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S. 2045, THE CPSC REFORM ACT OF 2007

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSUMER AFFAIRS, INSURANCE, AND AUTOMOTIVE SAFETY

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

OCTOBER 4, 2007

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THURSDAY, OCTOBER 4, 2007

U.S. SENATE,
SUBCOMMITTEE ON CONSUMER AFFAIRS, INSURANCE, AND AUTOMOTIVE SAFETY,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:38 p.m. in room SR–253, Russell Senate Office Building, Hon. Mark Pryor, Chairman of the Subcommittee, presiding.

OPENING STATEMENT OF HON. MARK PRYOR, U.S. SENATOR FROM ARKANSAS

Senator PRYOR. I want to thank everybody for being here and we have Senator Durbin here. I thought what I might do is acknowledge Senator Durbin, and then after he speaks, we may do our opening statements after that, to let Senator Durbin get back to his pressing scheduled needs.

We all know that, in the Senate, Senator Durbin's the Assistant Majority Leader, but I think everyone around this table and on the Senate floor will tell you that the respect that we have for him is not just tied to his title, it's on his skills as a legislator.

And I was in his home town of Chicago, or his home state, the big City of Chicago, not long ago, and I ran my own informal poll about what kind of job Senator Durbin's doing, and let me tell ya, he is loved in that State. Everyone I talked to was very, very pleased with him, and the leadership he provides for that State.

Also, I need to note that early on this year, as Senator Sununu knows we—I talked to Senator Durbin along with some others about getting some more money for the Consumer Product Safety Commission. He was already way ahead of me, he was already on track to do that, and very, very supportive.

And then he's had his own legislation to try to deal with toy issues and other things, along with some other Senators here we'll talk about in a few moments.

But, Senator Durbin, thank you for being before the Committee today, and we're honored to have you. Go ahead.

STATEMENT OF HON. RICHARD J. DURBIN, U.S. SENATOR FROM ILLINOIS

Senator DURBIN. Thank you very much, Mr. Chairman, and I'm glad you had a chance to meet my family in Chicago.

[Laughter.]

Senator DURBIN. Senator Sununu, Thank you for being here, and Senator Klobuchar, your leadership, as well, on this issue, and for today's hearing on consumer products safety.

Last month, my Financial Services ang General Government Appropriations Subcommittee held a hearing on the same topic, I was honored that, Mr. Chairman, you and Senator Klobuchar, as well as Senator Bill Nelson were able to join us at that important hearing. It's good to see the leaders on this issue working together on a bipartisan basis to address it.

Let's face it: Our consumer product safety system is busted, and in need of major repair. The Consumer Product Safety Commission is operating under laws that are outdated, at funding levels that are unrealistic, and frankly has been unable to perform the most basic part of the mission that they've been assigned.

Over the past several months, we have witnessed the recall of over 20 million defective toys, and other children's products. Just last week, the *Chicago Tribune* ran yet another series of investigative reports about a dangerous crib that was manufactured by a company known as Simplicity, Incorporated, of Reading, Pennsylvania.

I've got some photos I hope the Members of the Committee can see, of what these cribs look like. If you'll notice, this crib railing broke away from the structure, and created a hazard which I'll just describe in a minute.

These cribs were poorly designed. The drop rail on the side of the crib could detach from its plastic track, creating a gap between the crib and the rail. Children could fall into this gap, causing asphyxiation and serious injury.

The flaw resulted in dozens of injuries, and the death of at least three young children. The first infant's death from this crib was reported to the Consumer Product Safety Commission in April of 2005. Yet, there was a delay of nearly two and a half years between that incident and the recall of this product.

During this period of time, two more children died, and hundreds of thousands of faulty cribs were purchased and installed in homes across America. Interviews and records in the *Tribune's* story show that the Federal investigator assigned to investigate the April 2005 death, failed to inspect the crib in his initial inquiry, and didn't track down the model or manufacturer.

According to the investigator, and I quote, "We get so many cases, once I do a report, I send it in, and that's it. I go on to the next case. We could spend more time, but we are under the gun, we have to move on."

Only after inquiries by this newspaper did the investigator return to California to find the crib that caused the death. It had been held as evidence by the Sheriff's Department, and later put in storage by a lawyer retained by the family.

Now, last month in my home State, our State Attorney General Lisa Madigan, wrote to the crib company, posing as a consumer who had purchased on of these faulty cribs. In response to her complaint, the company sent an envelope with 8 pieces of plastic hardware, without any instructions or explanations. This is unacceptable.

Like the Magnetix toy recall of April 2007, the crib recalls were only announced following the hard work of investigating journalists. I want to recognize the efforts of two, in particular—Patricia Callahan and Maurice Posely—in bringing these cases to the public's attention and spurring the Consumer Product Safety Commission to act.

However, it is inexcusable for us, representing this great nation and this great government to have to rely on enterprising journalists to make certain that our agencies are doing their job.

Last week, I wrote to the Commission, asking them for a detailed report and timeline on what happened in this deadly case. An infant died. It took two and a half years before the product was recalled, and in that span, another two children died.

If the death of an infant does not set off the alarm bells at the Consumer Product Safety Commission, what will?

This is the kind of thing that, I think, causes concern among families across America—uncertain about what toys are safe for Christmas? What crib should I buy for my new baby? They trust us. They think if these products are for sale in our stores, surely someone in our government has taken a look at them. They must be safe.

Well, sadly, because of inadequate laws, inappropriate funding and lack of response, we can't answer affirmatively when it comes to that request from our constituents across America.

What these recalls revealed is the Consumer Product Safety Commission needs to change. Congress is taking steps necessary, in terms of increasing its budget. As the Chairman noted, I am Chairman of the Financial Services and General Government Subcommittee that is going to increase the funding for the Consumer Product Safety Commission.

I'm sorry I can't put more money in that Commission. I definitely want to make sure that they have more inspectors, better laboratories. That they can respond more quickly, in a timely fashion, to give American families peace of mind.

This is an indication of what's been happening here. You can see from this chart, the bar graph, the increase in imports into the United States, and then take a look at the dotted red line, how the staffing at the Consumer Product Safety Commission has been in decline, dramatically, and leveled off over the last several years.

Since its inception in 1973, the staffing at this Commission has decreased by almost 60 percent, from a high of 978 employees, to a low of 401, currently. The lab facilities are incredible. It is hard to imagine that this is what America has to offer to test the safety of products being sold to our families.

What you're looking at here, as I said in my earlier hearing, may look like my basement, but in fact, it happens to be one of the laboratory facilities of the Consumer Product Safety Commission where it investigates toys. Take a look at that, and tell me if that builds confidence in the work that's being done.

Now take a look at the drop test site, which we showed in the Committee, as well. This is how toys are tested, to see if you drop them, whether they'll fall apart. This—Bob, I think is his name—is probably a good, hardworking employee, look what he has to work with. Two lines drawn on a wall. They hold the toys up to

these lines and drop them to see what happens. This is our scientific testing of products being sold to families across America for our children to use. This is absolutely unacceptable.

We have to change it, I hope the Appropriations Committee will start us on this track, but there's more to be done.

Mr. Chairman, I want to salute you, because you and I have talked about this for quite awhile. You had some great ideas, I had a bill, you said, "I'll sit down with you and see what we can do to bring that bill into our plans for reauthorization." I'm very satisfied with what you did. I think that at the end of the day, bringing these two bills together is going to create an even stronger legislative product that will get the job done.

The Consumer Product Safety Commission is currently required in Section 6(b) of the statute to give firms a 30-day window before reporting hazards to the public. Because of this requirement, at times, the CPSC cannot act quickly to protect human health. That isn't there fault, that's the statute.

In addition, the maximum fine the CPSC can levy has not been updated for a long time. One of their enforcement tools can be shrugged off now as just the cost of doing business.

Thankfully, Chairman Pryor, you've done great work in crafting your comprehensive package of proposals in your Reform Act. I want to thank you Senator Klobuchar, Senator Nelson, and Senator Sununu for that effort. This will significantly—your bill—will significantly increase the funding level for the next 7 years, will allow the CPSC to increase its staff level, update its information technology systems, and improve—I shouldn't say improve—create a lab facility.

This bill would reduce the time lag under section 6(b) to 15 days, and allow the CPSC to share information with government authorities. It would also create a third-party requirement that all children's products be tested or credentialed at labs, and that we have the lowered lead threshold from 600 parts per million to 90 parts per million.

I might add that Senator Nelson—also a Member of your Committee—and I have a bill that would require the testing of products used by children under the age of 6—whether they're toys or cribs—anything, seats for automobiles that kids might be using.

This bill would also strengthen your enforcement capabilities, increasing maximum fines, and making it illegal to sell recalled products. Last, it would expedite recalls, by requiring durable markings on children's products—a great idea.

Combined with increased funding, this is a package of proposals that can make it less likely for us to worry about delaying recalls of consumer goods that are threatening our families' children. I support this set of proposals.

The stories of recent months have really raised, in my mind, a fundamental question as to whether or not this Commission—even given new resources and new authority—has the will to make a difference. I hope they do. We're counting on them. Families across America are counting on them.

Funding and authorities can't solve this most fundamental issue. It can only come from the determination of the people who work at the Consumer Product Safety Commission.

I thank you for allowing me to make this opening statement. Happy to answer any questions, or let you proceed with your hearing.

Senator PRYOR. Do you have any questions? Do you have any questions?

Thank you.

Senator DURBIN. Thank you very much.

Senator PRYOR. Senator, we appreciate you being here today. Thank you very much.

What I'd like to do now is go ahead with our opening statement portion of the hearing and welcome everyone. Thank you to everyone for being here. We know everybody's busy. We know that product safety issues have become a very prominent issue in the American media. Given the number of recalls and the attention that people are placing on it now, I think that the people in this country expect us, Congress—the House and Senate—to take action on this.

I do want to say though, before we get started, I want to be very clear about this; I want to thank industry, because many industries—whether it be individual companies, or industries generally—have taken steps and they've been trying to be proactive and trying to deal with the situation as it exists today. And certainly I appreciate your efforts. Your work has not gone unnoticed.

But, I think that we all agree that we all need to work together to strengthen product safety in this country. I would hope that today's hearing would be—not necessarily the start of, because we've been talking about this for awhile now—but part of a constructive dialogue on this issue, and a dialogue that leads to legislation, and more specifically, that leads to a reauthorization of the Consumer Product Safety Commission.

I'd like everybody to know who's here, that now is the time to let your voice be heard. Even if you're not a witness today, certainly, I encourage you, and all Senators encourage you to come in to our offices and talk to us about these issues that are in this bill. We need to hear from you now, because, we would like to move some legislation through the Senate this year.

I know that I personally, and my staff, and the Commerce Committee staff, and probably other Senators and their staffs, as well, have sat down with many companies, industries, and groups to talk about this legislation—some before the legislation was drafted, some while it was drafted, some after its been drafted—just a continuing discussion about it.

But many of those groups have been talking about concepts. We need to move from the concept to the concrete. We would like to have your ideas. If you want to have a role in shaping this, certainly we encourage you to come and see us, very, very soon, and talk about what you want to see in this legislation.

And also, let me say, and I know that the other Senators would say the same thing, given the chance, that on a bill like this, please understand, no one is going to be 100 percent happy. No one's going to get every single thing they want. We're going to try to have a bill that has balance to it. We'd love to get a bipartisan bill, and quite frankly, we'd like to get a bill that we can get 60 votes on, in the U.S. Senate.

So, I know I have my work cut out for me, and other Members of this Committee and the Senate does, as well.

The focus here today is the Consumer Product Safety Commission. Most Americans, if you were to ask them, what does CPSC stand for? They probably don't have any idea, and they probably don't have any idea what it does. And, as a confession, let me say that, I didn't really know what the CPSC did until I was elected as Attorney General of my State.

It became very clear, very quickly, how important the CPSC is when it comes to making sure our products are safe in the American marketplace.

Then, I must say, that when I came to the Senate, I was shocked at how under-resourced the CPSC is and how it's been allowed to wither on the vine over the last few years. I'm not pointing fingers, I'm not saying one Administration or one Congress, one Party—I don't want to get into any of that right now—but the reality is that we see an agency that, in my view, is in distress, and an agency that needs comprehensive reform.

That's the goal of this legislation—to have comprehensive reform. We're not trying to just throw money at a problem and hope that the problem goes away. We're actually trying to restructure and reshape and retool the Consumer Product Safety Commission so that it's prepared to meet the demands and the challenges in the 21st century marketplace.

So, let me just cover four broad topics that are in the legislation. Before I do, I want to thank Senator Durbin, Senator Bill Nelson and Senator Klobuchar, for their cosponsorship. They've really gone the extra mile on this legislation, and I appreciate it and we're trying to reach out to other Senators right now to try to get their thoughts, and hopefully, maybe get some cosponsors on—more cosponsors on both sides of the aisle.

But, let me say, again, I recognize that, from my standpoint, at least, the Consumer Product Safety Commission is an agency that has been overwhelmed by the changes in our economy, and the changes to that agency. There are now 15,000 consumer products in the marketplace that the CPSC regulates. In addition, there are a number of emerging technologies, like nanotechnology that, in my view, and if I talk to the CPSC people they'll tell us—that the CPSC is not really equipped to handle the emerging technology.

Senator Durbin showed a chart there a few moments ago that talked about the employee downward slide at the CPSC. President Bush has recommended further budget cuts. I just don't think we can expect this overburdened agency to prevent dangerous products from entering the shelves, and entering the marketplace here, if we continue to see cuts in the agency.

So, to address this, we're trying to ramp up the funding for this agency over a 7-year period, about 10 percent a year. That doesn't get us back to the 900 employees that the agency used to have, it only gets us back to 500 employees. But we think, given today's technology, and just changing circumstances, we think—we hope—that the 500 employees will be sufficient to do the job.

We also want to make sure that we have the proper checkpoints at our ports and also that the testing facilities that the CPSC has are adequate.

Another part of the bill would be improving safety in children's products, specifically, again—a lot of news media attention on this. The CPSC does much, much more than just children's products, but that's been where a lot of the news attention has been recently.

One thing we want to say in this legislation very clearly is that lead in children's products is unacceptable and the bill contains an outright ban on lead in children's products. There is an allowance for some trace amounts here and there. We can talk about that in a few minutes. But also, in addition to just the children's products, and the lead, this bill would set up a government-certified, third-party system to test children's products, to make sure they comply with U.S. standards.

Also, there's a process where the Consumer Product Safety Commission could give some sort of certificate where a product could be stamped on the package, for example, that shows that it does meet all U.S. safety standards.

Another thing that we do in the bill is we enhance the penalties and we really try to go after the bad actors and the unscrupulous importers. In fact, I think we've heard some people say, maybe anecdotally, but I think the CPSC has some record on this, as well, that some of the lower fines that the CPSC can give, basically have just become a cost of doing business for some of these importers and for some of these people who are allowing these dangerous products to come into the marketplace.

What we want to do with the fining authority and the penalty authority, is to put the Consumer Product Safety Commission on par with other Federal agencies, and give them some teeth, and even some criminal authority under some narrow circumstances, to go after the repeat offenders and the bad actors, when the circumstances call for that. We want to enhance the recall effectiveness. Senator Durbin gave us an example of a product that took way too long to be recalled. We want to streamline, and help strengthen, the rulemaking process over there, and—this is just touching the highlights of some of the things we want to try to do in this legislation.

Last thing I want to say before I turn it over to Senator Sununu—I want to thank him for his leadership on this Subcommittee and just being generally concerned about this issue, as well, like the rest of us have been. And also, I just want to again, tell the audience that we really are hoping to have some quick Committee action on this legislation. So, just want to put you on notice that it's time to come in and talk to us about any changes or any recommendations you might have in the legislation.

Senator Sununu?

STATEMENT OF HON. JOHN E. SUNUNU,
U.S. SENATOR FROM NEW HAMPSHIRE

Senator SUNUNU. Thank you very much, Mr. Chairman, and thank you to the witnesses we're going to hear from today. This is obviously a very important subject, the Consumer Product Safety Commission has a tremendous responsibility dealing with an incredible range of products, and making sure that hazardous products are taken off the shelves, and obviously with regard to the recent recalls in children's toys, making sure that the toys that kids

play with are safe and can be trusted, and that, when there's a problem, it's dealt with swiftly and effectively.

Senator Durbin asked—perhaps rhetorically—in his statement, whether or not the Consumer Product Safety Commission has the will to deal with this problem. At the outset, I want to state that my experience is that they do have the will to deal with the problem. I think the men and women at the Commission are hard-working and conscientious.

The two Commissioners here today, Commissioner Nord and Commissioner Moore—with whom I and my office have dealt with—I think have worked very hard and put a tremendous amount of time and energy into their work. While there's a clear need for some changes, improvements and additional powers to be put into their hands—Chairman Pryor mentioned the issue of fines and penalties, getting rid of lead paint and the like—I think the men and women at the Commission have worked very hard, and this year under particularly tough circumstances, with a tremendous number of recalls, driven in part by continued growth in imports from China and other parts of the world.

I hope that we don't question the ethic and the commitment of those men and women who are responsible, at the end of the day, for ensuring the safety of these products, and that we work to give them the resources they need.

I think it's extremely important, as we look at these issues and try to improve the statutes and the regulations under which the Commission operates, that we try to get the balance right, and that we look to find those approaches that have the broadest support and that we can be most certain will improve the situation.

As a couple of examples, we can talk about penalties and fines—they clearly need to be increased. We absolutely need civil penalties and fines such that the punishment fits the crime.

But, we have also benefited historically from a fairly high level of cooperation on the part of firms whose products are recalled. We want to maintain the highest potential level of cooperation, because that means that actions are taken faster, more efficiently, and more effectively, when there's a problem. If we create a system that encourages the maximum amount of litigation, and the maximum amount of confrontation, we run the risk of undermining a lot of the cooperation that has historically existed.

So, we want stronger penalties. We need stronger penalties. But we want to make sure that we also maintain incentives for a cooperative approach wherever possible.

We want to benefit from the strength and the experience that Attorneys General can bring to this effort. They deal with consumer fraud, they deal with issues of safety and consumer protection every day.

But at the same time, we need to make sure that we have as clear and consistent a set of laws as possible. If every state were to take a different approach to consumer safety or consumer products or recalls or liability or litigation, then we're going to create a system that's confusing, and not just confusing and costly for businesses, but confusing for consumers. And that carries with it some real, real risks.

It is true that we can't have a bill where everyone gets 100 percent of what they want. But we can have a bill where just about everyone agrees, everything in the bill improves the current situation, improves the framework, improves the regulations, improves the power of the Consumer Product Safety Commission in a positive way.

I think that's what we should strive for. I think we should listen very carefully to the Commission members themselves, because they've had to work under pressure, under the challenges of understaffing, under the challenges of under-funding—and I think they have good ideas about how to improve the Commission itself. I think we should work very hard to identify those areas of consensus, and then based on that information, act in as timely and deliberate a fashion as we can.

I look forward to doing that. As you know, Mr. Chairman, we—unfortunately—didn't really have a lot of time to review the legislation before it was introduced. And that was a little disappointing, and a little problematic, but I think there's a lot of opportunity to work going forward, and try to strengthen the legislation—bring in as many people from both sides of the aisle as possible and listen to their recommendations. I think at the end of the day that will be how good legislation is finally produced.

