result of CPSIA, but also as a result of recent CPSC guidance on the FFA. The problem is a simple one that can be fixed without any effect on product safety or compliance.
SOLUTION	The CPSC should issue a clear and concise statement that an item that is exempt from testing does not require a GCC. Clarify the certification requirements to reflect that product that is exempt from testing does not require a GCC will decrease the amount of confusion among manufacturers and retailers as well as significantly reducing the paperwork burden. By issuing such a statement, the CPSC will go a long way in bringing clarity to the testing regime.

The Definition of a Child Care Article Should Exclude Sleepwear

BACKGROUND	CPSC staff has issued several documents since the enactment of the CPSIA that include sleepwear in the definition of child care articles - guidance by the CPSC General Counsel in 2008 and a letter on loungewear enforcement at the end of 2011. The practical result of these decisions is that sleepwear (and presumably related garments including loungewear) is subject to testing and certification requirements for certain phthalates. The feature in sleepwear that was cited by the General Counsel in her letter in 2008, and which is likewise the only feature ever noted by CPSC staff, is the non-slip pad that is sometimes found on the bottom of kids' footed pajamas. Such non-slip pads are specifically intended to facilitate walking, further distancing such garments from the sleep facilitation context. The *Merriam-Webster* definition of "facilitate" is "to make easier: to help bring about." Children's sleepwear, under this definition, is not intended to facilitate sleep and therefore should not be included in the definition of a child care article under the requirements for phthalate testing. The phthalate ban in the CPSIA is ultimately based on a nearly identical ban that was enacted in the European Union (EU). Using virtually identical terms, the EU has issued guidance on child care articles, explaining that it does not consider sleepwear to facilitate sleep. The EU guidance states, "The main purpose of pyjamas is to dress children when sleeping and not to facilitate sleep. Pyjamas should therefore be regarded as textiles and, like other textiles, do not fall under the scope of the Directive."
PROBLEM	The CPSC incorrectly includes sleepwear under the definition of child care articles, which leads to unnecessary testing costs for phthalates in this category of garments. Although one may be tempted to reach the conclusion that sleepwear facilitates sleep because the word "sleepwear" contains the word "sleep," sleepwear in itself does not facilitate sleep in any manner. It is axiomatic that other articles of clothing, such as playwear, do not facilitate being awake. Likewise, it is difficult, if not impossible, to reach a conclusion that sleepwear facilitates being asleep. Indeed, most individuals can probably find multiple examples where they had difficulty falling asleep wearing sleepwear or difficulty staying awake while wearing other garments.
SOLUTION	An examination of the risk profile of the garment, not a narrow fixation on the name, should determine whether the article is included in the standard and subject to testing. The definition of a child care article should exclude sleepwear.

Use a More Aggressive CPSC Preemption to Ensure Better Alignment Among Different Regulatory Regimes

BACKGROUND	The Commission has spoken on the goals of harmonizing international regulations, especially with Canada and Mexico. However, the proliferation of current and planned regulations at the state and local level within the United States, including Washington State's Children's Safe Product Act; Illinois Lead Labeling Law; California's Proposition 65; several different cadmium bans in California, Connecticut, Illinois, Maryland, Minnesota; and state Drawstring regulations, has made it next to impossible for companies to comply with one regulation while at the same time not violating another.
PROBLEM	Due to the vast amount and variety of separate state regulations (with 28 states introducing individual toxic legislation in 2012) the United States is becoming more disconnected from the global marketplace. This implementation of state-level product safety regulations, whether they involve reporting or labeling, has created a cacophony of contradictory issues.
SOLUTION	The CPSC needs to implement a more aggressive harmonization initiative to work with local and state legislators to ensure all new regulations are in sync with national regulations and that standardized testing requirements flow from federal requirements to minimize testing costs.