Thank you very much.

Senator PRYOR. Senator Klobuchar?

STATEMENT OF HON. AMY KLOBUCHAR,
U.S. SENATOR FROM MINNESOTA

Senator KLOBUCHAR. Thank you, Senator Pryor, and Senator Sununu for your leadership on this Subcommittee, and thank you Senator Pryor for holding this hearing.

I think as everyone knows, this has been the summer and the fall of recalls. It seems like every day for the past 4 months, when you open up the paper you hear that another toy or children's product has been recalled.

As a mother and a former prosecutor, I find it totally unacceptable that these toys are continuing to get into the hands of our children, and it shouldn't be happening in this day and age.

As my 12-year-old daughter said—she was very uninterested in this issue when it was regarding Spongebob Squarepants, and the Thomas the Train set, but as she said when the Barbies came up, "Mom, this is getting serious."

One of the first products recalled this summer as a result of lead paint was the Thomas and Friends train, like the one that I have right here, 1.5 million of which were recalled. The RC2 Corporation, as everyone knows who has been following this issue, apologized to the customers, and said it would make every effort to ensure that this wouldn't happen again, and to encourage customer loyalty, and to prompt its customers to send in the trains, RC2 offered customers returning trains a bonus gift for their troubles.

Well, the bonus gift backfired in a big way. Just last week, it was discovered that 2,000 of these bonus gift trains contained lead paint levels four times higher than legally allowed, leaving parents of toddlers across the Nation to deal with a double recall.

As a result of this, and approximately 20 million other toys that have been recalled, American consumers are losing faith and losing confidence in the toys they can purchase in the stores. And, as we have watched this recall process unfold this summer, everyone has been enlightened to learn of the lack of resources, which Senator Durbin and Senator Pryor discussed at the Consumer Product Safety Commission.

In total, the Consumer Product Safety Commission has only about 100 field investigators and compliance personnel nationwide. Even worse, we now know from the photos and the visits of our staff, that they have only one toy inspector—Bob, the small parts guy—who is going to be retiring at the end of the year.

It is time for us to act. And I appreciate the work of Commissioners Nord and Moore. They have educated us on how the Commission can be modernized, and I thank Senator Pryor for working with all of us to put together this bill.

I also thank the companies that we have been working with in Minnesota, Target and Toys 'R' Us, for their input, and they've been very forthcoming.

And I am also pleased to report that this legislation that Senator Pryor has put together contains two of the more important pieces of legislation that I introduced, that makes it easier to identify recalled products and illegal to sell them, and also the lead ban that Senator Pryor discussed.

And the need for this ban, tragically, struck at home for our people, when a little 4-year old boy named Jarnelle Brown died after swallowing a heart, a little charm that he got with a pair of tennis shoes. He didn't buy the charm, it was given to him as a little bonus gift with the tennis shoes, and he swallowed it. And he didn't die from choking. He didn't die from inhaling that charm. He died over a series of days as the lead crept into his bloodstream. He should never have had access to that toy in the first place, and it was made in China. And when they tested it in Minnesota, it was 99 percent lead.

The first piece of legislation that I introduced that's included in this bill is that lead ban. And, I think it's hard for people to believe that we don't have a Federal lead ban now. We have guidance, a voluntary guideline. What we did is we took that guideline, and looked at other guidelines with the understanding that there is trace lead in products, and set it at .04 parts per million for jewelry, lower .02, which is the standard they're going to be using in California next year, and we've made some other exceptions, as well, for batteries and other things.

The second piece of legislation which I think is really important to the parents across the country is that they know what products they're dealing with. When they look at their kids' toy boxes, and they see all of these toys, and they're supposed to figure out when they bought it, and a date, and a batch number—unless you're my mother-in-law, no one keeps the packaging from the toys.

And, one of the things that I'd like to see improved in this legislation, is to make sure that we require that the numbers and the batch numbers be actually printed on the toy. Obviously you're not going to be able to do it with pick-up sticks and things like that, but for most toys, you're going to be able to write a date and a

batch number at the bottom. And I think it should be very clear, so that parents can easily look at this.

The other thing you need to do is to have it on the packaging. Because unlike some of our major retailers like Target or Wal-Mart, a lot of the Mom and Pop operations, or when things are sold on eBay, they're not able to identify in their computer system when something's recalled. And, it would also be good to have it on the packaging for retailers, only. Obviously, the parents are going to need it on the toys themselves.

So, those are our practical solutions. We look forward to working with Senator Pryor and the rest of this Committee on something—the time has come. It's time to act, and I'm hopeful we're going to get this legislation through this Subcommittee.

Thank you very much, Mr. Chairman.

Senator PRYOR. Senator McCaskill?

STATEMENT OF HON. CLAIRE MCCASKILL,
U.S. SENATOR FROM MISSOURI

Senator MCCASKILL. Thank you, Senator Pryor. I will hopefully have an opportunity to ask some questions.

But, when all of this surfaced, the first question I had was, where is the Inspector General at the Consumer Product Safety Commission? So, I did what you would think most consumers would do, if they wanted to contact a government agency, I went to the Internet. And I was surprised when I learned that there was no website in existence for the Inspector General at the Consumer Product Safety Commission.

Now, you may not think this is startling, until you realize there are only three Inspector Generals in the entire Federal Government that don't have websites. The other two are the Capitol Police, and the CIA. I don't think either one of their missions have to do with helping consumers.

So, I asked a series of questions of the IG, and I don't mean to pick on the Inspector General—but all of these problems are things that should have been discovered by an Inspector General and reported by an Inspector General—whether it's staff morale, or whether it's the failure to have adequate staff to do the work, whether it's the inadequacies of the testing facilities, or even the unbelievable fact, to me, that we negotiate recalls. The products should be recalled, we should recall them. There should be no negotiation. That's negotiating something that has to do with the safety of the American consuming public.

I received a lengthy response from the Inspector General, and I must say that I now understand why the Inspector General at the Consumer Product Safety Commission is very ineffective—there are only two people there. This is a huge responsibility to have a budget of only $200,000 and a staff of a total of three.

If you look at what they're supposed to be doing—now, I'm not saying it should be like the Department of Defense, where we've got 20,000 people that work in the area of oversight and accountability, but certainly we could do better, I think, than two.

And so, I think this legislation, and the attention that this problem is getting is incredibly important, and I thank you Senator Pryor for doing this today.

I will say that, the irony of it being Thomas the Train is not lost on any of us that are mothers, because, I remember thinking with some kind of self-satisfaction that buying Thomas the Train toys was getting back to basics. There are no motors, there are no parts that come apart, there's nothing to put together—it's a wooden track and a simple rolling train, and my kids loved them.

They're embarrassed I'm talking about this, because they're too old now to admit that they ever liked Thomas the Train, that went between the Transformers and the Teenage Mutant Ninja Turtles with all the swords and stuff. I always went for Thomas the Train. So, imagine how disappointing it is to parents across the country who thought they were doing the right thing, and the safe thing, as it turned out, no one's minding the store for safety. We must do better. I think the American public deserves it, and frankly, I think they ought to demand it.

Thank you, Mr. Chairman.

Senator PRYOR. Thank you.

I'd like to ask our two Commissioners to come up and take your seats at the table, please.

First we're going to have the acting Chairman of the U.S. Consumer Product Safety Commission, the Honorable Nancy A. Nord, and then we'll have the Honorable Thomas H. Moore, who's also a Commissioner on the Consumer Product Safety Commission.

So, again, we want to welcome you all, and as you're taking your seats, let me correct an oversight a few moments ago. I mentioned the cosponsors of the bill, but I forgot the most important one, who is Senator Inouye. Senator Inouye is an original cosponsor, and I accidentally—I know, I accidentally——

Senator MCCASKILL. Whoops.

Senator PRYOR.—left out the Chairman.

[Laughter.]

Senator PRYOR. But, anyway, thank you all for being here, and Chairwoman Nord, if you'd like to go ahead and start, we'd love to hear from you. Thank you.

STATEMENT OF HON. NANCY A. NORD, ACTING CHAIRMAN, U.S. CONSUMER PRODUCT SAFETY COMMISSION

Ms. NORD. Thank you, Mr. Chairman, Members of the Committee. I really very much appreciate the opportunity to testify today on S. 2045, and I want to thank the Committee for your interest in, and support of the safety mission of the CPSC.

No small amount of work went into the crafting of the original legislation establishing the CPSC 35 years ago. Congress's thoughtful deliberations, hard work, and keen foresightedness resulted in the creation of an agency that has contributed substantially to the decline in the rates of death and injury related to the use of consumer products.

The dynamics of the marketplace have changed dramatically since then, and it's important to move forward in modernizing this Agency. But, it's also important to do so, recognizing that the statutory foundation on which the Agency was built, is fundamentally a strong one.

In moving forward, it's important to understand the rationale and common sense behind the original legislation, and the subse-

quent reauthorizations that underpin the most effective product safety system in the world.

Since being appointed to the Commission two years ago, and subsequently being named Acting Chairman last year, I've closely studied, enforced, and directed the implementation of CPSC's statutes that we enforce.

Based on this working experience, earlier this year I submitted to the Congress a comprehensive list of legislative proposals, the Product Recall Information and Safety Modernization Act, or PRISM, that would strengthen the Commission's hand in enforcing our laws and protecting the American public from unsafe products.

I'm pleased to see a number of my proposals from PRISM included in the Chairman's bill that we're discussing today. For example, the bill adds asset forfeitures as a potential criminal penalty under the CPSC statutes; it clarifies the criteria to be applied in assessing penalties; makes it unlawful to sell a recalled product after the public announcement of the recall; and it gives the Agency greater flexibility in designing a remedy when the recall is ordered.

Harmonization of the CPSC statutes is another important element that is common to both our proposals. I'm also pleased to see in the Chairman's bill, my proposals to streamline the rulemaking process, and clarify the information sharing provisions with State, local and foreign governments.

The testing and certification provisions of the bill also represent an area where we have common ground. In my proposal, I contemplated that the testing and certification requirements would be part of specific rulemakings, and so would be tailored to the risks that we're trying to address in the particular rulemaking.

S. 2045 takes a different approach, and overlays a detailed testing and certification process for children's products on top of existing rules, and directs the Commission to construct and implement the program.

As I'm sure the Committee is aware, the National Institute of Standards and Technology is charged under the National Technology Transfer and Advancement Act of 1995 with coordinating the conformity assessment activities of the Federal Government with those of the private sector.

Assuming that this is consistent with the policy behind the provision in your bill, I would contemplate working with NIST to develop the best approach to meet the requirements of the bill, while utilizing the existing conformity assessment infrastructure.

One particular provision of PRISM that is not in your bill, and that I would strongly encourage the Committee to consider as it continues its work on the legislation, is my proposal to clarify the enforceability of voluntary standards upon which the Commission has formally relied. I believe that such standards are, and should be, enforceable as mandatory product safety standards, under appropriate circumstances, as set out in the Act.

I believe that this interpretation of the Consumer Product Safety Act would be an especially potent tool to use in dealing with unsafe imports, and I'll be submitting a briefing paper to the Committee, further outlining this important issue.

While I believe many of the provisions of the legislation will be very helpful to the Agency, there are several provisions that I've flagged in my written testimony as raising resource concerns, expanding our jurisdiction into non-safety areas, and being unintentionally counterproductive in helping us carry out our mission.

I have a number of substantive recommendations in that regard and I look forward to the opportunity to meet with the Committee's staff to discuss these recommendations in depth.

We welcome the scrutiny and attention of Congress, and commend the leadership of this Committee for recognizing the need for reauthorization.

Mr. Chairman, you referred to a constructive dialogue, and that is what I truly hope will take place, both here today and as we move forward. Our common goal is to make certain that the CPSC continues to represent the world's gold standard for consumer product safety. I look forward to working with you toward this objective, on behalf of American families.

[The prepared statement of Ms. Nord follows:]

PREPARED STATEMENT OF HON. NANCY A. NORD, ACTING CHAIRMAN, U.S. CONSUMER PRODUCT SAFETY COMMISSION

Mr. Chairman, and Members of the Committee:

I appreciate the opportunity to testify today on S. 2045, legislation introduced by Chairmen Inouye and Pryor to modernize the statutes of the U.S. Consumer Product Safety Commission (CPSC). I want to thank the Committee for your interest in and support of the important safety mission of the CPSC. It has been a privilege to work this year with Chairman Pryor and Ranking Member Sununu and other Senators, and staff members, both at public hearings and in personal meetings, conversations and correspondence.

Since its creation, CPSC's governing statutes have made the agency unique among government regulatory agencies in numerous ways. Forty years ago, in 1967, the Congress created the National Commission on Product Safety, and after 3 years of work, the Commission reported its findings to Congress in 1970. Informed by the Commission's findings, Congress proceeded to create the Consumer Product Safety Commission in 1972.

No small amount of work went into the crafting of that original legislation. For example, the Senate Commerce Committee held 10 days of public hearings; and in the House, the Interstate and Foreign Commerce Committee held thirteen days of hearings and ten executive sessions, including the joint sessions by the conference committee.

Congress's thoughtful deliberations, hard work and keen farsightedness resulted in the creation of an agency that has contributed substantially to the decline in the rates of death and injury related to the use of consumer products. We estimate that overall, injuries and deaths associated with the use of products under CPSC's jurisdiction have declined by almost one-third since the agency's inception. Some products have shown even more dramatic reductions, such as crib-related deaths that have declined by 89 percent over that time.

The blueprint that Congress used in building this agency has served the public well. I am proud of CPSC's record of achievement and of the public service of the talented staff who have dedicated themselves to the agency's safety mission over these past three and a half decades.

In preparing for a hearing earlier this year, I came across a statement from 1972 by former Congressman Harley Staggers who was Chairman of the House Interstate and Foreign Commerce Committee when the CPSC was established. Chairman Staggers was on the floor of the House bringing forward the CPSC enacting legislation and he noted in his remarks: "The technological revolution and ever-increasing public demand for consumer products has produced over the last several years thousands of new products whose applications are not easily understood and whose use may pose potential for harm."

I was taken by the fact that this statement could be repeated today without sounding at all dated, and yet, there have obviously been very significant changes

since 1972 in the way that consumer products are manufactured, marketed, bought and sold.

Clearly, the dynamics of the marketplace have changed dramatically over these years. There are new technologies that have emerged, and continue to emerge, in creating and manufacturing products, such as nanotechnology which is addressed in the Chairman's bill. Additionally, technology has changed the way that consumers shop and purchase goods and the way that the public receives information. Perhaps the most significant change is that most of America's consumer products now come from overseas.

So it is important to move forward in modernizing this agency, but it is also important to do so recognizing that the statutory foundation on which the agency was built is a fundamentally strong one. In moving forward, it is important to understand the rationale and common sense behind the original legislation and the subsequent reauthorizations that underpin the most effective product safety system in the world.

The mission of the CPSC is to protect the public from unreasonable risks of injury and death associated with more than 15,000 types of consumer products under the agency's jurisdiction. We fulfill this mission by enforcing our governing statutes, including the Consumer Product Safety Act (CPSA), the Federal Hazardous Substances Act (FHSA), the Flammable Fabrics Act (FFA), and the Poison Prevention Packaging Act (PPPA).

Since being appointed to the Commission two years ago, and subsequently being named Acting Chairman last year, I have closely studied, enforced and directed the implementation of these statutes. Based on this working experience, earlier this year I submitted to Congress a comprehensive list of legislative proposals, the Product Recall, Information and Safety Modernization Act, or PRISM, that I believe will strengthen the Commission's hand in enforcing our laws and protecting the American public from unsafe products.

I am pleased to see a number of my proposals from PRISM included, and in some cases expanded, in the Chairman's bill that we are discussing today. For example, the bill adds asset forfeiture as a potential criminal penalty under CPSC's statutes and makes it unlawful to sell a recalled product after the public announcement that it has been recalled. Harmonization of CPSC's statutes is another important element that is common to both of our proposals. When CPSC was created, the agency inherited the authorities of other existing agencies, and we need to make the various statutes that CPSC administers more consistent.

I am also pleased to see in the Chairman's bill my proposal to eliminate the requirement (but not the option) to do three-stage rulemaking, as opposed to two-stage rulemaking, which is what most other agencies use to promulgate their regulations. Implemented properly, this change would allow us to use three-part rulemaking for controversial and complex issues and issues that raise new matters while using two-part rulemaking for amendments to existing regulations and non-controversial technical rules (and I recommend Congressional direction to this effect). This change will make our regulatory process more streamlined, efficient and effective.

While I have some questions about the implementation, resource requirements and potential outcomes of some sections of S. 2045, and I look forward to discussing some of those today, I do believe that many of the provisions in the legislation, many of which were drawn from my proposal, will enhance CPSC's ability to accomplish its important safety mission.

One particular provision of PRISM that is not in the bill, and that I would strongly encourage the Committee to consider as it continues its work on the legislation, is my proposal to clarify the enforceability of voluntary standards upon which the Commission has formally relied. Under existing law, the Commission is required to terminate a formal rulemaking to write a safety standard and "rely upon", a voluntary standard under certain circumstances, and only after notice and comment to the public.

The extent to which such a "relied upon" consensus standard is enforceable by the CPSC has been a subject of some debate in recent years. I have suggested that such standards are and should be enforceable as mandatory product safety rules, under appropriate circumstances, as set out in the Act.

I believe that this interpretation of the CPSA would be an especially potent tool to use in dealing with unsafe imports. It would allow Customs and the CPSC the ability to stop these products at the port and refuse admission so that they are far less likely to reach store shelves or consumers hands.

We have seen situations where consensus standards, complied with by much of industry, do a very good job of addressing a risk of injury. But if a foreign-manufactured product, which does not comply with such consensus standards, is imported into the United States, without this tool our enforcement option is to effect a recall.

By clarifying the enforceability of relied upon voluntary standards, we would have a better ability to stop the import of unsafe products. I firmly believe that these changes would strengthen the Commission's hand, and I hope that the Committee will take a close look at that as we move forward. For the record, I am submitting a briefing paper to the Committee further outlining this very important issue.

While I believe many of the provision of the bill will be very helpful to the agency, there are several provisions that I flag as raising resource concerns, expanding our jurisdiction into non-safety areas, and being unintentionally counterproductive in helping us carry out our mission. I have a number of substantive recommendations in that regard and look forward to the opportunity to meet with committee staff this month to discuss them in-depth.

With respect to resource concerns, while the Senate Appropriations Committee and the full House of Representatives have passed funding increases for the CPSC, the Committees have also given the agency direction for the use of those funds. For example, the House-passed bill would increase CPSC's funding by $4.1 million and recommends funding sufficient to maintain staff at a level of 420 FTEs. CPSC staff estimates that the cost of that would be $2,087,000. The Committee also included $1,500,000 for information technology improvements. That would leave a balance of just over $500,000. (The bill approved by the Senate Appropriations Committee would provide an additional $3.2 million above the House measure.)

The resource requirements of S. 2045 would require many times the discretionary amount left to us under the appropriations bills. For example, the requirement for five commissioners will increase the agency's overhead by approximately $2 million, monies that could otherwise be spent on other safety-related enforcement or regulatory activities. As another example, implementation of the ban on lead in children's products, one of eight rulemakings mandated in the bill, will require resources to be diverted away from existing enforcement and regulatory activities.

To assist your deliberations, I have requested that our budget office analyze the bill to determine the resource implications and will provide that information to the Committee when it is available.

With respect to expanding our jurisdiction into non-safety areas, I point to the provision in Section 16 making it a violation of our Act to sell a counterfeit product whether or not the product is safe and to the provision requiring the CPSC to referee whistleblower disputes. Further, the regulatory system set up for certifying and auditing testing laboratories seems to duplicate many of the functions of existing government and private organizations.

With respect to provisions that make it more difficult to carry out our mission, I point, as examples, to the information disclosure provisions (which will make it more difficult to obtain the useful information we need to assess risks), the massive increase in penalties (which will induce companies to overwhelm us with uninvestigated consumer complaints), and the *parens patriae* provision (which will interfere with Commission investigatory and enforcement activities).

As I noted earlier, the legislation that established the CPSC in 1972 was the result of a long, arduous and thoughtful process by Congress. In the enacting legislation, the authors envisioned that the talents and resources of the private sector would play an important role in assuring consumer product safety for the American public.

By leveraging those talents and resources through the voluntary standards process, which is given preference in our governing statutes, experts and persons from industry, consumer advocacy organizations, and other interested parties are brought together to develop the effective safety standards that cover many of the 15,000 types of consumer products under the agency's jurisdiction.

Some have called this the "Summer of Recalls", especially with regard to toys manufactured overseas. I understand the concerns of parents and caregivers. I want to assure them that this agency is aggressively policing the marketplace, and that is part of the reason that you are seeing these recalls. The CPSC is engaged in a multi-pronged approach that involves initiatives with the Chinese government and the private sector, including foreign manufacturers directly, and increased surveillance and enforcement activities at the borders and within the marketplace.

These recalls make the case for some of the changes in CPSC's governing statutes that we have proposed, but in amending these statutes, we should be careful not to undermine a system established by Congress over 30 years ago that has been extraordinarily effective in maintaining the safety of the vast majority of the hundreds of millions of products brought into American homes every year and in making our product safety system the envy of the rest of the world.

CPSC's safety mission is never a completed task. It is an ongoing and continuously evolving process. We welcome the scrutiny and attention of Congress and commend the leadership of this Committee for recognizing the need for reauthorization.

Our common goal is to make certain that the CPSC continues to represent the gold standard of consumer product safety. I look forward to working with you toward this objective on behalf of America's families.

Senator PRYOR. Thank you.
Commissioner Moore?

STATEMENT OF HON. THOMAS H. MOORE, COMMISSIONER, U.S. CONSUMER PRODUCTS SAFETY COMMISSION

Mr. MOORE. Mr. Chairman, Mr. Ranking Member, and Members of the Subcommittee, I appreciate the opportunity to appear before you today to provide testimony on S. 2045, legislation to reform and reauthorize the United States Consumer Product Safety Commission, CPSC. The Commission is charged by Congress with the critical responsibility of protecting the public against unreasonable risk of injury and death, associated with over 15,000 classes of consumer products.

This is now—and has always been—a very crucial responsibility, because without CPSC's intervention, the consequences of exposure to the hazards associated with dangerous products may literally be of a life or death nature for individual consumers who unknowingly possess unsafe consumer products.

The question that many American consumers will be asking during this holiday gift-buying season is, is it safe?

This year, the Commission has been involved in a large number of highly publicized recalls. Some of these recalled products were associated with long-trusted domestic manufacturers, and involved very popular products that could be found in the homes of millions of consumers. These recalls have shaken the confidence of the American consumer in the government's present ability to protect them from unreasonable hazards associated with products produced in our current global marketplace.

Today we find that increasing numbers of U.S. companies are either importing finished products or component parts made in other countries, or establishing their own production plants outside of the U.S. In many, many cases, domestic companies have not exercised the same degree of control over these products as they would have if their products were being made in this country.

This inability to have constant, hands-on supervision has resulted in products entering this country that do not meet long-established U.S. mandatory safety standards. In addition, the delicate balance that exists between the development and enforcement of mandatory product safety standards, and the development and enforcement of voluntary product safety standards is not always completely understood by many foreign manufacturers who introduce consumer products into this country's system of commerce.

As a result, we are now keenly aware that inspection, testing, education and enforcement tools at the Commission's disposal are glaringly insufficient to police our present, globally affected consumer marketplace. Moreover, new and emerging technologies, such as nanotechnology, present unique challenges for the Commission. Given the many products already on the market using nanotechnology, from computer chips to Docker pants, I do not think it will be too long before the Agency is asked to assess the risk of nanotechnology use in some consumer products under our jurisdic-

tion. At this point in time, we would be hard-pressed to make an assessment, because we simply do not have the resources to do it.

As you are aware, CPSC's last authorization expired in 1992, and although we have visited the process of reauthorization on a couple of occasions, our statutes have not been significantly revised since 1990. However, it is exceedingly obvious that the marketplace for consumer products has changed dramatically since that time.

I must acknowledge that both the House and the Senate were moving in the direction of modernizing the Commission well before the publicity surrounding recalled products under our jurisdiction began earlier this year. We know that these reauthorization proceedings can be an exceedingly intensive undertaking for the CPSC, but I welcome this reauthorization process in both the House and the Senate, because I believe it presents a unique, and much-needed, opportunity for all of us to focus on the Commission's present and future agenda. I think that this comprehensive legislation package takes a giant step—more like a giant leap—in the direction of giving the Commission the tools that it needs to become the enforcement force that it should be in today's consumer marketplace. Many of the provisions come from recommendations submitted by myself and Acting Chairman Nord, and I am very hopeful that we see this legislation move from the introduction stage to final passage.

However, I think it is very important that, in whatever we do collectively—through efforts at the Administration level, Congress and the Commission to address the most recent problems facing the Commission, we must send a clear, unequivocal message to manufacturers, importers, and retailers who bring and offer for sale in this country products which present a substantial product hazard or that do not comply with the U.S. product safety standard. That message should be that, your actions are unacceptable and you will be held accountable.

The Commission must have the sufficient resources, the adequate authority, and the internal willingness to deliver that message with no hesitation. The Pryor legislation goes very far in providing the first two variables in the equation for an effective enforcement authority. The Commission must be ready to supply the rest.

Thank you for holding this important hearing—very important hearing. And I would be happy to now answer questions that you may have. Thank you.

[The prepared statement of Mr. Moore follows:]

PREPARED STATEMENT OF HON. THOMAS H. MOORE, COMMISSIONER, U.S. CONSUMER PRODUCT SAFETY COMMISSION

Mr. Chairman, Mr. Ranking Member, and Members of the Subcommittee, I appreciate the opportunity to appear before you today to provide testimony on S. 2045, legislation to reform and reauthorize the United States Consumer Product Safety Commission (CPSC). The Commission is charged by Congress with the critical responsibility of protecting the public against unreasonable risk of injury and death associated with consumer products. This is now, and has always been, a very crucial responsibility because, often without CPSC's intervention, the consequences of exposure to the hazards associated with dangerous products may literally be of a life or death nature for individual consumers *unknowingly* in possession of unsafe consumer products.

Is it Safe?

The question that many American consumers will be asking during this holiday gift buying season is, "is it safe?" This year, the Commission has been involved in a large number of highly publicized recalls. Some of these recalled products were associated with long trusted domestic manufacturers and involved very popular products that could be found in the homes of millions of consumers. These recalls have shaken the confidence of the American consumer in the government's present ability to protect them from unreasonable hazards associated with products produced in our current global marketplace.

Today we find that increasing numbers of U.S. companies are either importing finished products or component parts made in other countries or establishing their own production plants outside of the U.S. In many, many cases, domestic companies have not exercised the same degree of control over these products as they would have if their products were being made in this country. This inability to have constant hands-on supervision has resulted in products entering this country that do not meet long established U.S. mandatory safety standards.

In addition, the delicate balance that exists between mandatory product safety standards development and enforcement and voluntary product safety standards development and enforcement is not always completely understood by many foreign manufacturers who are involved in importing consumer products into this country's stream of commerce. As a result, we are now keenly aware that inspection, testing, education and enforcement tools at the Commission's disposal are glaringly insufficient to police our present globally affected consumer marketplace.

Moreover, new and emerging technologies such as nanotechnology present unique challenges for the Commission. Given the many products already on the market using nanotechnology, from computer chips to Dockers pants, I do not think it will be too long before the agency is asked to assess the risks of nanotechnology use in some consumer product under our jurisdiction. At this point in time we would be hard-pressed to make such an assessment because we simply do not have the resources to do it.

As you are aware, CPSC's last authorization expired in 1992 and, although we have visited the process of reauthorization on a couple of occasions, our statutes have not been significantly revised since 1990. However, it is exceedingly obvious that the marketplace for consumer products has changed dramatically since that time.

I must acknowledge that both the House and the Senate were moving in the direction of modernizing the Commission well before the publicity surrounding recalled products under our jurisdiction began earlier this year. We know that these reauthorization proceedings can be an exceedingly intensive undertaking for the CPSC, but I welcome this reauthorization process in both the House and the Senate because I believe it presents a unique and much needed opportunity for all of us to focus on the Commission's present and future agenda.

Senator Pryor's legislation, which is the subject of this hearing today, takes a giant step—more like a giant leap—in the direction of giving the Commission the tools that it needs to become the enforcement force that it should be in today's consumer marketplace. From this point in my statement, I will go through the legislation, section by section, and express my views on its affect on how a future Commission would operate given the passage of such a provision.

Section by Section

Section 3: Reauthorization

Section (a)—Reauthorization Levels

I support this incremental approach to increasing our budget and staff. Since we require a yearly increase of about 3 to 4 percent to keep current with increases in salaries, rents and other operating costs, yearly increases in the range of 10 to 15 percent would, in my mind, provide the Commission with a good growth pattern. This growth pattern would also allow the Commission to do a yearly assessment of where the areas of need most exist at the Commission therefore allowing the Commission to address its needs in light of the current consumer product safety problems.

Section (b)—Lab Modernization Funding

I support providing this level of funding to modernize our testing facilities. Given that we are the Federal agency designated to protect consumers from product hazards and that our laboratory testing plays a key role in making hazard determinations, I think that the state of our lab should concern everyone. The Lab Modernization Feasibility Study, completed jointly with GSA in 2005, formed the basis for a

capital project submitted to OMB by GSA as part of their FY 2007 budget. However, other national priorities precluded the project from being funded. It was estimated back in 2005, that the cost to truly modernize our lab, if we were to stay on the current site, would be somewhere around thirty million dollars. Forty million over 2 years would expand our capabilities plus give us new equipment and a physical plant that is both energy efficient and an effective use of space.

Section (c)—Funding for Nanotechnology Research

I support funding for research in this emerging hazard area as I have indicated above.

Section 4: Personnel

Section (a)—Professional Staff

I support bringing the level of full-time personnel employed by the Commission to a minimum of 500 by the beginning of FY 2013. In fact, it is my hope that by 2013 we would be beyond the 500 FTE level. In a three-year period, the Commission staff level has been reduced from a funded level of 471 FTEs in FY 2005 to a proposed level of 401 FTEs for FY 2008. I would hope that we could get well above that level of employment in the 5 years contemplated in this legislation.

Section (b)—Professional Career Path

I support incentives to attract highly qualified professionals to the Commission and to keep them there. Over time we hope to be able to train replacements for the many experienced employees that have left the Commission during the last few years but the experience that we have lost will take years to recover.

Section (c)—Change of Employment Status by Political Appointees

I support this provision which would provide a mechanism for the Commission to discourage the practice of unnecessarily placing political employees into career positions.

Section (d)—Personnel in Immediate Office of Commissioners

I support this provision which would prevent alliances from being formed by a majority of Commissioners to affect staffing in any Commissioner's immediate office. I do understand that in times where the whole Commission is being reduced, Commissioner's immediate offices should also be a part of reduction considerations but any decision about reductions in immediate offices should be something agreed upon by *all* Commissioners.

Section 5: Full Commission Requirement; Interim Quorum

Section (a)—Number of Commissioners

I support restoring the Commission to its full 5 member complement. It is my experience that the current 3 member structure usually only allows for one alliance to be formed—by the majority political party at the Commission. With only 3 Commissioners, the Chair assumes greater significance than our statute contemplates. The "executive and administrative functions," which should be the only authority that sets the Chair apart from his colleagues have morphed into control over policy matters. Now the Chair only has to secure one vote—that of his fellow party member—to control the Commission. If the Chair had to secure two votes, his ability to have unchecked say over policy matters would be lessened. Also, when you have an agency with five members, the Sunshine Act does not hamper the normal dialogue that should go on in an agency because any member can still talk to any other member about agency business. But where you have only three Commissioners, the result is that no Commissioner should ever talk to another Commissioner about any matter of substance pending before the Commission except in an open meeting after public notice because two members constitute a quorum.

Section (b)—Temporary Quorum

When there are only three Commissioners on the Commission, in times where there is a vacancy on the Commission, two Commissioners, if not of the same party, should always constitute a quorum for transacting Commission business. I certainly understand that this might tend to lessen the pressure on the President to fill a vacancy but as long as there are only three Commissioners, the chance of losing the ability to operate as a Commission will exist. It has happened on three separate occasions since 2001.

Section 6: Submission of Copy of Certain Document to Congress

I support this provision. Congress used to get a copy of our budget submission to the Office of Management and Budget (OMB). Several years ago, in an effort to

cut down on the reports it was receiving, Congress indicated it no longer wanted to see those budget submissions. OMB has since made these budget submissions confidential so they no longer can be made public by the agency. I think that Congress (and the public) should be able to fully review the agency's original budget request to the administration as it makes final funding decisions with regard to the agency.

Section 7: Public Disclosure of Information

I think that this provision of the legislation strikes a good balance between the need for the public to have expeditious and accurate information about potentially hazardous products and the legitimate desire of companies to protect themselves from the possible disclosure of confidential or inaccurate information about them or their products. I know that some argue that being able to provide information to the Commission and having it kept secret from the public somehow encourages fuller disclosure by companies than there would be otherwise. However, companies are required, by law, to report certain information to the Commission and to respond truthfully and completely to our information requests. Companies can keep certain information out of the public eye by appropriately identifying information such as trade secrets, which they want kept confidential, and the Commission can use the law enforcement exception to the Freedom of Information Act, if it feels withholding certain information is necessary.

Section 8: Rulemaking

I support this provision which gives the Commission the option of streamlining the regulatory process in the Consumer Product Safety Act and the Federal Hazardous Substances Act when the Commission feels that a shorter process may be appropriate. One example of such an occasion might be where the Commission believes an adequate voluntary standard exists (based upon active staff participation in the development of the standard) that addresses a real risk of injury but which is not being adequately complied with and where the enforcement powers that come with a mandatory standard could significantly increase the compliance rate. Giving the Commission the option to go straight to a notice of proposed rulemaking in such a case as this makes sense and would be a reasonable application of such an option. Another example where the Commission might decide to streamline the process is in a rulemaking where the Commission is proposing amendments to a current regulation that do not change the overall thrust of the regulation.

Section 9: Prohibition on Stockpiling Under Other Commission-Enforced Statutes

I agree with this provision which adds the anti-stockpiling provision of the Consumer Product Safety Act to all of the other statutes which the Commission administers.

Section 10: Third Party Certification of Children's Products

I support this provision which requires independent third-party testing and certification of children's products, as defined, which are subject to a consumer product safety standard under the CPSA or a ban under the CPSA or any other Act administered by the Commission. This provision will give the Commission additional enforcement powers to identify and stop violative children's products from entering this country and authority to penalize those who fail to comply with its requirements.

The Commission will also have the ability to prescribe by rule the qualifications of the certifying parties, criteria for which a certificate can be issued, as well as requirements for periodic audits of testing laboratories.

Section 11: Tracking Labels for Durable Products for Children

I support this provision. Identifying the exact product to be recalled can sometimes present a problem. We have been involved several times in situations where we have initiated a recall and then, based upon subsequent information, had to expand that recall. I agree that the burden should be on the manufacturer/importer/distributor to make sure that children's products or other products are clearly marked and distinguished so that problem products can be readily sourced and identified by the manufacturer, the Commission staff and by consumers who may have the product in their homes.

Section 12: Substantial Product Hazard Reporting Requirement

I agree with explicitly extending the reporting requirements of Section 15(b) of the CPSA to all of the other statutes that we administer.

Section 13: Corrective Action Plans (Mandatory)

I support giving the Commission the authority to decide what remedy a company must take to adequately protect the public when the company has refused to do a satisfactory voluntary recall. Some companies have used our inability to require a particular remedy in a mandatory recall setting as leverage in structuring their voluntary recall response. The current system, which allows the company to select the recall remedy, is one reason why the Commission has so rarely used its mandatory recall authority.

With regard to the language in new subsection 3(C), depending upon the remedy chosen for the action plan, there may or may not be a product still being distributed in the market that was subject to the recall. The subcommittee might want to consider amending the language along the following lines: ". . . the manufacturer, retailer or distributor shall take whatever remedial action, including ceasing further distribution in commerce of the product to which the action plan applies, as the Commission shall order."

Section 14: Identification of Entities in the Supply Chain

I support this provision. It puts everyone in the supply chain on notice that they need to know who they are dealing with, no matter how long that chain is. In the event of a recall or other investigation by the Commission, such information can be essential in getting accurate, timely information to consumers.

Section 15: Repeat Violators—Importers

I support this provision. While individual importers are not licensed, and in fact, anyone can go online and get an identification number and instantly become an importer, importer *brokers,* who most importers use, *are* licensed. Our staff has identified brokers they consider to be bad actors whose importers routinely bring in violative products, and who take advantage of our limited port presence to steer importers with noncomplying products to ports where they are less likely to be inspected.

I was shocked to read in the recent report to the President by the Interagency Working Group on Import Safety that there are over 825,000 importers. I do not know how many different people/entities that number actually represents since one person can have an unlimited number of import registration numbers, but even if only 10 percent of them handle consumer products, that still presents our agency with a daunting responsibility in terms of educating and policing that community. Focusing on the brokers may be a more manageable task.

Section 16: Sale and Exportation of Violative and Recalled Products

Section (a)—Sale of Recalled Products

I support this provision. This will make retailers, in particular, more vigilant in checking their shelves to make sure recalled products are promptly removed and will help stop the sale of recalled items over the Internet, a problem which has increased in recent years. This also expands the prohibited acts section of the CPSA to cover any of the rules or bans issued by the Commission under our other statutes.

Section (b)—Export of Recalled Products

I have raised the issue of our export policy because I believe it is time to have a discussion about whether that policy still serves our national interest. I purposely refrained from suggesting any "fix" because I think there needs to be a broad reexamination of the role this country now plays in the world marketplace. If we want other countries to protect *our* consumers here in the U.S. through *their* export policies, then perhaps we should be more willing to protect *their* consumers through our own export policy. It has been twenty-five years since this was last debated and it is fitting that any discussion be in the Congress, as Congress established our current policy.