Third Party Testing Requirements by CPSIA, Should not Extend to General Product Safety Requirements

BACKGROUND	When Congress wrote the CPSIA, it made a clear effort to differentiate between general product safety standards and children's product safety standards. The CPSIA determined children's product safety standards to include lead paint, cribs and pacifiers standards, small parts, children's metal jewelry standards, baby bouncer standards, walkers and jumpers standards, and all other children's product safety rules. These children's product safety standards can be differentiated from product safety standards applicable to all consumer products such as the *Flammable Fabrics Act* (FFA).
PROBLEM	Application of third party testing to the portion of children's products covered by the FFA also bifurcates the FFA into a double standard, creating confusion and adding costs. Before this decision, companies could follow one set of testing rules for this standard. Now, companies have to understand two separate sets of testing rules for the same standard (notwithstanding the fact that the underlying testing procedures in the FFA are still intact). Furthermore, requiring manufacturers to go beyond the testing requirements laid out in 16 CFR 1610 to demonstrate compliance in effect amends the FFA regulation, which violates the requirements laid out in Section 4(b) of the FFA regarding the proper way in which the FFA is to be amended. Any amendment to an FFA standard, "shall be based on findings" that the amendment, "is needed to adequately protect the public against unreasonable risk of the occurrence of fire leading to death, injury, or significant property damage, is reasonable, technologically practicable, and appropriate." The CPSC has not demonstrated that third party testing is needed, and the burden companies subsequently take on is not reasonable; therefore, the CPSC has not made any findings that amending 16 CFR 1610's testing requirements is appropriate or necessary.
SOLUTION	Nothing in the FFA suggests there needs to be such a differentiation between adult and children's clothing. Moreover, the CPSIA offers little to suggest that such a differentiation was intended for the FFA. There is no evidence that Congress wanted to apply the third party testing requirements to children's products subject to general product safety standards. Therefore, the CPSC should remove the third-party testing requirement for children's products under FFA. By doing so, the CPSC can drastically reduce the cost of testing without compromising the safety and integrity of a children's product.

A Tolerance Factor is Needed to Accommodate Inter-Lab Variability

BACKGROUND	The variability of inter-laboratory testing for lead in substrate and paint at the 100ppm level is not a new issue, and it is an issue for which the CPSC has received hundreds of thousands of data points from AAFA, our members, and several other sources, including a briefing package from the CPSC's own staff, and studies done by the Institute for Interlaboratory Studies (IIS). In the CPSC briefing package, the staff recognized and discussed the existence of material and testing variability. The IIS study also emphasizes this fact in their study *Results of Proficiency Test Total lead in Paint*. In one report published in 2010, the Institute found that when testing a component at 360ppm there was an acceptable level of error of 78ppm with outliers ranging from 110ppm below to 212ppm above. In a 2011 report, the Institute made the determination that, "Total lead determination on this sample, at a concentration level of 106mg/kg, may be somewhat problematic."
PROBLEM	With all of the data that has been provided, it is hard to ignore the existence and prevalence of inter-lab variability. While industry is striving to minimize its effects, it is impossible to eliminate all variability at the 100 ppm level.
SOLUTION	The CPSC must look into implementing a de minimis exemption for the 100ppm lead limit. The purpose would not be to increase the lead limit, but to accommodate for the inevitable variability that will always occur in testing. CPSC should conduct an ongoing component of certifying laboratories, an annual correlation exercise by laboratory location to ensure that the de minimis level of substance is reasonable and practicable based on the testing capabilities and accuracies of the CPSIA- certified laboratories. The Global Apparel, Footwear and Textile Initiative (GAFTI), is working hard to pinpoint the causes of the test variability and we encourage the CPSC to continue their collaboration with GAFTI.

Allow Third Party XRF Testing to Screen Products for Compliance

BACKGROUND	X-Ray Fluorescence (XRF) is a non-destructive method of testing for lead content. An XRF is a portable x-ray machine that is frequently used by all members of the product safety world, including by CPSC and CBP officials, for screening materials at the port. The advantages and disadvantages of XRF testing are well known by the CPSC, which has hosted many hearings and discussions regarding the possible uses of XRF to benefit small batch manufacturers. The hindering factor of XRF testing continues to be that it has not always been reliable enough to give accurate readings under the 100ppm lead level. While XRF technology is quickly improving and becoming more accurate it is still not capable of being 100 percent reliable for an accurate result. It has, however, proven to be very capable for determining if a product requires further testing.
PROBLEM	The cost of Wet Chemical testing continues to be high. Meanwhile, as the CPSC has mentioned on several occasions, XRF technology can be used as an effective screening device.
SOLUTION	We believe that the CPSC has received enough scientific evidence to allow for XRF testing to be used as a screening process for further testing. By allowing a third party lab to accept XRF results for lead that are either non-detect or preferably, under a certain variance, the CPSC could drastically reduce the cost of third party testing by reducing the need for wet chemistry testing while still maintaining the high degree of assurance for compliance.