This provision gives the Commission broad authority to prevent the export of a product that violates one of our mandatory rules or bans, or has been recalled, or has been declared an imminent hazard under the CPSA. On its face I think this is good policy although it would be much simpler for the Commission to enforce if the law stated that the Commission would only allow export of those products if it received notification from the receiving country that it would accept the product.

There are U.S. manufacturers who make products for export that meet the standards of the receiving country but that do not comply with the comparable U.S. mandatory standard. A policy that required the receiving country to evidence its acceptance of the product would not interfere with legitimate trade between willing trading partners.

I see no impediment to applying such a requirement that we receive positive notice from the receiving country before allowing exportation of recalled *unregulated*

products. This would eliminate the need for the phrase "would have been subject to mandatory corrective action under this or another Act enforced by the Commission if voluntary corrective action had not been taken by the manufacturer." It could be difficult for the Commission to develop industry guidance on such a phrase. The staff does now, on occasion, negotiate a non-export provision with a company as part of a voluntary recall of an unregulated product. This legislative change would provide staff with the clear authority to deny the exportation of recalled unregulated products as part of the corrective action plan unless the receiving country indicated their willingness to receive the product. I also support making the export provisions of the Flammable Fabrics Act consistent with the export policy in our other statutes.

The current export policy was written in a different era when we were a major exporter. Now we are largely on the receiving end and our consumers do not know who to trust anymore when they are buying a product. Changing our policy to one that requires the consent of the receiving country to export a product that we would not sell to our own citizens puts us in a better position to be able to more successfully demand that products coming into our own country from abroad meet our own safety standards.

Section (c)—False Certification of Compliance With Testing Laboratory Standards

I support this provision which will give us another tool to penalize makers and importers of recalled products that purport to meet nationally recognized standards, but which intentionally do not. Counterfeiting is big business and we should make it a costly mistake to make unsafe products under the false auspices of a respected entity such as the Underwriters Laboratories.

Section (d)—Misrepresentation of Information in Investigation

I support this provision. Occasionally manufacturers, in an attempt to reduce the cost of a recall, will try to limit the number of products affected by it. Then, when injuries occur with the same product, but in a production run not covered by the initial recall, the Commission is forced to expand the scope of the recall to cover those additional products. We seem to be seeing more of these situations lately. This provision would make companies pay closer attention to correctly identifying the scope of their products included in the recall and give us one more tool to keep companies honest in their dealings with the Commission.

Section 17: Penalties

Section (a)—Civil Penalties

I support this increase in the maximum amount of civil penalties that may be assessed for violations of our statutes. While I had initially supported having no civil penalty cap at all, I think the amount specified by this bill is sufficient to prevent even the largest companies from viewing the risk of getting caught violating our statutes as merely a cost of doing business.

Our negotiating room would no longer be so limited that it would be difficult for the agency to make, and for industry to see, meaningful distinctions in our assessments of civil penalty amounts among the types and circumstances of the violations involved. As a practical matter, the staff and the Commission would still be guided by the circumstances of each violation but would no longer be constrained by an upper limit that often results in penalties lower than the staff would like to assess. In addition, with such an increase the agency could immediately begin to look at assessing penalties for *all* violations of section 19 and not focus, as we have almost exclusively, on failure to report, a situation that I believe has resulted from a maximum penalty amount set too low to accommodate multiple violations.

I support making the penalty amounts the same in all of our statutes. I also support the provision that makes it clear that the Commission may consider other factors in deciding the amount to assess for a civil penalty in addition to those specified in our statute.

Section (b)—Criminal Penalties

I support removing the requirement in the CPSA that there has to be a notice of noncompliance received by the company from the Commission before a criminal penalty can be imposed for a violation of section 19. This has been an impediment to the Justice Department's ability to pursue criminal sanctions on the agency's behalf.

The two-tier criminal penalty system laid out in the bill is similar to one that the Justice Department has indicated we should have and since they actually prosecute our criminal cases, I would bow to their assessment that they think such a system is needed. It might be helpful if the bill provided some guidance as to the meaning of "knowing" and "willful" in the criminal penalty provisions.

I also support the two-tier system in the FHSA. I do note that while it increases the penalties, it does add a "knowing" requirement to the first tier offenses that does not currently exist. Given the increase in the penalty amount, and the desirability of harmonizing the criminal penalties with that of the CPSA, that may be an appropriate change.

I do not know why there are no criminal penalties under the Flammable Fabrics Act, but considering that children's sleepwear, mattresses, and upholstered furniture are regulated (or may potentially be regulated) under this statute, Congress might want to consider including the same criminal sanctions in that statute as are contained in the CPSA and the FHSA.

I also support having the additional criminal penalty of requiring a company to forfeit any assets associated with a violation of our statutes. All of these provisions will greatly strengthen the agency's hand in criminal cases and put real teeth in our enforcement abilities.

Section 18: Preemption

I believe the Commission went astray went it decided in 2006, after years of not offering an interpretation of the preemption language in the Flammable Fabrics Act, to use the new Mattress Flammability Standard to interpret that statute to prevent certain civil court actions. I would hope any court looking at this sudden and unnecessary change in Commission policy would ignore it, but I would have much preferred if the Commission had not attempted to sway the courts with its own interpretation in the first place. It is up to Congress to decide what the preemptive effects of our statutes should be and I leave it to Congress to decide whether all of our statutes should contain the explicit non-preemption language contained in section 25(a) of the CPSA that makes it clear that CPSC rules and other orders "do not relieve any person from liability at common law or under State statutory law to any other person."

Section 19: Information Sharing with Federal, State, Local and Foreign Governments

I support this provision for information sharing. The Commission would have to be judicious in its distribution of material to others and vigilant in making sure that information provided by it or given to it is not disclosed inappropriately. Information given by the agency to an entity who inappropriately disclosed it, should nullify any agreement to share information with that entity in the future.

Section 20: Bond Authority

I support this provision to require a measure of financial security from those who seek to distribute or sell products in our country and whose products may subsequently be recalled or seized at their port of entry for failure to comply with a mandatory standard. This may be particularly helpful in the case of certain importers who have little financial stake in the transaction they are facilitating.

Section 21: Enforcement by State Attorneys General

Given the Commission's historically small resources for litigation, having fifty additional legal teams to enforce the provisions of our statutes could be of tremendous benefit. However, the Commission needs to retain control over the interpretation of its statutes for enforcement purposes and would not want to spend significant resources intervening in cases to assure this result. The subcommittee might consider whether it is possible to require the State Attorneys General to consult with the General Counsel of the Commission prior to filing a lawsuit and condition the filing of the suit upon the consent (or non-objection) of the Commission. This would allow us to head off misguided lawsuits and lessen the need for the Commission to intervene in these proceedings.

Section 22: Whistleblower Protection for Manufacturers' Employees

The bounty provision of this section is intriguing. On occasion, employees of companies have provided information to the Commission that has proven useful in pursuing actions against their companies for violations of our statutes. Encouraging employees with this type of information to come forward, and then protecting them when they do, could act as one more deterrent to companies who put profit ahead of safety. However, the protection side of the equation would be difficult for our agency to administer. Each case would require an examination of the facts in the particular situation and an understanding of the personnel system and rules in the employee's company as well as the history of the interactions between the employee and the company. These are not the types of cases in which CPSC lawyers are typically involved and I am not at all sure that having the Commission become so intimately engaged in the inner workings of a company's employment practices would

be appropriate. If the subcommittee wants to provide protection to employees in these situations, it may want to look at another venue for these employee complaint determinations, such as the Department of Labor.

Section 23: Ban on Children's Products Containing Lead and Amendment of the Lead Paint Rule

I support this provision. I am pleased to see that this bill gives teeth to the Commission's 1998 guidance statement to industry urging them to remove lead from children's products. The response from the Congress, the media, and from parents to the recent spate of recalls makes it clear that consumers will not tolerate their children being exposed to lead in children's products. The bill provides a ceiling for lead in these products, but gives the Commission the authority to set that ceiling even lower. It also lowers the amount of lead allowed in paint or other surface coatings on children's products. It is my understanding that the majority of American paint manufacturers already meet this extremely low level of 90 parts per million, so this change reflects a standard of care most members of our industry already meet and it should similarly be attainable by paint manufacturers in other parts of the world who send their products to the United States.

Section 24: Cost-Benefit Analysis Under the Poison Prevention Packaging Act

I support this provision as I believe it clarifies the intention of an earlier Congress not to require a cost-benefit analysis in a statute that seeks to reduce children's poisoning deaths by requiring certain substances to be in child-resistant packaging. The cost of child-resistant packaging adds pennies to the cost of a product. This is a small price to pay to help keep our children safe. This Act has worked well and it should not be weakened by allowing OMB to pressure CPSC to read language into the statute that does not exist.

Section 25: Completion of Upholstered Furniture Rulemaking

I appreciate the subcommittee's frustration with the slow pace of this rulemaking, although I think certain developments, such as the Commission's work in the mattress rulemaking, have added greatly to our understanding of the fire dynamics of upholstered furniture and have changed the way our staff is looking at this problem for the better. I do think it is time for the Commission to issue a proposed rule based on the staff's extensive work and let all parties have their say.

Conclusion

I think that the comprehensive legislation package introduced by Senator Mark Pryor, with Commerce Committee Chairman Senator Daniel Inouye as original cosponsor, and with Senator Richard Durbin and Senator Amy Klobuchar as cosponsors, will severely test the will of Congress to provide the Commission with the necessary tools it needs to be an effective force in protecting consumers from product safety hazards. Many of the provisions come from recommendations submitted by myself and Acting Chairman Nord.

However, I think that it is very important that in whatever we do collectively—through efforts at the Administration level, Congress and the Commission—to address the most recent problems facing the Commission, we must send a clear, unequivocal message to manufacturers, importers and retailers who bring and offer for sale in this country products which present a substantial product hazard or that do not comply with a U.S. product safety standard: That message should be that, "your actions are unacceptable and you will be held accountable." The Commission must have the sufficient resources, the adequate authority and the internal willingness to deliver that message with no hesitation. The Pryor legislation goes very far in providing the first two variables in the equation for an effective enforcement authority. The Commission must supply the rest.

Senator PRYOR. Thank you, Commissioner.

What we're going to do is go a little bit out of order because of some scheduling constraints here. I'll recognize Senator Sununu first, and we'll go to Senators Klobuchar, then McCaskill, then Nelson.

Senator SUNUNU. Thank you, Mr. Chairman.

Chairman Nord, you spoke about one provision you'd like to see included in the legislation that's not there, that's the "relied upon" standard. Could you explain, briefly, what that really means, and why you think it's an important item to have in the legislation?

Ms. NORD. Yes, the Consumer Product Safety Act sets out a rather complex way for the Commission to write safety standards on its own initiative. But, it also recognizes that there is a very skilled community out there that writes safety standards, that pulls in all stakeholders, that looks at the technical feasibility of these things, and comes out with voluntary standards. An example might be an Underwriters Laboratory standard for electrical products, extension cords, that sort of thing.

The statute says that the Commission may rely on these voluntary standards under certain circumstances. It talks in terms of putting that decision out for notice and comment so that we can get input from the public on whether that standard is a good one, and should be relied on.

I believe that the statute can be read—and should be read—to say that in those circumstances, when we go through that process, that standard then takes on an enforceability characteristic. And if we did that, then we would be able to use that as a way to deal with unsafe imports.

As I said, there's a UL standard for electrical products—that's a voluntary standard, that's not a mandatory standard. But, I think that's an example of something where we could rely on that standard—after getting notice and comment, which our statute requires—and then enforce that standard against imports also. I think it could be done now, under the way the statute is written, however, if there is confusion on that point, I would be happy to submit for your consideration some clarifying—minor clarifying—amendments.

Senator SUNUNU. Where in the legislation might you highlight one or two areas of particular concern? Where do you think that the goals or the objectives of the legislation might not be well-served because of secondary impacts or unintended consequences?

Ms. NORD. Well, I'm concerned about the provision calling for a *parens patriae* enforcement of the Consumer Product Safety Act. We can talk about how that would impact our Agency, but I do think that that would result in a great deal of confusion and a lack of primacy of the Agency in interpreting its own statutes.

I am concerned about the amendment to Section 6(b), because I think that 6(b) is very much of a tool in our tool chest that we use in order to get information from companies, and enforce the law. So, I'm concerned about the way that that provision of the bill is written. I think, however, that under the construct that is set out there, we can make some changes to it, to keep the good parts of 6(b), but get rid of the parts that are being criticized.

Senator SUNUNU. And 6(b) affects manufacturer's ability and opportunity to comment on information, and provide information to the Commission, is that correct?

Ms. NORD. Yes, yes it does.

Senator SUNUNU. So is it—part of that process sort of maintaining a high level of cooperation and collaboration?

Ms. NORD. Well, it's more than that.

Under the Consumer Product Safety Act, manufacturers are to report to us whenever they become aware of a defect that could present a problem. That is a much, much looser standard than any

other Federal agency has with regard to reporting requirements. It's much looser than, for example, what NHTSA has.

So, what we are doing is telling companies that they need to report to us, and they have to make a judgment call as to when they need to report to us—it's when a defect could pose a problem.

Senator SUNUNU. When you say it's a looser standard, you're saying it's a very low bar——

Ms. NORD. Yes.

Senator SUNUNU.—a very low threshold for them to come forward to you with information, because they think that there might be an issue?

Ms. NORD. Yes, yes. But, on the other hand, I'm not criticizing that standard, I think that standard is important, because it encourages companies to come to us and talk to us about problems. We, then, work with the company to determine whether there is an issue, whether there is a defect, whether a recall needs to happen. And with respect to a number of the reports we get, we determine that no recall is required.

What we don't want to do, and what I'm concerned about with the way the amendment to 6(b) is written, is that it is going to decrease the incentive for companies to come to us and work through these problems. Because the confidentiality isn't protected. I think, however, that if we were to take the construct of the amendment to 6(b) in this Act, and include a requirement that we could keep confidential information that is reported to the Commission until after there is a recall, that could go a great way toward alleviating the concern that I have about how this would operate in a way that would be counterproductive to the Agency.

Senator SUNUNU. Commissioner Moore, are there any provisions in the legislation that you have concerns about, or that you'd like to see expanded or added to?

Mr. MOORE. I really have looked at the legislation carefully, and we've reviewed it carefully, and I think it offers some very positive steps for us to take, in terms of our ability to be effective in the consumer safety area. So, I don't see any problem with the legislation.

Senator SUNUNU. Thank you, last question—there's a provision, Commissioner Nord, to authorize $20 million for upgrades to the lab in Gaithersburg. We saw a picture, and obviously it was a very cluttered space, where there were a lot of items on the bench—I don't think we should draw too many conclusions from one photograph, but I would guess that there are some specific needs. Any time you have a laboratory, you want to keep it as up to date as possible.

Does the Commission have a blueprint or an idea of how that funding for laboratory space would be used? And what the priorities would be, if that funding were included in final legislation, and an appropriation bill?

Ms. NORD. Is that to me?

Senator SUNUNU. Yes.

Ms. NORD. Oh, yes.

We are now working very closely with GSA to try to find a real estate solution to the issues presented by the laboratory. It is out of date, it needs to be modernized. At one point, we were talking

with GSA about basically tearing it down and rebuilding it. And, at that point—and this was about 5 or 6 years ago, we were talking in the range of $20 million. If we were to reconstruct it, I think $20 million would probably be low.

I think we can do it in a more cost-effective way, through a realistic solution to the problem. However, I do feel compelled to say to you, that even in a modern laboratory, the picture you saw of Bob and the drop test—that would still be the same. That test is used around the world in order to determine small parts. It's used in the most modern laboratories, and in our laboratories. So, that is the same test that you would be seeing, when we move into our new laboratory, which I hope will be soon.

Senator SUNUNU. Thank you very much.

Thank you, Mr. Chairman.

Senator PRYOR. Thank you.

Senator Klobuchar, you're recognized for 5 minutes.

Senator KLOBUCHAR. Thank you, Commissioner Nord, Commissioner Moore. And, we're together again, Commissioner Nord, I think it's a third time. They say third time is a charm, hopefully not a lead charm.

[Laughter.]

Senator KLOBUCHAR. I was trying to understand—I just couldn't resist—how you identify products to test and to recall. And, you know, I've been—Tamara Fucile who's my great staff member on this—these were her daughter's trains, and these were recalled on June 13. She, in fact, had a whole starter set for her daughter, which included this little tree, and this signal in the Thomas the Train set. And so, she dutifully gave these to me with which to go around the country.

But, she found out that these other sets were recalled on September 26. So, she thought these were safe, even though they were in one grouping of toys that she bought together—and you can see how her daughter has chewed on these, on the corner of the tree—and, in fact this green paint, and this with the green paint as well, was recalled even though they were all in the same set, on September 26.

And so, what I'm confused about is, if these were tested and we found out that this red paint had a problem, why these weren't recalled at the same time, when they were in the same set? And so, how do you identify the products that you need to test for a recall?

Ms. NORD. Recalls occur in a variety of different ways. First of all, companies—because they do have an obligation to report to us, they do come to us and say, "Look, we think we've got a problem."

When that happens, a couple of things can happen. First of all, we will sit down with the company and research it, and make a determination as to whether a recall should occur, or it shouldn't occur.

Another way that recalls happen is that, if the company comes to us and says, "Look, we believe that we have got a violation of," for example, "the lead paint ban." We're going to do a recall. And it's something that they—they don't have a conversation with us about. They have decided to do it. That is what is called a "fast track" recall, and when that happens, we try to get those recalls

accomplished within 20 days of having the first conversation with the company.

What happened with respect to the Thomas the Train Engine, I believe, is that the company—well, I know—the company came to us and said, "We are going to be doing a recall of this product, because we have found lead paint in them." We facilitated that recall.

Senator KLOBUCHAR. But when they have the same items in the same set—doesn't that trigger some kind of testing requirement? When they've told you that this item has a problem, you don't test for the other items in the same set?

Ms. NORD. No, the lead paint ban is a bright-line statutory ban. If they sell product with lead paint, then they are in violation of that.

Senator KLOBUCHAR. I understand that, but our country did not step in, and say that these other items should be recalled. It would seem it would be simple to test this green paint, and to find a set that was sold together like this.

Ms. NORD. Our country stepped in and said, "If you sell something with lead paint, you will be in violation of the law, and it will be recalled."

Now, after the June situation with Thomas the Train Engine, we did sit down and do a great deal of testing on these products. And, I'd be happy to get back to you as to why the green tree was or was not—there's a lot of misinformation out there about these particular products. But let me just find out what, actually, we did, and I'll respond to you. Be happy to.

[The information previously referred to follows:]

Thomas and Friends Product Testing

The green tree was tested before the original recall of items in the Thomas and Friends Wooden Railway Toys set in June 2007, but the test did not show lead-containing paint. Later tests showed some green trees with lead-containing paint and some without; however, the firm decided to recall all of the green tree units without regard to production date. Accordingly, this item was added to the recall list on September 26, 2007. (*http://www.cpsc.gov/cpscpub/prerel/prhtml07/07308.html*).

Senator KLOBUCHAR. Thank you, my time is expired, and I appreciate that. We can talk about it more in the future.

Senator PRYOR. Senator McCaskill?

Senator MCCASKILL. I recall, Ms. Nord, when you were here earlier this year in front of the Commerce Committee. And my recollection is—and I think the record will reflect this—that you indicated, in fact, testified, that the Fiscal Year 2008 budget request was adequate for your needs. Is that correct?

Ms. NORD. I testified that we were submitting a budget that laid out what we would be doing. That the monies that were being requested would be adequate to do the things that were laid out in that budget document.

Senator MCCASKILL. But weren't you specifically asked if you needed more? And didn't you specifically say that you didn't?

Ms. NORD. No. I believe I was asked—what I recall saying is that, with more I would do more.

Senator MCCASKILL. But you didn't request more?

Ms. NORD. We requested what was in the budget document. And that was, frankly, a unanimous vote of the Commission. So, my colleague and I made that request.

Senator MCCASKILL. It's irrelevant whether it was unanimous or not. I'm trying to figure out how we get past the reality of the situation we're facing right now? We had a full Committee hearing concerning your agency, and there were no alarm bells signaled by anyone at your agency at that hearing that the facilities were inadequate, that the staff was inadequate. You all did not come to this Committee at that point in time and say, "We've got all these problems out there."

Now, we have this scandal that has been uncovered in one of our Nation's largest newspapers, and here we are and I'm assuming that you will say today that you need more.

Ms. NORD. Give me more, and we will spend it.

Senator MCCASKILL. No, I'm not asking you—do you, do you believe to do your job—this is a very simple question. You are the leader of this agency. Do you believe that you need more to protect the American consumer, or not?

Ms. NORD. I would like to have more resources, absolutely.

Senator MCCASKILL. And are you requesting more resources to do your work?

Ms. NORD. There is an appropriations bill that has been before the Senate and it gives us, I believe, another $7 million. We will put that to very, very good use.

Senator MCCASKILL. That's not my question. You will not—are you requesting more money for your Agency? Yes or no?

Ms. NORD. Give me more money, and I will put it to good use, Senator.

Senator MCCASKILL. Why can't you say you need more? What is the problem here? You have got the parents of America that are outraged that they are buying products from manufacturers like Mattel, the venerable Barbie doll, Thomas the Train, part of our cultural land of toys in America, and they are scared. And this article has exposed that you've got a corner of a room where you're testing toys, there are only 2 people working in the IG's office, your staff is back at the level it was in the 1980s and you can't bring yourself to say, we need more?

Ms. NORD. Senator, in March I did identify the problem with the laboratory in rather significant detail, I highlighted it at that point. I'm just so pleased to see that this Committee is authorizing significant amounts of money so that we can deal with that.

Senator MCCASKILL. I think it's obvious that for some reason you are uncomfortable stating the obvious. And it really worries me about this agency and your unwillingness to state the obvious.

Could you tell me the average length of time between the point in time you get notice of a potential recall, the average number of days between notice of a potential recall and recalls that have actually occurred?

Ms. NORD. We do—in any given year, between 450 and 475 of them. Every one would be very different, I would need to——

Senator MCCASKILL. I asked for the average.

Ms. NORD. About half of our recalls are fast track recalls, which I've just described to Senator Sununu. They're done within 20 days of when the company comes in and starts talking to us.

With respect to the other recalls, those are the much more complicated ones, and that can range from a few days to a year, or

more than a year. It really depends on the complicated nature of the recall, the complexity of the issue, the kind of product that we're dealing with, but——

Senator MCCASKILL. But if you had more staff, it could go more quickly, couldn't it? Maybe it wouldn't take a year if you had more help.

Ms. NORD. If we had more staff, what we would be doing is probably—well, we would be—out there in the marketplace policing the marketplace in a more aggressive way, absolutely, ma'am. We would be on the Internet, we would be increasing the number of compliance officers we had. With more staff, we can do more, absolutely.

Senator MCCASKILL. I want to assure you that, I think, for the majority of Congress you're not going to get in trouble for saying you don't have enough and that you need more.

Thank you, Mr. Chairman.

STATEMENT OF HON. BILL NELSON,
U.S. SENATOR FROM FLORIDA

Senator NELSON. Would the Senator yield?

Senator MCCASKILL. If it's OK with the Chairman, he's in control, I think.

Senator PRYOR. Not necessarily.

Senator NELSON. Yes, the Chairman's in control.

Mr. Chairman, I just want to say to the Senator from Missouri, the reason the Chairman of the CPSC will not answer the question, is that she, as Chairman, as a political appointee, is not allowed to ask for more, because she is under the orders of the White House Budget Office only to ask for what is approved by the White House budget. And this isn't the only Agency that does this. We've got a huge amendment that's coming up on the floor on the Commerce, State, Justice Appropriations that directly affects me, and a lot of folks, including you in Missouri on NASA. And NASA can't request more, although they desperately need more. Because they've spent all of that money on the return to flight after the Space Shuttle *Columbia's* disaster.

And so, why don't we just get to the nub of the coconut, which is, you can't ask for more even though you say you'll spend more, because you're under orders from the White House not to ask for more. Is that correct?

Ms. NORD. I have never had a conversation like that with the White House, but——

[Laughter.]

Senator NELSON. Mr. Chairman——

Senator PRYOR. Go ahead.

Senator NELSON. Well, there's one of them. Let's stipulate that once a product is recalled that it ought to be removed from the stream of commerce. But unfortunately, that has not happened.

Here is Barbie's Dream Kitty Condo. And Barbie's Dream Kitty Condo has a kitty cat. And this product was still being sold over the Internet after it had been recalled—that was 2 weeks after it had been recalled. Obviously, it's critically important to get these things out of circulation. This one was recalled because of the lead paint, as was this Thomas the Train because of the lead paint.

So, what about the recalls. What is the CPSC doing to make sure that once the recall is made that you get them out of the stream of commerce?

Ms. NORD. That is an excellent question, Senator, and I'm so pleased that you raised it, because it does highlight a weakness in the statutes that we are administering.

I was rather surprised—to say the least—to realize that it is not a violation of the law to sell a recalled item, unless we would go through a process to declare it a substantial product hazard. That is why I suggested, and I'm so pleased to see in the Chairman's bill, a provision that would make it against the law to sell a recalled item. And, I hope that that provision is, indeed, enacted.

Trying to get recalled products out of the stream of commerce is an incredibly difficult and complex thing, and you referenced the Internet. The Internet has made it more difficult, by orders of magnitude. We do have a relationship with the big auction houses, where they agree to not sell recalled items, or to take them down if they find them. But things slip through, and we are continually having those kinds of conversations with auction houses. When you get down to the smaller sellers, or individual sellers, it becomes a very, very difficult problem, and we have to address it on a case-by-case basis. But, I think the provision in the Chairman's bill that makes it against the law to do this will be very, very helpful.

Senator NELSON. So, that's helpful, and that's another reason why we need to pass your bill.

So, until this bill gets passed, and it becomes law, you're saying that you are powerless to deal with the items that have been recalled and are still out there in the stream of commerce?

Ms. NORD. No, we're not powerless to deal with them, and with respect to——

Senator NELSON. Well, tell us what?

Ms. NORD. With respect——

Senator NELSON. What powers do you have that enable you to deal with it now?

Ms. NORD. With respect to, for example, the lead paint ban. They would be selling a product in violation of a regulation. So, they would be in violation of a standard. So, we would be able to bring an action against them. And, indeed, we do do that.

With respect to things that are recalled because they are defective, but there is no regulation, at that point, we would have to make a determination that that was a substantial product hazard, and they would have had to have reported to us. So, what we would do would be to get them on a reporting violation. That's not the most graceful, easy way to enforce the law. So, again, I'm pleased to see that the Chairman has included this provision in his bill.

Senator NELSON. OK, I'm reporting to you now that Barbie's Dream Kitty Condo is being sold on the Internet, after it has already been recalled. So, what power does the CPSC have to stop it being out there in the stream of commerce?

Ms. NORD. And it's being recalled for a lead pain violation?

Senator NELSON. Yes.

Ms. NORD. It's in violation of the statute, and we will take enforcement action.

Senator NELSON. There it is, right there.

Ms. NORD. Thank you, Senator. We'll get right on it.

Senator NELSON. All right.

Ms. NORD. Sir, in fact, sir, if your office could give us the details, it would be helpful.

Senator NELSON. OK. Well, other than what I've just told you. Mattel——

Ms. NORD. Well, where did you buy it?

Senator NELSON. On the Internet.

Ms. NORD. Well, we need to have a website address.

Senator NELSON. All right.

Ms. NORD. Thank you.

Senator NELSON. Have you asked manufacturers to make the process easier for consumers through incentives, to return products?

Ms. NORD. In some cases, yes, indeed, we do do that. Each recall is different, and each recall is tailored to meet the particular issue that is presented to us. And in some cases, yes, indeed, we have required incentives.

Senator NELSON. You've required them?

Ms. NORD. Yes.

Senator NELSON. Have you negotiated with manufacturers on voluntary corrective action plans?

Ms. NORD. Of course, yes.

Senator NELSON. You have?

Ms. NORD. Of course.

Senator NELSON. And as a result, have they said that they're going to get them out of the stream of commerce?

Ms. NORD. Well, when you have a recall, that is what you're doing.

Senator NELSON. But, in the secondary case, when they go back into the stream of commerce?

Ms. NORD. They shouldn't be going—I'm not sure I'm following you. They shouldn't be going back into the stream of commerce if they've been recalled——

Senator NELSON. But they are.

Ms. NORD. Well, in that case, we would be going after them for a violation—we recently had a situation where we did recall a piece of clothing because it had a drawstring, which is a substantial product hazard, and the product ended up on the shelves, so we took enforcement action against the product seller. We do that from time to time, sure.

Senator NELSON. In your testimony, you have expressed some concern over the part of this bill that would require third-party testing and certification of children's products.

You stated that, "the regulatory system set up for certifying and auditing testing laboratories seems to duplicate many of the functions of existing government and private organizations."

Ms. NORD. Yes.

Senator NELSON. I want to show you a new photograph that you haven't seen.

Ms. NORD. Oh, good.

Senator NELSON. This is the CPSC.

Ms. NORD. Yes.

Senator NELSON. Does that please you?

Ms. NORD. I've been testifying since I have been the acting Chairman of this agency that our lab needs to be modernized. We need a new laboratory.

Senator NELSON. And yet, you don't want independent certification?

Ms. NORD. No, I never said that.

Senator NELSON. Well, in your testimony you stated, "The regulatory system set up for certifying and auditing testing laboratories seems to duplicate many of the functions of existing government and private organizations."

Ms. NORD. No, what I am concerned about in the provision, and it may be just a function of, that we're not understanding what the drafters had in mind, but there is a whole structure out there for credentialing laboratories, certifying certifiers.

For example, as I said in my oral statement, the National Institute of Standards and Technology under something they call NVCASE, National Voluntary Conformity Assessment Systems Evaluation Program—well, it's a program that they have where they certify the certifiers, and then a group like ANSI or A2LA will then certify the people that are actually doing the testing.

And that process works fairly well, it's something that people are familiar with. And I would hope that under the construct of the Chairman's bill, something like that would not necessarily be precluded from the requirements. And there are people out there who know how to do this, and the CPSC does not. I mean, we have a testing laboratory, we test, but for us to certify other people to go do testing would be a brand new and, I think, rather resource-intensive process for us.

So, what I'm saying is that I would hope that we could use all of the various resources that are out there, that are already looking at these issues, and not reinvent something from whole cloth. And I would hope that that was the Chairman's intention when he drafted the bill.

Senator NELSON. Since 80 percent of these toys come from China, do you have any objection to independent certification before the toys would ever be shipped from China?

Ms. NORD. Absolutely not. And, indeed, in the proposal that I sent to the Committee several months ago, I requested an amendment to the Federal Hazardous Substances Act so that we could indeed have certification authority.

Senator NELSON. It's obvious that neither the Chinese government is going to police the toys—and it hasn't—nor is the Chinese industry going to police the toys—and it hasn't. So, isn't it logical that, since most of the toys are coming from China, to ensure that we don't have defective toys, that they get an independent certification such as one of those international laboratories that is well-recognized for its professionalism?

Ms. NORD. Sir, I think that independent testing and certification is a very, very good way to assure product quality, as well as give the CPSC a very effective enforcement tool.

Senator NELSON. Do you intend for the CPSC to take a position on that?

Ms. NORD. On——

Senator NELSON. What we've just been talking about, for the last 5 minutes?

Ms. NORD. I am taking a position. As the Chairman. I would have to defer to my colleague.

Senator NELSON. Well, I would assume that would be something you would present before the CPSC.

OK, Mr. Chairman, thank you. You've been very kind with the time.

Senator PRYOR. Chairwoman Nord, let me ask you a few questions.

First, you talk about the—some people call it "fast track" authority, some people call it "relied upon" or voluntary standards—you mentioned a few moments ago that you believe that the proper interpretation of the statute is for the CPSC to accept a voluntary standard and to try to make it enforceable, is that fair?

Ms. NORD. In certain instances, I think we have the authority to do that.

Senator PRYOR. And has the CPSC done that?

Ms. NORD. They did it—they have done it twice.

Senator PRYOR. And how long ago was that?

Ms. NORD. It was back in the 1980s.

Senator PRYOR. Is there a reason why you haven't done it since you've been at the CPSC?

Ms. NORD. I sought to do it once, but I was not able to get a majority vote in order to do it.

Senator PRYOR. And we understand the agency has had problems with quorum and all of that, so——

Ms. NORD. No, I was not able to get a majority vote in order to do it.

Senator PRYOR.—let me ask about the full-time employees. As I understand it, today, you're authorized for 420 full-time employees, I believe. Do you know how many full-time employees you actually have?

Ms. NORD. Well, it fluctuates—but at this point, we're down to around 400, under 400.

Senator PRYOR. And has that been the trend that the number of employees are going down?

Ms. NORD. Well, our challenge was that under the President's budget we would have an FTE ceiling cap of 401 employees.

Senator PRYOR. Yes.

Ms. NORD. So, what we need to do is get down to that cap, unless our budget is different.

Senator PRYOR. Well, there again, we can talk about OMB and all of that——

Ms. NORD. OK.

Senator PRYOR.—in another context, if you want to.

You, I believe, mentioned in your opening statement and I know in the written testimony, as well—that you have some concerns about the Attorney General enforcement, the State Attorney General enforcement?

Ms. NORD. Yes, I do.

Senator PRYOR. Right now, how are enforcement actions done, when you have to go to court—do you all do that or does the Department of Justice do that?

Ms. NORD. The Department of Justice does it.

Senator PRYOR. And how many cases are referred to the Department of Justice every year? Give me a sense of that workload there.

Ms. NORD. We have always an ongoing number of cases that goes up and down, probably 10 at any given time.

Senator PRYOR. I'd like to get into that in more detail at some point with you or your staff——

Ms. NORD. Fine.

Senator PRYOR.—to figure out exactly how that's working right now, and how the Department of Justice is doing and how they prioritize it, and how they move things through the system, and how satisfied the Commission is about that.

Let me also mention that there—what I perceive as an inconsistency in your testimony—and that is, when you talk about penalties, and we talk about whistleblowers and things like that, I think you mentioned that increased penalties might result in more information coming to the CPSC, but when you talked about the disclosure provisions in the bill, you talked about how that might mean less information coming to the CPSC. Could you clarify that? Maybe harmonize your testimony there?

Ms. NORD. I'd be happy to.

As I mentioned to Senator Sununu, under Section 15(b), companies are required to report to us if they become aware of a problem that could pose a defect. That's a very, very loose standard.

What we tell companies is, when in doubt, report. We want to hear from them about issues and problems that may pose a problem, because once they report, we look at it, then we go back to them, ask for more information, work it through and then make a determination as to whether there's a real problem here, or if it is not a problem. So, that's what's happening under Section 15(b), and that's what we want to have happen.

What I'm concerned about, under the penalties provision, is that if you increase the penalties so dramatically, as you have in your bill, companies will—out of an excess of caution, at least probably the big ones—not go through that process of trying to separate the wheat from the chaff, and we will get it all.

And so, our compliance office is then going to be challenged to sort through the large amount of information we get, in order to figure out what's significant, and what isn't. And that, I think is going to overwhelm—I know, the compliance people have talked to me in great detail about their concerns about this provision, and how it may well overwhelm them.

Right now, I think that the statute sets up a good counter-balance. It protects information that comes in that we use, and while we're using it. And once a recall occurs, then that protection goes away. If you feel that the penalties are too low, increase them. And indeed I suggested $10 million. But, I think $100 million may have the perverse effect of having companies basically send all their consumer complaints to us, and let us go through the process of figuring out what's important and what isn't.

Senator PRYOR. And, I think you referred to confidentiality when you were discussing this with Senator Sununu, I think you said that was your primary concern.

But let me ask this—previously in other testimony, you also mentioned, you referred to NHTSA in another context. But NHTSA has a website where all of their complaints—as far as I can understand it—all of their complaints, no matter how valid or not they are, they go on the website and are open to the public for everybody to see. What's the downside of you all posting all of the complaints, just so John Q. Public can see what's being said about these various products? Whether valid or not, let the public sift through that. What's the downside of not following a NHTSA model there?

Ms. NORD. Well, if we were to follow the NHTSA model, that would be fine, but what I would suggest to you is that we really have to follow the NHTSA model.

When complaints come into NHTSA, it is at a much further point in the process. When somebody reports into NHTSA, it is because they have fully investigated the report, and they're ready to do a recall. So, that's one aspect of it.

With respect to consumer complaints coming into NHTSA, Mr. Chairman, first of all, NHTSA is dealing with a much more defined jurisdiction than the CPSC is. We get about 30,000 consumer complaints coming into our Agency every year. They come in, in various forms, many of them are not accurate. I'm not sure how the public would be benefited by learning about the fact that, you know, a person has complained about a coffee maker of Brand A, when actually it's Brand B, and the fire was started by faulty wiring in the home. That really doesn't help the consumer.

So, I think if we're going to go that route, we need to spend Agency resources to make sure that the consumer complaints that go online have some meaning so that consumers are not mislead or confused by what's there.

Senator PRYOR. Well, we can check the facts on that, but you know, my understanding, and the Committee staff just reiterated it with me, is that consumer complaints are posted on the NHTSA website, for example, the one they gave me is with baby seats, car seats.

[The information referred to follows:]

10089116

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

Sharon B. Winston
Technical Information Specialist
Office of Information Services
National Injury Information Clearinghouse

Tel: 301-504-0424x1181
Fax: 301-504-0025
Email: swinston@cpsc.gov

2004 AUG 12 PM 5:04

National Highway Traffic Safety Administration
(NHTSA)
Department of Transportation
400 7th Street S.W.
Washington, DC 20590

Dear Sir:

The enclosed letter or complaint/inquiry cannot be processed by the Consumer Product Safety Commission. The products or matters that are the subject of the correspondence apparently do not fall within our jurisdiction; therefore, we do not maintain any records responsive to the request and cannot respond to the concerns of the correspondent(s)

We are forwarding the letter or complaint/inquiry to you for whatever action your agency deems appropriate.