Fix the Determination of Fabric as a Barrier for Inaccessible Parts

BACKGROUND	In their guidance to industry on "Inaccessible Component Parts for Children's Products Containing Lead" the CPSC stated that "the Commission has revised the final interpretative rule by adding a new Sec. 1500.87(i) to explain that a children's product that is or contains a lead-containing part which is enclosed, encased, or covered by fabric and passes the appropriate use and abuse tests on such covers, is inaccessible to a child unless the product or part of the product in one dimension is smaller than 5 centimeters. The Commission also has renumbered proposed Sec. 1500.87(g), which pertained to the intentional disassembly or destruction of products by children, as Sec. 1500.87(j)." The CPSC also stated that "unlike other children's products that have lead-containing components that are accessible, children will not touch the lead containing component with the hands or fingers if the component is enclosed or encased in fabric." The CPSC also mentioned that "The Commission believes that, in general, fabric coverings may be considered barriers to physical contact with underlying materials…" Unfortunately, the CPSC then used the definition of "a toy that can be placed in a child's mouth" for the phthalate ban under the CPSIA to formulate their guidance for inaccessibility of a fabric barrier. Due to this incorrect assumption, the CPSC declared that, "For fabric-covered children's products, an additional test to determine whether any part **in one dimension** is smaller than 5 centimeters should be performed to see if it can be placed in the mouth. If mouthing or swallowing of a component part could occur, the material beneath the fabric covering is considered to be accessible to a child."
PROBLEM	It is impossible for any apparel or footwear article to be greater than five centimeters **in all dimensions**, which in turn makes this exemption invalid for any product created by an apparel or footwear manufacturer. Apparel and footwear are not toys. While being worn as intended it is impossible for a child to swallow an article of clothing or a shoe and therefore the one-size-fits-all definition of an inaccessible toy does not apply to these categories.
SOLUTION	A component on an article of clothing or shoe which has been made inaccessible by a layer of fabric poses no risk to a child's health. The CPSC does not need to create a new exemption to alleviate this unnecessary burden. The CPSC just needs to modify the inaccessibility exemption that has already been created and make it viable for the industry the exemption was originally intended to help.

Fix the Boundaries of Lead in Fabric Determination

BACKGROUND	On August 26, 2009, the CPSC published in the federal register their finding that textiles (dyed or undyed) cannot possibly contain lead. "We also examined the dyes used on textiles. [Refs. 1 and 3]. Dyes are organic chemicals that can be dissolved and made soluble in water or another carrier so they can penetrate into the fiber. Dyes can be used in solutions or as a paste for printing. Commercial dyes are classified by chemical composition or method of application. Many dyes are fiber specific. For example, disperse dyes are used for dyeing polyester, and direct dyes are used for cellulosic fibers. Dyes can be applied to textiles at the fiber, yarn, fabric, or finished product stage. Dye colorants are not lead based. Although not typical, some dye baths may contain lead. However, even if the dye bath contains lead, the colorant that is retained by the finished textile after the rinsing process would not contain lead above a non-detectable lead level. In contrast to dyes, pigments are either organic or inorganic. Pigments are insoluble in water, are applied to the surface of textile materials, and are held there by a resinous binder. Binders used with pigments for textiles are non-lead based. Processes that are lead-based are used for some industrial textiles that require a greater level of colorfastness or durability, but are not typically intended for apparel textiles. Although most pigments do not contain lead, there may be some lead based paints and pigments on non-textile materials that may be directly incorporated into textile products or added to the surface of textiles, such as decals, transfers, and screen printing."
PROBLEM	The CPSC caused an unnecessary confusion when they excluded from "textiles", any textiles that contain, "after treatment applications, including screen prints, transfers, decals, or other prints. There is a distinct difference between screen prints and "other prints." Other prints include several forms of dyeing that fall distinctly under the category of exempted items. The resulting confusion has been costly and has required a significant amount of unnecessary testing.
SOLUTION	The CPSC should remove this confusion by indicating which "other prints" are not covered by the exemption so the industry may continue to rely on the global knowledge that there is not lead in dyed or undyed fabric.