If you have any questions or concerns call us at (301)504-6907.

Sincerely,

Sharon B. Winston

8/17/04

20040-7217 7/28

DeTemple, Ann

From: Rogers, Theresa D.
Sent: Wednesday, July 28, 2004 10:55 AM
To: DeTemple, Ann
Cc: Cumberland, Catherine A
Subject: FW: Internet Form Complaint - Doc #I0470546A

Ann, please forward this to NHTSA. Thanks.

Terri Rogers
Associate Director
Recalls and Compliance Division
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814
301-504-7584

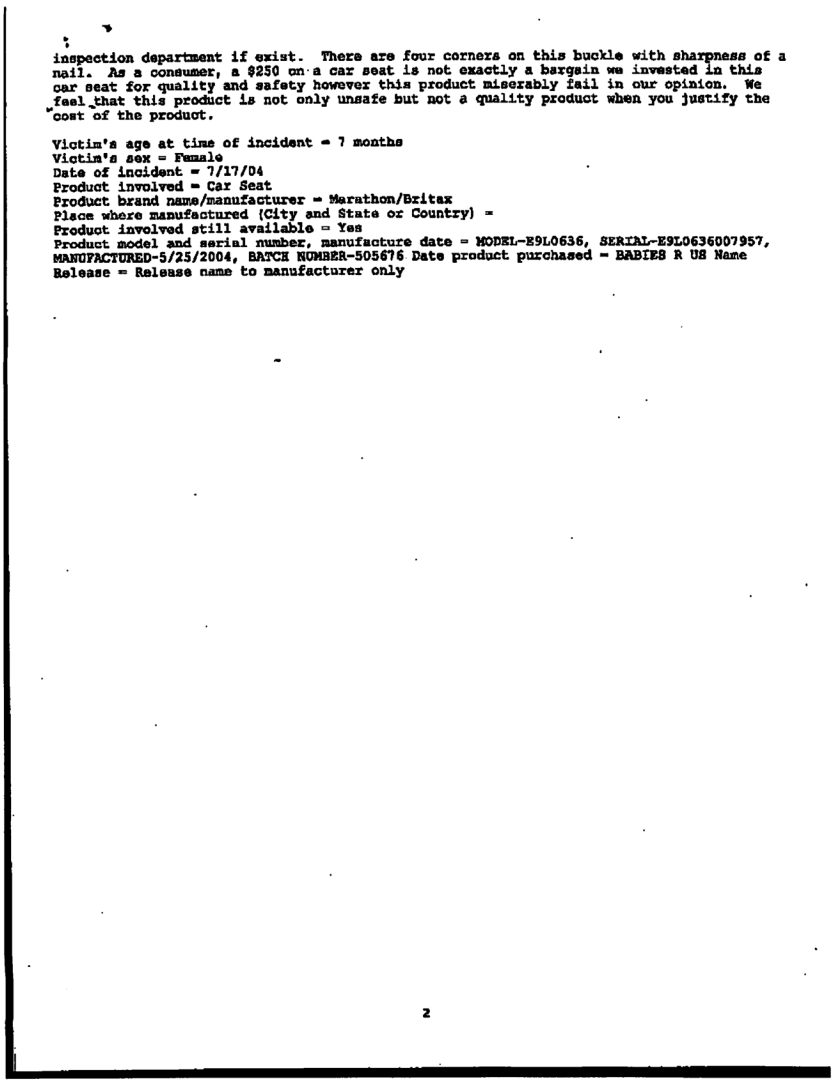
-----Original Message-----
From: Mills, Alberta E.
Sent: Tuesday, July 27, 2004 8:33 AM
To: Rogers, Theresa D.
Subject: FW: Internet Form Complaint - Doc #I0470546A

-----Original Message-----
From: Pucciarelli, Ellen M
Sent: Tuesday, July 27, 2004 8:23 AM
To: Emerging Hazards; Internet Incident Reports; Incident Reports; Cohn, Murray S.; Budnall, Maria L.; Pucciarelli, Ellen M; Haque, Mohammad O
Subject: Internet Form Complaint - Doc #I0470546A

07/26/2004 18:53:49

Name = [redacted]
Address = [redacted]
City = Santa Ana
State = California
Zip = [redacted]
Email = [redacted]
Telephone = [redacted]
Name of Victim = [redacted]
Victim's Address = [redacted]
Victim's City = Santa Ana
Victim's State = California
Victim's Zip = [redacted]
Victim's Telephone = [redacted]

Incident Description: We have purchased Britax Marathon car seat from Babies r us on 7/16/04 and first used on 7/17/04. My wife noticed our daughter crying when she first pulled her out of the car seat. She simply thought that [redacted] was hungry or tired but later she found 2 to 3 inches of scratch on her left arm near the joint. She had no idea where the scratch orginated from and we never suspected that this supposed to be one of the best car seat could cause such injury. On 7/25/04, we noticed another 2 inches scratch identical to her first scratch on her left hip so we carefully examine the car seat and found a very sharp edges on the buckle. We couldn't believe how this product passed the safety inspection with such sharp edges enough to cause serious injury to a baby or an infant. Also, we wanted to be sure that it wasn't the car seat that we got was defected so we went to Babies r us and Toys r us to verify that the edge of the buckle on this particular carseat did have sharp edges. Indeed, every one that we've looked at did have the sharp edges which confirmed us that this was how it was manufactured. This flaws may not be a life threatening but still danger enough for baby and infant. This product supposed to be quality product and we are very disappointeded and the product safety



inspection department if exist. There are four corners on this buckle with sharpness of a nail. As a consumer, a $250 on a car seat is not exactly a bargain we invested in this car seat for quality and safety however this product miserably fail in our opinion. We feel that this product is not only unsafe but not a quality product when you justify the cost of the product.

Victim's age at time of incident = 7 months
Victim's sex = Female
Date of incident = 7/17/04
Product involved = Car Seat
Product brand name/manufacturer = Marathon/Britax
Place where manufactured (City and State or Country) =
Product involved still available = Yes
Product model and serial number, manufacture date = MODEL-E9L0636, SERIAL-E9L0636007957, MANUFACTURED-5/25/2004, BATCH NUMBER-505676 Date product purchased = BABIES R US Name Release = Release name to manufacturer only

2

Senator PRYOR. But anyway, we can talk about that later. Let me ask one last question and that is, in your testimony you say, with respect to expanding our jurisdiction into non-safety areas, I point to the provision in Section 16, making it a violation of our Act to sell a counterfeit product—whether or not the product is safe—and to the provision referring to.

Let me ask this—you have indicated in your testimony—both written and oral testimony—today that you feel like this bill that we've drafted gets us into non-safety areas. Maybe you and I just see it differently, but when it comes to the third-party certification to look at products, to make sure they meet our standards, to me that is a safety—I would not characterize that as a non-safety proc-

ess. I mean, to me, you have a third-party that you all would lay out the parameters of what they need to be doing. They basically need to certify that these products—whatever they may be—meet U.S. safety standards, and to me, that is not a non-safety area. Could you elaborate on that?

Ms. NORD. I couldn't agree with you more, sir. Third-party testing certification to product safety standards is something that I think needs to be implemented. And I am in wholehearted support of that, and will work cooperatively and enthusiastically to implement that kind of provision.

What I was referring to is the provision in the amendment to Section 19 of our Act, dealing with prohibited acts, which would make it a violation of law to import a product with a false certification from a nationally-recognized testing laboratory. Which wouldn't necessarily go to safety, to a safety aspect.

And all I'm suggesting is that that really is a false labeling issue, I think, more properly under the jurisdiction of the Federal Trade Commission. What you're basically having us do, is now police the marketplace against counterfeits. And while I am—I think that we need to do everything we can to get rid of counterfeits and protect intellectual property, I'm just not sure of the role of the CPSC is to do that, I think that's more properly the role of the Federal Trade Commission, and that's the only point I was trying to make there.

Senator PRYOR. I guess what would concern me there is if you take that position, and take it too literally, you're going to have a huge body of products that just fall between two camps: is it FTC or is it CPSC, and to me there's a very large safety component. And I'll admit, it's probably not present in every single case, but there's a very large safety component when it comes to counterfeit products. I think by their nature—I'm not saying they're unsafe by their nature—but I do think by their nature, they are not complying with globally recognized standards, just by them being counterfeit products and being mislabeled. Just on the outset, they're telling the world that they're not playing by everybody else's rules.

Ms. NORD. I couldn't agree with you more. And frankly, when we see counterfeit goods, that's a flag to us. Then we do test them for safety. Because you're absolutely right—if something is counterfeit, there is a very good chance that it is also unsafe.

But, our agency is looking at the safety aspect of it, not the consumer fraud piece of it. This is an interesting conundrum that our agency was in about a year ago, just as I was coming on the Commission, whereby we found a group of products that were counterfeit, and they were such good counterfeits that they were very, very safe. And that puts us into an odd situation, because we couldn't find a safety violation in those counterfeit goods.

And I'm just trying to draw that distinction between counterfeiting—making us, having us enforce intellectual property laws, as opposed to safety laws.

Senator PRYOR. I want to thank both of you for your time today, and your testimony. Did you all have any other questions of this panel? Because I was going to move to the next panel.

Senator KLOBUCHAR. That's fine. Thank you.

Senator PRYOR. Is that OK? Thank you all for your time, and your testimony today. I'm sure we'll be back in touch. And by the way, we're going to leave the record open for two weeks, and allow Senators to submit questions in writing and we'd appreciate timely responses.

What I'd like to do now is introduce the second panel. We're, right now, by the way as a floor update—we're waiting a little bit on the Senate, we understand that we may have votes at some point soon, but it's indefinite. So, we'll just plow through this and see how far we can go.

But, I would like to introduce the third panel, now, which will be Mr. Ed Mierzwinski, Federal Consumer Program Director, U.S. PIRG; Mr. Travis Plunkett, Legislative Director, Consumer Federation of America; Mr. Alan Korn, Director of Public Policy and General Counsel, Safe Kids Worldwide; Mr. Joseph McGuire, President of the Association of Home Appliance Manufacturers, on behalf of the National Association of Manufacturers; and Mr. Al Thompson, Vice President for the Global Supply Chain Policy, Retail Industry Leaders Association.

So you all, if you don't mind, take your seats, and as soon as we get everybody's microphones turned on and placards in place there, we'll go ahead and allow you all 5 minutes each for an opening statement.

And I'm sorry—did I pronounce that right—is it Mierzwinski?

STATEMENT OF EDMUND MIERZWINSKI,
CONSUMER PROGRAM DIRECTOR,
U.S. PUBLIC INTEREST RESEARCH GROUP

Mr. MIERZWINSKI. Senator, that's correct, that's the best it's been pronounced in Congress, ever.

[Laughter.]

Senator PRYOR. All right. Well, thank you.

Well, if you want to be our first testifier, please go ahead.

Mr. MIERZWINSKI. Thank you very much, Chairman Pryor, Senator McCaskill, Members of the Committee.

I'm Ed Mierzwinski and I'm with the U.S. Public Interest Research Group. We serve as the Federal lobbying office for an association of state public interest research groups with over a million members around the country.

For 21 years, we have published a report on dangerous toys, and that report is called *Trouble in Toyland.* And *Trouble in Toyland* has resulted in over 120 recalls or other corrective actions by the Consumer Product Safety Commission or other manufacturers or other agencies. We would believe that it has actually resulted in more than 120 corrective actions from toys that we have discovered on the list, except that because of the notorious Section 6(b) of the Consumer Product Safety Act, the Commission does not always tell us what they do with the toys that we have put on the list, even though sometimes these toys have been on television stations, they've been listed in the newspapers, and they've certainly been posted on our website. So, we appreciate the provision in your bill that would fix Section 6(b).

We would prefer to have Section 6(b) actually repealed, but we believe your bill goes a long way toward improving it.

Your bill does three things that we think are critical to improving the Commission. First, it gives it the money and the opportunity to increase its staff that it needs to provide safety to the American public.

Second, it holds the corporate wrongdoers accountable, by increasing civil penalties, making it harder for them to wiggle out of providing corrective actions, and a number of other things that it would provide to improve the operations of the CPSC.

Second, your bill bans lead. It broadens—it very much broadens current lead bans that are in place for lead paint. Currently, except for lead paint, the CPSC must do an accessibility test in order to ban lead in any other product, including jewelry, and we support strongly the idea of banning lead in all children's products, particularly only down to trace levels.

And we would encourage the Committee to look at the testimony before the House of the American Academy of Pediatrics last month. They've looked at all of the science, and they believe these doctors who have been in coalition with our organizations on a number of projects, that we can get lead levels down to 40 parts per million, not 200 parts per million, that's the trace amount in clean soil.

So, we support your provision, and would encourage you to take a look at improving it even more.

Third, the bill goes a long way toward improving the safety of imports. We very much support the third-party testing certification provision, and the other provisions about improving the safety of imports, and particularly the provision that gives the CPSC the authority to prevent recalled products from being dumped abroad, which is a problem that has surfaced in some of the research and the reporting that has been done over the summer, as a result of some of the problems with the CPSC.

I also want to say that as an association of state organizations that strongly believes that the states should continue to serve as laboratories of democracy, and that we need 51 consumer cops on the beat, that is, 50 Attorneys General, as well as a Federal agency, that your expansion of Attorney General authority to enforce the Federal Consumer Product Safety Act and other Acts from the states is a very critical provision, and the provision that you have in the bill that says that stronger State laws are not preempted, is one that we can always, always support. And just like with toxics in children's products, we believe in the precautionary principle—Congress should set a floor, but the states should be allowed to go further.

So, there are a number of provisions in your bill that we strongly support. We look forward to working with the Committee on the bill.

There is one item that is not in my prepared testimony, it came to my attention, I've received a number of communications in the last day or so from eminent biochemists and some doctors, including burn doctors, who suggest that you should reevaluate Section 25 of the bill, which calls for an immediate furniture flammability standard. My organization has spent many years, and worked on many projects to get toxic chemicals—persistent bio-cumulative

toxic chemicals out of products. And we have also worked on fire-safe cigarette laws.

So, we care about burns and we care about toxic chemicals. These groups believe—and I'd like to enter some materials into the record if it's proper, that they've provided me—that we should take, and we'd be happy to work with the Committee to help those groups come before the staff, to talk about whether that section needs to be amended.

[The materials previously referred to follow:]

THE BURN CENTER AT ARKANSAS CHILDREN'S HOSPITAL
Little Rock, AR, October 4, 2007

TATE HEUER,
Senior Legislative Assistant to Senator Mark Pryor,
U.S. Senate,
Washington, DC.

Dear Mr. Heuer:

I would like to share the concerns of the burn community about current Federal legislative and regulatory activity regarding upholstered furniture flammability in general, and an open flame standard for such flammability in particular.

Our concern is highlighted in Section 25 of recently introduced reauthorization legislation related to the Consumer Product Safety Commission (CPSC), which proposes a deadline for action on this standard. Please share our concerns with the members of Senator Mark Pryor's Subcommittee on Consumer Affairs, Insurance, and Automotive Safety, in preparation for their meeting on October 4, 2007. As review of this proposed standard evolves in the coming months, I would also like to present the concerns summarized in this letter in greater detail either in person or in writing, as appropriate.

I am writing as a practicing burn surgeon for the past 22 years, and the current Director of the Burn Center at the Arkansas Children's Hospital. Along with my 3,500 fellow members of the American Burn Association (ABA), I am familiar with both the causes and the impact of severe burn injury, and supportive of all worthwhile burn prevention efforts. The ABA, for example, was the first professional organization to support Federal legislation mandating the development of fire-safe cigarettes in 1979.

The ABA has continually supported Federal studies and state legislation to support fire-safe cigarettes. However, many of us who are aware of the current draft of CPSC regulations related to upholstered furniture flammability standards, including the members of the ABA Burn Prevention Committee, have serious concerns about those regulations, as outlined in the CPSC'S proceeding entitled *"Ignition of Upholstered Furniture by Small Open Flames and/or Smoldering Cigarettes,"* issued as an advance notice of proposed rulemaking on October 23, 2003. Our concerns are summarized below and described in more detail in an attachment providing supporting evidence.

1 Growing evidence of the increasing public health hazard represented by the flame retardant chemicals required for upholstered furniture to comply with TB 117.
2. The magnified risk when ignition of FR-treated furniture occurs.
3. Ineffectiveness of existing upholstered furniture flammability standard. (California's TB 117, on which the proposed Federal rule is modeled).
4. Lack of technical success or priority in developing a Federal open flame standard.
5. The resulting pending initiation of a major study of this issue by two highly regarded independent research organizations.
6. Declining justification for a small open flame standard.
7. Probable further decline in upholstery fire incidence, in the absence of a new standard.
8. The emerging development of alternative approaches to furniture flammability.

Thank you for your consideration of these concerns.

Sincerely,

WILLIAM L. HICKERSON, M.D., F.A.C.S.
Professor of Surgery/UAMS, Medical Director, Burn Center

THE BURN CENTER AT ARKANSAS CHILDREN'S HOSPITAL
Little Rock, AR, October 18, 2007

Hon. MARK PRYOR,
Chair,
Senate Subcommittee on Consumer Affairs, Insurance, and Automotive Safety,
Washington, DC.

Dear Senator Pryor:

I write to share the concerns many of us in the burn community have in regards to the current Federal standard-setting activity about upholstered furniture flammability in general, and an open flame standard in particular. The reference is to a Consumer Product Safety Commission (CPSC) proceeding entitled "Ignition of Upholstered Furniture by Small Open Flames and/or Smoldering Cigarettes", issued as an advance notice of proposed rulemaking on October 23, 2003 and further discussed in the Commission's December 2005 briefing package.

Our concern is highlighted in Section 25 of S. 2045, the recently introduced CPSC reauthorization legislation that proposes a June 2008 deadline for action on this standard. While we appreciate the strong desire of both Congress and the Commission to conclude the lengthy consideration of this standard, we still have grave doubts whether a standard with such important potential long-range effect on public health should be addressed under a mandated deadline.

The ABA has continually supported such legislation, which has now been enacted in at least 22 states. Now that such laws cover more than half the Nation's population, we fully expect the cigarette industry will soon decide to apply fire-safe technology to all U.S. production. CPSC's cost-benefit analysis however dismissed the likelihood that fire-safe standards would expand beyond the three states which had passed such laws by the end of 1995. This development has rendered obsolete the cost-benefit analysis on which the case for the proposed flammability standard is based.

Although the new Federal standard might reduce the already small number of casualties, the burn community might still consider it another step forward were it not for serious concerns related to the potential hazards of flame retardant chemicals. Such chemicals are now used to meet the only existing regulation of furniture foam, California's TB 117, and their use would expand substantially under the proposed Federal standard. The ABA Burn Prevention Committee, for example, has recommended to the ABA Board of Trustees that the Association take a position opposing any standard that would depend on the use of chemicals whose safety to the environment and to public health could not be proven.

Our concerns are summarized below and described in more detail in an attachment providing supporting evidence. In your upcoming mark-up of S. 2045, please consider if it is realistic for the Commission to complete rulemaking by June 2008. We are in a dynamic environment where the following factors either challenge the premise of the standard or will continue to evolve rapidly after that date:

1. Growing evidence of the increasing public health hazard represented by the flame retardant chemicals used in upholstered furniture to comply with California TB 117.
2. The magnified risk to firefighter health when ignition of FR-treated furniture occurs.
3. Lack of evidence of effectiveness of the only existing upholstered furniture foam flammability standard, a state-level measure enacted in California in 1975.
4. Declining statistical justification for a Federal standard since it was first proposed in 1994, and, independent of any additional standard setting, likely
5. The imminent initiation of a major study of the upholstered furniture flammability issue by the National Fire Protection Association and Underwriters Laboratories.
6. The very slow turnover of upholstered furniture in lower income households.
7. The emerging development of alternative approaches to furniture flammability.

Thank you for your consideration of these concerns.

Sincerely.

WILLIAM L. HICKERSON, M.D., F.A.C.S.,
Professor of Surgery, UAMS Director,
ACH Burn Center.

ATTACHMENT

Concerns Regarding CPSC Proposed Small Open Flame Upholstery Ignition Standard

1. *Growing evidence of the health risk from flame retardant chemicals.* Brominated and chlorinated chemicals, the most common flame retardant chemicals, have been found in increasing levels in the environment and in mothers' milk. These levels approach those associated with neurological and reproductive deficits, endocrine disruption and cancer in animal studies. When incorporated into manufactured products, these chemicals do not remain encased in those products, but gradually release and migrate into the indoor environment, dust, and human's bodies where they represent a significant threat to public health.[1]

The current method of achieving small open flame resistance, the standard for foam flammability contained in the current draft of the proposed CPSC standard, is to incorporate substantial quantities of these chemicals into the upholstery fabric and/or the flexible polyurethane foam used in upholstered furniture padding.[2] As a result of the only existing state standard, California homes, pets and people now have high levels of toxic fire retardant chemicals. These chemicals, since their introduction as flame retardants around 1980, have also been associated with a growing incidence of hyperthyroid disease in domestic cats. Furthermore, studies are underway at the U.S. EPA and UC Davis on a possible link between fire retardant chemicals and autism.

2. *Magnified risk when ignition occurs.* Upholstered furniture ignition standards are based only on the ability of furniture components to *delay* becoming the *initial* item ignited. They do not protect furniture from igniting in a conflagration that begins elsewhere in a residence or commercial structure. Such was the case in the tragic May 2007 furniture store fire in South Carolina, which began outside the store and killed nine firefighters. (I don't understand the connection of the previous sentence to the point. You might want to say. Similar hear is given off from combustion of furniture with and without added FR chemicals.) When released in a fire, such chemicals, already known as a threat to firefighter health,[3] add further to the toxic chemical burden in the environment.

3. *Lack of evidence of effectiveness of existing foam flammability standard.* (California's TB 117, on which the proposed Federal rule is modeled). The only existing standard requiring resistance to open flame ignition of the flexible polyurethane foam used in the padding of upholstered furniture has been in effect in California since 1975. Since the fire and death rate in fires first ignited in upholstery has not decreased any more rapidly in California than in the rest of the country since 1985,[4] there is no proof that this standard has contributed to this decline, nor that any tightening of this standard would contribute to such a decline in the future.

4. *Declining Justification for a "Small Open Flame" Standard.* Deaths in fires in which upholstered furniture was the first item ignited have decreased 80 percent since a voluntary flammability standard was first adopted by furniture manufacturers in the early 1980s,[5] and 50 percent since a mandatory Federal standard was first proposed in 1994. By 2004, such deaths had declined to an estimated 550, over 90 percent caused by cigarettes and just 10 percent from open flames. The most recent statistics, for the year 2004, estimate a decline of 50 percent from approximately 1,300 to 650.[6] The trend line of the decline in such deaths closely matches that of decline in smoking in the general population.

Although the "small open flame" standard, representing only an estimated 15 percent of fires originating in upholstery, is not directed at fires started by cigarettes themselves, the decline in smoking has reduced the presence of the major sources of such flames which are likely to come in contact with upholstered furniture, name-

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[1] Thomas McDonald, Ph.D., "Polybrominated Diphenylether Levels in U.S. Residents: Daily Intake and Risk of Harm to the Developing Brain and Reproductive Organs", *Integrated Environmental Assessment and Management,* 2005. v.1:4, 343–354. (*contains extensive bibliography on environmental impact of brominated chemicals*).

[2] "An Evaluation of the CPSC Staff Preliminary Regulatory Analysis of the Draft Upholstered Furniture Flammability Standard," CRA International, Oakland, CA, March 2006. (prepared for the American Home Furnishings Alliance), 106 pp.

[3] Grace LeMasters, Ph.D., *et al.,* "Cancer Risk Among Firefighters: A Review and Meta-Analysis of 32 Studies," *Journal of Occupational and Environmental Medicine,* 48: 11, 1189–1202. (*contains extensive bibliography*).

[4] Kimberley Rohr, "Products First Ignited in U.S. Home Fires", National Fire Protection Association, Quincy, MA, April 2005, 131 pp.

[5] Upholstered Furniture Action Council (UFAC) Standard, later modified and published as ASTM Standard 1351E (see *www.UFAC.org*)

[6] CRA International, *op. cit.* 2006.

ly, matches and cigarette lighters. The resulting reduced estimate of open flame-ignited fires originating in upholstery is now so low (averaging 40 a year in the years 1999–2003)[7] that its statistical significance is highly questionable.

5. *The pending initiation of a major study of this issue by two highly regarded independent research organizations.* The National Fire Protection Association and Underwriters Laboratories are about to embark on a major study of upholstered furniture flammability, beginning with a review of the very sketchy data available on the subject.

The study, expected to take 18 months, began with a public briefing hearing at NFPA headquarters in Quincy, MA on October 17.[8] The apparent need for such a study by the Nation's major independent fire protection and product evaluation organizations calls into question the appropriateness of both the CPSC's current draft standard and the proposed June 2008 deadline for final rule-making on this standard.

6. *The emerging development of alternative approaches to upholstered furniture protection.* Legislation introduced in California in 2006 would ban the entire class of brominated and chlorinated chemicals currently used as flame retardants. In place of these chemicals, AB 706 enables the California Bureau of Home Furnishings and Thermal Insulation (the only such state-level organization in the country) to develop alternative methods to protect the public against fire risk involving upholstered furniture.[9] Although AB 706 was narrowly defeated in the California Senate earlier this month in its first legislative test, it has gained considerable momentum and will no doubt be revived in future sessions of the CA General Assembly.

Potential alternative approaches identified by AB706 proponents and described in a series of conferences on the flame retardant dilemma in Berkeley in 2007 include alternative non-toxic chemicals, furniture design changes, and the adoption of a policy testing the flammability risk of the entire item of furniture, rather than its individual components.[10]

AB 706 (Leno)—Fact Sheet—As amended 08–27–07

THE CRYSTAL GOLDEN-JEFFERSON FURNITURE SAFETY AND FIRE PREVENTION ACT

Coauthors: Assembly Members Bass, Berg, Brownley, DeSaulnier, Hancock, Hayashi, Huffman, Jones, Lieber, Ruskin, and Swanson

Purpose

The California Furniture Safety and Fire Prevention Act will reduce the threat from fires and health impacts caused by toxic chemical fire retardants. The bill requires the Bureau of Home Furnishings and Thermal Insulation to modify fire safety standards for furniture in a manner that delivers equivalent fire safety without the use of certain toxic chemicals and institutes updated furniture labeling requirements. It also institutes a process for the Bureau to obtain recommendations on toxicity concerns from the California Office of Environmental Health Hazard Assessment and creates a reconsideration process for any component or chemical prohibited by the bill.

Summary

AB 706 requires the Bureau of Home Furnishings and Thermal Insulation to improve fire safety standards for furniture such that equivalent fire safety is achieved with reduced use of chemical fire retardants. Current furniture standards are applied to the component parts of furniture such as fabric or polyurethane foam and do not reflect the reality of how fires start or burn.

One possible solution is a furniture construction standard that achieves equivalent fire safety and reduced chemical loading thus minimizing both fire and chemical exposure risks. AB 706 leaves the actual standards to the experts through the regulatory process, but does require that the most toxic chemicals not be used.

This bill would prohibit from seating furniture, mattresses, and bedding products selected toxic chemicals known as brominated fire retardants (BFRs) and chlorinated fire retardants (CFRs) that may cause reproductive, developmental, neu-

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[7] Rohr, *op. cit.*

[8] NFPA–UL Upholstery Flammability Study October 17 Briefing Session agenda. National Fire Protection Association, Quincy, MA.

[9] AB 706 Fact Sheet, Office of Senator Mark Leno, Sacramento, CA, as amended 08–27–07.

[10] View "Fire Retardant Dilemma" conference presentations (Nos. 1 through 3, January, April and September 2007) at *http://www.greensciencepolicy.org/conferences.*

rological or other health problems including cancer, birth defects, learning disorders, and mental retardation.

AB 706 requires the Bureau to modify existing standards for fabric and foam used in upholstered furniture in a manner that maintains equivalent levels of fire retardancy while eliminating the use of BFRs and CFRs.

This bill creates a process whereby the Bureau may obtain health and environmental information for fire retardant chemicals and, if determined by the Bureau to be necessary, prohibit use of fire retardant chemicals in furniture that cause harm to animal or human health. Any component or chemical prohibited by this process or by the provisions of this bill may be reconsidered based on new data.

The bill requires a consumer awareness label that states "DOES NOT CONTAIN BROMINATED OR CHLORINATED FIRE RETARDANTS." This is intended to help consumers discern which furniture is safe for human use.

Comments

California has one of the most stringent fire retardance standards in the world for furniture, mattresses, and box springs, and is currently developing new regulations to require the use of fire retardant chemicals in pillows, comforters, futons, and other bedding products. To meet existing furniture, mattress, and box spring standards, many manufacturers employ fire retardant chemicals.

Serious Health Concerns—Children at Risk

Two classes of these chemicals, brominated fire retardants and chlorinated fire retardants, can cause serious toxic effects including cancer, developmental impairment, birth defects, and endocrine and reproductive dysfunction, often at extremely low doses.[1] [2] Infants and children are particularly likely to absorb these fire retardant chemicals through direct physical or oral contact with these compounds in furniture, bedding, and mattresses, or through inhalation of dust and ingestion of these substances from their mothers' milk and from their diets.[3]

A New Approach to Fire Safety

California can achieve similar or even superior fire safety without the use of brominated or chlorinated fire retardants. Current fire safety standards test interior foam filling separately from fabric, batting, and other components without consideration of the realities of how furniture fires actually start. This approach is a *de facto* mandate to use the most toxic fire retardants.

Improved furniture design, the use of chemicals that are safer for human health and the environment, and the implementation of an integrated furniture construction standard to replace outdated tests should over time lead to further increases in furniture safety. Furthermore, prohibiting BFRs and CFRs from use in furniture will spur industry innovation in fire safety through "green chemistry" that is safer for human and animal health and the environment.[4]

More on Green Chemistry
http://coeh.berkeley.edu/docs/GreenChemBrief_final.pdf

Regulatory History

In 1977 and 1978 articles in the academic journal *Science* showed that brominated and chlorinated Tris, the two major flame retardants used in children's sleepwear, were mutagens (that means they changed DNA) and that brominated Tris was ab-

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[1] Linda S. Birnbaum, Daniele F. Staskal; 2004 Brominated Flame Retardants: Cause for Concern? *Environmental Health Perspectives,* Vol. 112.

[2] Gundersen Y., Vaagenes P., Reistad T., Opstad P.K.., Brominated Flame Retardants May Cause Brain Injuries In The Fetus And The Newborn, Tidsskr Nor Laegeforen.; 2005 Nov. 17125(22):3098–100.

[3] Jones-Otazo, H.A.; Clarke, J.P.; Diamond, M.L.; Archbold, J.A.; Ferguson, G.; Harner, T.; Richardson, G.M.; Ryan, J.J.; Wilford, B., Is house dust the missing exposure pathway for PBDEs? An analysis of the urban fate and human exposure to PBDEs. *Environmental Science & Technology* 2005, 39, (14), 5121–5130; Stapleton, H.M.; Dodder, N.G.; Offenberg, J.H.; Schantz, M.M.; Wise, S.A., Polybrominated diphenyl ethers in house dust and clothes dryer lint. *Environmental Science & Technology* 2005, 39, (4), 925–931.

[4] Wilson M., Chia D., Ehlers B.. Green Chemistry in California: A Framework for Leadership in Chemicals Policy and Innovation. Special Report to the California Legislature, University of California Policy Research Center and the Center for Occupational and Environmental Health, University of California, Berkeley. March 2006 (*http://coeh.berkeley.edu/news/06_wilson_policy.htm*).

sorbed into children's bodies from their pajamas.[5] After the National Cancer Institute found brominated Tris to be a potent carcinogen in animals, the Consumer Product Safety Commission forced manufacturers to stop using either form of Tris in children's sleepwear.

In 1975 California instituted Technical Bulletin 117 which requires all polyurethane foam used as filling in seating furniture to pass stringent fire safety testing. It was the first (and to date the only) state in the Nation to have such a standard.

Today, chlorinated Tris, one of the same chemicals removed from children's pajamas in the 1970s is widely used in furniture sold in California to meet the standards of TB 117. This chemical has recently been determined by the Consumer Product Safety Commission to be "a probable human carcinogen based on sufficient evidence in animals."[6] The other most widely used chemical fire retardant, Firemaster 550, is highly ecotoxic according to a U.S. EPA study.[7]

Leapfrogging From One Toxic to Another

Due to their potential harm to human health and the environment, two categories of fire retardants known as pentabrominated diphenyl ether (PentaBDE) and octabrominated diphenyl ether (OctaBDE) have been banned by the State of California for use at levels higher than one-tenth of 1 percent in virtually all new products, including furniture and the plastic housings of electronics, computers, and circuit boards as a result of AB 302 (Chan) enacted in 2003 and AB 2587 (Chan) enacted in 2004. If California were to ban the two most widely used fire retardant chemicals in furniture, other chlorinated and brominated replacements currently being considered to replace them would also pose hazards to human health and the environment.

Our objective is to prevent senseless and shortsighted leapfrogging from one toxic chemical to another by prohibiting the entire classes of brominated and chlorinated fire retardants. This bill takes that step, but in a modest way by prohibiting BFRs and CFRs from the products with the most intimate human contact, such as the chair you may be sitting on now or the bed your children will sleep on tonight.

Fire Retardants in Humans

Since the discovery of carcinogenic Tris byproducts in the urine of children wearing fire retardant pajamas thirty years ago, other fire retardants have been found in people's bodies. For example, polybrominated diphenyl ethers (PBDEs), a subcategory of brominated fire retardants, have increased forty-fold in human breast milk since the 1970s.

More on Chemicals in Breast Milk
www.ewg.org/reports/mothersmilk/

Levels of PBDEs have increased forty-fold in human breast milk since the 1970s. Women in North America on average have ten times the levels of women in Europe or Asia.[8] PBDEs have the potential to disrupt thyroid hormone balance and contribute to a variety of neurological and developmental deficits, including low intelligence and learning disabilities.

Structurally Like Other Toxics

PBDEs are structurally half way between polybrominated and polychlorinated biphenyls (PBBs and PCBs) and dioxins and furans which are known to cause cancer and are prohibited in the United States.

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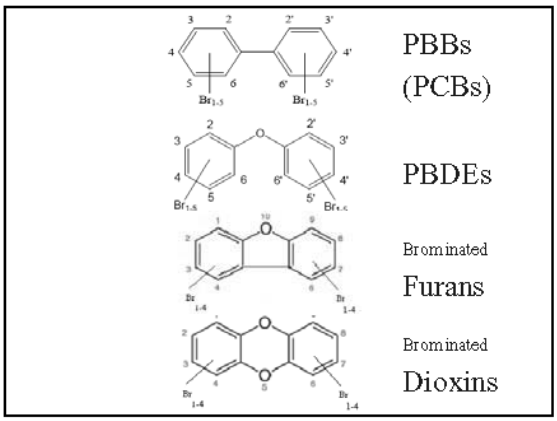
[5] A. Blum and B.N. Ames, *Flame Retardant Additives as Possible Cancer Hazards: The Main Flame Retardant in Children's Pajamas is a Mutagen and Should Not Be Used.* Science 195, 17 (1977); M.D. Gold, A. Blum, B.N. Ames, *et al.*, *Another Flame Retardant, Tris-(1,3-Dichloro-2-Propyl)-Phosphate, and Its Expected Metabolites and Mutagens.* Science 200, 785 (1978).

[6] Michael Babich, Dec. 21, 2006, Peer Reviewed CPSC Staff Research Reports on Upholstered Furniture Flammability, page 12.

[7] Furniture Flame Retardancy Partnership: Environmental Profiles of Chemical Flame-Retardant Alternatives for Low Density Polyurethane Foam Volume 1. U.S. Environmental Protection Agency report EPA 742–R–05–002A, page 4–3, September 2005.

[8] Lunder S., Sharp R.. 2003. Mothers' Milk: Record levels of toxic fire retardants found in American mothers' breast milk. Environmental Working Group (*www.ewg.org/reports/mothersmilk/*).

Human health effects from exposure to these related chemicals include a broad range of developmental and cognitive deficits.[9] For example, maternal exposure to PCBs causes long-lasting deficits in learning, memory, IQ, and attention span in infants and children.[10] Similar harmful effects are found in animals exposed to PBDEs.[11]



Brominated furans and dioxins exhibit similar carcinogenicity and toxicity to chlorinated ones.[12] Given the similarity in chemical structures, it is probable that PBDEs will have similar human health effects as those of PCBs, PBBs, dioxins and furans. Continuing to expose our children to this class of chemicals in furniture, mattresses, and bedding constitutes an exposure risk we should not be taking.

Chemical Bans

The European Union and many U.S. states have banned two brominated PBDE chemicals known as pentaBDE and octaBDE. These states include: California, Hawaii, Illinois, Maryland, Maine, Michigan, New York, Oregon, and Rhode Island. This year Washington State and Maine passed bans on decaBDE which is another brominated PBDE chemical. DecaBDE was recently banned in Sweden, and is in the process of being banned in the EU.

Climbing the Food Chain

Apart from toxic effects in humans from direct exposures, brominated and chlorinated fire retardants have been disposed of in ways that contaminate soils, groundwater, drinking water, ambient air, our oceans, and other natural ecosystems. These chemicals have also been detected at high concentrations in animals and fish, as well as marine mammals such as dolphins and harbor seals, indicating that they are already bioaccumulating in the food chain and in marine wildlife.[13] [14] [15] Fish and meat consumption are partly responsible for increasing levels of some these chemicals in humans.

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[9] L.S. Birnbaum, D.F. Staskal, J.J. Diliberto, September 2003, Health effects of polybrominated dibenzo-p-dioxins (PBDDs) and dibenzofurans (PBDFs)—*Environment International,* Volume 29, Number 6, pp. 855–860(6).

[10] Jacobson J.L., Jacobson S.W.. 2003. Prenatal exposure to polychlorinated biphenyls and attention at school age. *J Pediatr:* 2003 Dec. 143(6):780–8.