Provide a Small Batch Exemption for Larger Manufactures Producing a Small Batch

BACKGROUND	"Small batch manufacturers" , are defined by H.R. 2715 and by the CPSC as, "a manufacturer that had no more than $1,000,000 in total gross revenue from sales of all consumer products in the previous calendar year", and manufactures less than 7,500 units of the product that qualifies for the small batch exemption. The spirit of the exemption would appear to be to reduce the burden of third party testing when a small batch of products is being manufactured. However, as it currently stands, the exemption only applies to manufacturers whose total gross revenue is less than $1 million for all their products. Many manufacturers, while they may have a total gross revenue exceeding $1 million, have certain product lines that consist of very small batches.
PROBLEM	Third party testing for these small batches of products forces a manufacturer to incur prohibitive costs. Furthermore, the cost of the third-party testing reduces the ability of the manufacturer to create those product batches that could compete with those produced by small batch manufacturers. Regardless of whether a manufacturer is large or small, requiring an expensive third party testing process on, for example, a 100-item specific product batch, takes away a large chunk of the small revenue received from this small product batch, and goes against the spirit of the exemption. Requiring third party testing on such small production batches will severely hinder a larger company's ability to test new markets and create new and innovative products that could advance America's technology and global competitiveness.
SOLUTION	We believe that the CPSC should fashion a small batch exemption for larger companies – akin to the small batch exemption from H.R. 2715. We understand the exemption in H.R. 2715 only applies to the defined small batch manufacturers, but H.R. 2715 also gave the CPSC the authority to create a testing exemption for a batch of products for which the cost of testing would otherwise be prohibitive and ineffective.

Apply an Inaccessibility Exemption that Pertains to Lead in Paint

BACKGROUND	Section 101(b) (2) (A) of the CPSIA states that, "[a] component part is not accessible under this subparagraph if such component part is not physically exposed by reason of a sealed covering or casing and does not become physically exposed through reasonably foreseeable use and abuse of the product." The CPSC has made several determinations and provided extensive guidance in terms of inaccessibility for lead in substrate, which continue to dictate whether third party testing is required. However, the CPSC has still never applied this exemption to lead in paint. In terms of inaccessibility and the absorption of lead, there is no difference between lead in paint and lead in substrate when a CPSC accepted barrier is involved.
PROBLEM	The perfect example of this situation is a component inside of a children's shoe. One of the most popular forms of children's shoes is one that contains painted figures of a child's favorite TV show or movie characters on the side of the shoe, which is then covered over by a clear plastic coating to maintain a smooth feel of the shoe. These shoes are just as protected and just as safe as any product that falls under the inaccessibility exemption for lead in substrate, but they are still required to perform expensive third party testing due to the omission of an inaccessibility exemption for lead in paint.
SOLUTION	Because the CPSC made the determination that children's products bearing lead-containing paint are hazardous in a regulation, and not by Congress in a statute, CPSC has the authority to change the determination. The CPSIA did revise the regulation's numeric threshold (changing 0.06% to 0.009%); but CPSC could still revise its regulation to apply its inaccessibility standard to lead in paint by stating that children's products bearing paint with the specified amount of lead "in accessible components" are banned hazardous substances. Items with inaccessible components are just as deserving of relief from the burden of third party testing for lead in paint as items with inaccessible components that enjoy relief from phthalates and lead in substrate. The CPSC has the authority and understanding to provide this relief without any reduction in product safety.

The CPSIA Does not Require that all Periodic Testing of Children's Products Needs to Be done by A Third-Party Lab

BACKGROUND	In Section 102(a)(2) of the CPSIA, it states that before importing for consumption, warehousing, or distributing, any children's product subject to a product safety rule must have samples sent to a "third party conformity assessment body…to be tested for compliance with such children's product safety rule." Section 102(b)(d)(2), which is the only section of the CPSIA that dictates what a periodic testing plan should be based on, states that the CPSC should (A) initiate a program by which a manufacturer or private labeler may label a consumer product as complying with the certification requirements of subsection (a); and B) establish protocols and standards— (i) for ensuring that a children's product tested for compliance with an applicable children's product safety rule is subject to testing periodically and when there has been a material change in the product's design or manufacturing process, including the sourcing of component parts; (ii) for the testing of random samples to ensure continued compliance; (iii) for verifying that a children's product tested by a conformity assessment body complies with applicable children's product safety rules; and (iv) for safeguarding against the exercise of undue influence on a third party conformity assessment body by a manufacturer or private labeler."
PROBLEM	Costs of testing are high, and the requirement to have children's products periodically tested by third-party establishments complicates the already expensive process. Furthermore, there is no language in 102(b)(d)(2) that states all periodic testing must be done by a third party testing lab. Each and every one of these requirements can be met by an individual company that is able to perform its own periodic in-house testing as established by a reasonable testing protocol.
SOLUTION	By following the language of the law and removing the requirement that periodic testing be performed by a third party testing lab, the CPSC can drastically reduce the cost of testing without in any way compromising the safety and integrity of a children's product. To clarify, this does not remove the requirement that third party testing is not done. It only removes the requirement – which is not found in statute – that subsequent *periodic* testing on a product be performed by a third party.

Expedite the Elimination of the Three Temporary Phthalates from Being Banned

BACKGROUND	As the CPSC FAQ on phthalates states: "Three phthalates, DEHP, DBP, and BBP, have been permanently prohibited by Congress in concentration of more than 0.1% in "children's toys" or "child care articles." A "children's toy" means a product intended for a child 12 years of age or younger for use when playing, and a "child care article" means a product that a child 3 and younger would use for sleeping, feeding, sucking or teething. Three additional phthalates, DINP, DIDP, and DnOP, have been prohibited pending further study and review by a group of outside experts and the Commission. This interim prohibition applies to child care articles or toys that can be placed in a child's mouth or brought to the mouth and kept in the mouth so that it can be sucked or chewed that contains a concentration of more than 0.1% of the above phthalates" AAFA members have been removing the harmful phthalates from their accessories and items that may include them. The Chronic Hazard Advisory Panel (CHAP) is working very diligently to ensure that the correct studies, facts and sciences are use while determining the risks involved with the three phthalates being studied but progress has been slow.
PROBLEM	Phthalate testing and phthalate alternatives are extremely expensive. Companies are left wondering when a decision will be made and how long it will be before any alternatives for those phthalates are temporarily banned for study as well.
SOLUTION	By working with the industry to come to a final decision on the three phthalates, the CPSC could save the industry millions of dollars in testing while at the same time giving industry the assurance that there is a safe alternative to the banned phthalates.

Risk Potential and Level of Risk Should Always be Taken into Consideration and Evaluations Should be Reasonable

BACKGROUND	All product safety regulations should be designed to mitigate and protect against specific risks and be clearly supported by the data and facts. Understanding new safety regulations involves understanding how they will address a specific hazard. Using risk potential when doing a retrospective review is also important. If an unintended consequence is the result of a broad regulation, it should be examined, and if no history or risk is determined, it should be removed or exempted.
PROBLEM	The footwear and apparel industry are struggling with the CPSIA rules that are designed to address product safety concerns with toys, whose risks do not apply to apparel or footwear.
SOLUTION	It is important to also use risk potential when doing a retrospective review. If an unintended consequence is the result of a broad regulation that shows no evidence of mitigating risk it should be examined, and if determined to have shown no history of risk it should be removed or exempted from the rule. Many of the suggestions listed here today were never considered to be a feasible outcome of the requirements created by Congress in the passing of the CPSIA. While some unexpected risks can be prevented by the CPSIA, many more nonexistent risks were created by it. These nonexistent risks, many of which are listed in these comments, have cost millions of dollars to American companies without providing any increase in safety or protection for our nation's youth.