[11] Viberg, H.; Fredriksson, A.; Jakobsson, E.; Orn, U.; Eriksson, P., Neurobehavioral derangements in adult mice receiving decabrominated diphenyl ether (PBDE 209) during a defined period of neonatal brain development. *Toxicological Sciences* 2003, 76, (1), 112–120.

[12] L.S. Birnbaum, D.F. Staskal, J.J. Diliberto: *Health Effects of Polybrominated dibenzo-p-Dioxins (PBDDs) and Dibenzofurans (PBDFs).* Environmental International, Volume 29, Number 6, pp. 855–860(6) (September 2003).

[13] Johnson-Restrepo, B.; Kannan, K.; Addink, R.; Adams, D.H., Polybrominated diphenyl ethers and polychlorinated biphenyls in a marine foodweb of coastal Florida. *Environmental Science & Technology* 2005, 39, (21), 8243–8250.

[14] Christensen, J.R.; Macduffee, M.; Macdonald, R.W.; Whiticar, M.; Ross, P.S., Persistent organic pollutants in British Columbia grizzly bears: Consequence of divergent diets. *Environmental Science & Technology* 2005, 39, (18), 6952–6960.

[15] Voorspoels, S.; Covaci, A.; Lepom, P.; Escutenaire, S.; Schepens, P., Remarkable findings concerning PBDEs in the terrestrial top-predator red fox (*Vulpes vulpes*). *Environmental Science & Technology* 2006, 40, (9), 2937–2943; Chen, D.; Bixian, M.; Song, J.; Suin, Q.; Zeng, E.; Hale,

Over the last thirty years, there have been hundreds of scientific journal articles and reviews citing these and other negative health impacts in people and/or in animals resulting from exposure to brominated and chlorinated fire retardants.

Distribution of tens of millions of pounds of fire retardant chemicals annually in California represents an ongoing danger to public health and the environment all without an adequate scientific understanding of the long-term consequences of exposure. Workers involved in fire retardant and furniture production may be at even higher exposure risks.[16] [17]

Replacements Brominated and Chlorinated Fire Retardants

Substantial efforts to eliminate brominated and chlorinated fire retardants such as brominated and chlorinated Tris, PentaBDE, OctaBDE, DecaBDE, PBBs, and PCBs from products have been made throughout the world, including the private and public sectors. These efforts have made available replacements substantially safer to human health while meeting fire safety standards.

Improved furniture design and AB 706's smarter approach to furniture fire performance standards may lead to further increases in furniture safety in the future.

Rather than loading furniture cushions with up to 10 percent fire retardants by weight in order to comply with California Technical Bulletin 117, many manufacturers would like to utilize innovations such as fire resistant foam cushion wraps, health and eco friendly "green chemistry" retardant alternatives, use of fire resistant materials such as wool blends and synthetics, or other structural barriers such as polyester batting that provide similar or better fire safety performance without toxicity.

Simply requiring foam filling to delay burning for 12 seconds when exposed to a small open flame is an old approach that needs to be updated to reflect the reality of how fires start and burn.

Fire Fighter Toxicity Risk

When brominated and chlorinated fire retardants burn after a momentary resistance to open flame, they release a dark smoke that greatly reduces visibility for fire fighters.

An additional concern for fire fighters when fire retarded furniture burns is that brominated fire retardants are converted into dioxin and furans, exposing firefighters to dangerous levels of these extremely toxic and cancer-causing chemicals.[18] Firefighters are at particular risk during the clean up or "overhaul" of a burn site when the need for protective gear may not be apparent. Skin contact with soot that contains dioxin and furans from combusted brominated fire retardants is a key route of exposure to firefighters.

Fire Fighter Cancers

An analysis of 32 studies was published last November in the *Journal of Occupational and Environmental Medicine.* The analysis found firefighters had significantly elevated rates for four types of cancer: multiple myeloma, non-Hodgkin's lymphoma, prostate, and testicular cancer.

Eight additional cancers including malignant melanoma and brain cancer were determined to have a "possible" association with firefighting.[19] The authors also concluded that firefighter risk for the four most common cancers could be related to their exposures to complex mixtures such as the toxic products created when brominated and chlorinated fire retardants burn.

Due to elevated levels of cancer among firefighters, the California Professional Fire Fighters, the California State Firefighters Association, San Francisco Fire Fighters local 798, the San Francisco Fire Marshal, and other locals support AB 706.

R.C. In *Polybrominated Diphenyl Ethers in Birds of Prey Collected from Northern China,* SETAC, Montreal, Quebec, 2006; Montreal, Quebec, 2006; Peter S. Ross, *Fireproof Killer Whales (Orcinus orca): Flame Retardant Chemicals and the Conservation Imperative in the Charismatic Icon of British Columbia, Canada.* Journal of Fisheries and Aquatic Sciences, Volume 63, Number 1, pp. 224–234 (11) (January 2006).

[16] Thuresson, K.; Bergman, A.; Jakobsson, K., Occupational exposure to commercial decabromodiphenyl ether in workers manufacturing or handling flame-retarded rubber. *Environmental Science & Technology* 2005, 39, (7), 1980–1986.

[17] Thuresson, K.; Hoglund, P.; Hagmar, L.; Sjodin, A.; Bergman, A.; Jakobsson, K., Apparent half-lives of hepta- to decabrominated diphenyl ethers in human serum as determined in occupationally exposed workers. *Environmental Health Perspectives* 2006, 114, (2), 176–181.

[18] Gunilla Soderstrom, 2003, On The Combustion And Photolytic Decomposition Of Some Brominated Flame Retardants, Thesis, University of Umea, Sweden.

[19] LeMasters G.K., *et al,* December 2006, Cancer risk among firefighters: a review and meta-analysis of 32 studies, *J. Occup. Environ. Med.* 2006 Nov; 48(11): 1189–202.

Crystal Golden-Jefferson

On July 20, 2005, a Los Angeles County Fire Department firefighter named Crystal Golden-Jefferson passed away from work place related non-Hodgkin's lymphoma. She was a single mother and a dedicated paramedic firefighter with 19 years of service to the people of Los Angeles County. While the cause of Crystal Golden-Jefferson's cancer can not be definitively linked to dioxin exposure, dioxins are known to cause non-Hodgkin's lymphoma and Crystal Golden-Jefferson was regularly exposed to soot and smoke in her work.

In the naming of AB 706, it is the intent of the Legislature to honor Crystal Golden-Jefferson and other fire fighters who, like her, have lost their lives due to toxic chemical exposure and workplace related cancers. Removing from furniture chemicals that convert into carcinogenic dioxins and furans during fires can reduce workplace exposures and cancer risk for fire fighters who bravely sacrifice their lives so that others may live.

Fire Safety Improving For Other Reasons

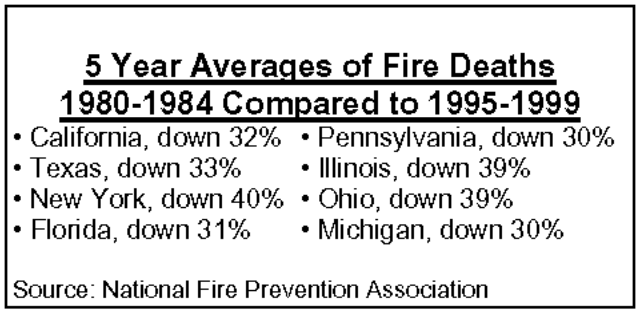
Fires started from residential furniture or mattresses have decreased in recent years due to:

- Fire safety education,
- Improved electrical and building codes,
- Increased use of smoke detectors and building sprinkler systems,
- Mandated "fire-safe" cigarettes with lower ignition propensity, and
- General decreases in smoking.

In 2005, California passed AB 178 (Koretz) requiring all cigarettes sold in California be fire-safe by January 2007. Today, the Bureau of Home Furnishings and Thermal Insulation has difficulty finding cigarettes that will smolder long enough in order to conduct the smoldering test required in Technical Bulleting 117.

Are We Really Getting More Safety?

Despite our being the only state with furniture flammability standards, California has not reduced fire deaths more than other states during the years that our standard has been in effect. A comparison of fire deaths by the National Fire Prevention Association of 5-year averages among the most populous states showed California was statistically equal to states without the tough furniture standard.[20]



Fire Safety Standards a Good Idea

Fire safety standards for furniture can reduce fire hazard, but they must be updated to ensure we are not causing adverse long term health impacts like cancer and neurological problems that can adversely affect far more people. The Bureau of Home Furnishings and Thermal Insulation should have the authority to weigh these issues in consultation with toxics experts at the California Office of Health Hazards Assessment in order to best protect public safety from fires and public health from chemical risks.

Smarter Regulation = More Safety

AB 706—The California Furniture Safety and Fire Prevention Act will:

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[20] John R. Hall Jr., U.S. *Unintentional Fire Death Rates By State, Fire Analysis and Research Division,* National Fire Protection Association, Ouincy, MA, June 2006.

- Provide the furniture industry more options for creating safe and affordable furniture,
- Create opportunities for green chemistry innovation,
- Reduce workplace exposure to toxic chemicals for furniture industry workers and fire fighters,
- Remove toxic brominated and chlorinated chemicals from products that come in direct contact with our families, animals, and the environment, and
- Protect human and environmental health both now and for future generations.

All this can be done by smarter regulations developed with an eye toward protecting overall public health and fire safety.

Status

Held in Senate Appropriations Committee.

Votes

4–10–07 Passed Assembly Environmental Safety & Toxic Materials Committee in a vote of 5–2.
4–17–07 Passed Assembly Business & Professions Committee in a vote of 7–3.
5–31–07 Passed Assembly Appropriations Committee.
6–6–07 Passed the Assembly Floor in a vote of 46–31.
7–9–07 Passed Senate Committee on Business, Professions, and Economic Development in a vote of 6–3.
7–10–07 Passed Senate Committee on Environmental Safety and Toxic Materials in a vote of 5–2.

Support

Bluewater Network/Friends of the Earth (co-sponsor)
MOMS—Making Our Milk Safe (co-sponsor)
AFSCME
Alisa Ann Ruch Burn Foundation
As You Sow
Breast Cancer Action
Breast Cancer Fund
Burn Institute
California for a Safe Environment
California Furniture Manufacturers Assn.
California Labor Federation (AFL–CIO)
California Professional Fire Fighters
California State Firefighters' Assn.
Center for Environmental Health
City and County of San Francisco
Clean Water Action
Coalition for Clean Air
Coalition for a Safe Environment
Commonweal
Consumer Attorneys of California
Consumer Federation of California
Diversified Health Services
Environment California
Environmental Working Group
Episcopal Diocese of California
Firefighters Burn Institute
Firefighter Cancer Support Network
Get Able
Healthy Children Organizing Project
Marin County Board of Supervisors
MomsRising.org
Monterey Fish Market
Natural Resources Defense Council (NRDC)
Ocean Conservancy
Oceana
Physicians for Social Responsibility
Planning and Conservation League
Sacramento Fire Fighters Local 522
San Francisco Fire Marshal
San Francisco Fire Fighters Local 798
Sierra Club California

Silicon Valley Toxics Coalition
The Trauma Foundation

Neutral

Assn. of Woodworking & Furnishings Suppliers
American Home Furnishings Alliance
California Fire Chiefs Association
Polyurethane Foam Association

Opposition

Alliance of Automobile Manufacturers
American Chemistry Council
BSEF (Bromine Industry)
CA Black Chamber of Commerce
CA Building Industry Association
California Chamber of Commerce
CA Council for Environmental & Economic Balance
California League of Food Processors
CA Manufacturers & Technology Assn.
California Retailers Association
California Space Authority
Chemistry Industry Council of CA
Department of Consumer Affairs
Department of Forestry and Fire Protection
Department of Toxic Substances Control
Dietler Group
Flicker of Hope Foundation
Fresno Fire Chief
Industrial Environmental Association
International Sleep Products Association
Office of Environmental Health Hazard Assessment
Roseville Fire Department
Silicon Valley Leadership Group
W.F. McDonald Company

The New York Times OP-Ed—Published November 19, 2006

CHEMICAL BURNS

By Arlene Blum

Thirty years ago, as a researcher at the University of California, Berkeley, I published papers in *Science* magazine calling for the ban of brominated and chlorinated Tris, two flame retardants used in children's sleepwear. Both forms of Tris caused mutations in DNA, and leached from pajamas into children's bodies. In 1977, when brominated Tris was found to be a potent carcinogen, the Consumer Product Safety Commission banned Tris from children's sleepwear.

So I was astonished to learn recently that the same chlorinated Tris that I helped eliminate from children's pajamas is being used today in the foam inside furniture sold in California to meet standards there for fire retardancy, and that the state is considering similar standards for pillows, comforters and mattress pads. The Federal safety commission, following California's lead, is working to set a national standard for fire-retardant furniture.

Unfortunately, the most effective and inexpensive way for manufacturers to meet such standards is to treat bedding and furniture with brominated and chlorinated hydrocarbons like Tris. Though the chemical industry insists that they are safe, when tested in animals most chemicals in this family have been found to cause health problems like cancer, sterility, thyroid disorders, endocrine disruption, developmental impairment or birth defects, even at very low doses.

Many of these chemicals are long-lived and accumulate, especially in people and other animals high on the food chain. For example, PCBs, chlorinated chemicals that were also used as flame retardants, were banned in 1977, but very high concentrations can still be found in many creatures, including dead killer whales washed ashore in British Columbia.

According to the polyurethane-foam industry, if the new Federal standard for furniture were similar to the California standard, using current technology, then an estimated 17 million pounds of fire-retardant chemicals, mostly brominated and chlorinated hydrocarbons, would be used annually. (A more rigorous standard also

being considered by the safety commission would require up to 70 million pounds of chemicals a year, the industry says. Some of that could eventually end up in people and the environment.)

To complicate matters, consumers wouldn't know whether the sofa they're curled up on had been treated with Tris or its cousins. The United States does not require labeling on furniture contents.

All this is not to say that furniture fires don't pose a danger. According to a recent report from the commission, 560 Americans died in house fires that started in upholstered furniture in 2003. But by contrast, cancer killed more than 500,000.

What makes the potential increased use of chlorinated and brominated fire retardants all the more troubling is that it comes at a time when the risk of furniture fires is receding.

Most fatal furniture fires are caused by cigarettes, which typically smolder for half an hour after being put down. The good news is that after decades of opposition from the cigarette industry, cigarettes that extinguish themselves within minutes are now mandatory in New York State and laws have been passed requiring them in five other states. They are likely to become universal in the United States in the near future, thereby greatly reducing the risk of furniture fires—and the need for chemical treatments.

So why are we still using these potentially dangerous chemicals?

In the United States, chemicals are innocent until proven guilty: we wait until someone has been harmed by exposure to chemicals before regulating them. This is not an effective strategy, since most cancers occur 20 to 40 years after exposure, and are usually caused by multiple agents. Consequently, it's very difficult to link human cancer to specific chemicals or consumer products.

And there's another problem: In the United States, the manufacturers of consumer products are not required to disclose the results of toxicity tests to regulators or the public before selling their products.

In marked contrast, the European Union is adopting a "better safe than sorry" philosophy through regulations known as the Registration, Evaluation and Authorization of Chemicals. Manufacturers must demonstrate that their products are safe for people and the environment to introduce them and keep them on the market.

This standard provides a strong incentive for finding new alternatives to potentially dangerous brominated and chlorinated chemicals. An innovative Swedish company, for example, is developing a nontoxic fire retardant, Molecular Heat Eater, derived from oranges and lemons, that prevents fires in plastics and fabrics.

Home fires are a defined danger in the present. Chemical fire retardants pose a more ambiguous risk that can last for decades. We need to consider the larger picture before passing regulations that would put chemical fire retardants inside our pillows and those of our children, who are even more vulnerable to carcinogens. These regulations would lead to the widespread use of fire retardants that could be ultimately much more hazardous to us and our environment than the fires they're intended to prevent.

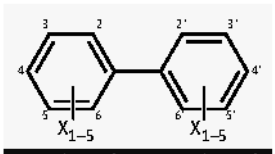
Arlene Blum, the author of "Breaking Trail: A Climbing Life," is a biophysical chemist.

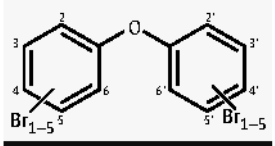
Science Magazine—12 October 2007 Vol 318

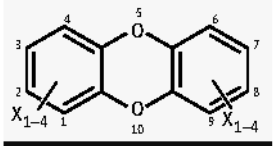
THE FIRE RETARDANT DILEMMA

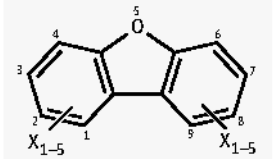
by Arlene Blum, Center on Institutions arid Governance, University of California, Berkeley

Although smoking and fire deaths are rapidly decreasing in the United States [1] proposed new flammability regulations could add tens of millions of additional pounds of potentially toxic fire-retardant chemicals to bed clothing, pillows, and foam within upholstered furniture [2]. In the 1970s, the flame retardants brominated tris [tris (2,3-dibromopropyl) phosphate] and chlorinated tris [tris (1,3-dichloro-2-propyl) phosphate] were removed from use in children's slcepwear after being found to be mutagens [3] [4] that could be absorbed into children's bodies.[5] They are also probable human carcinogens.[6] [7] Today, chlorinated tris is the second most used fire retardant in furniture, found in amounts up to 5 percent of the foam's weight. How did this happen?









Related structures. PBDEs, used as fire retardants in furniture, are structurally similar to the known human toxicants PBBs, PCBs, dioxins, and furans. In addition to having similar mechanisms of toxicity in animal studies, they also bioaccumulate and persist in both humans and animals.

In the 1980s, the fire retardant pentabromodiphenyl ether (pentaBDE) was added to polyurethane foam to meet California's Technical Bulletin 117; to date, no other states have similar regulations. PentaBDE disassociates from foam and migrates into the indoor environment [especially household dust [8]]; studies show that pentaBDE is bioaccumulating and has the potential to adversely affect health [9] and the environment. In 2003, California banned pentaBDE; eight other states and the European Union (EU) followed suit. In 2004, the U.S. manufacturer voluntarily ceased production.

PentaBDE was replaced by chlorinated tris and unknown proprietary mixtures containing chemicals such as chloroalkyl phosphates, halogenated aryl esters, and tetrabromophthalate diol diester, which may be no safer. An EPA study of these chemicals shows areas of concern, as well as large data gaps for human health and environmental safety information for all of them.[10]

While we continue to risk our health through exposure to these retardants, they do not appear to provide measurable fire protection. From 1980 to 1999, states that did not regulate furniture flammability experienced declines in fire death rates similar to that seen in California.[1] Other causes of fire death reductions nationwide include a 50 percent decrease in per capita cigarette consumption since 1980; enforcement of improved building, fire, and electrical code; and increased use of smoke detectors and sprinklers. Recent legislation mandating fire-safe cigarettes in 22 states, including California, should bring further reductions in deaths due to fire, without adding questionable chemicals to home furnishings.

New European regulations for the Registration, Evaluation, and Authorization of Chemicals (REACH) require industry to provide data to establish the safety of new and existing chemicals. The United States should follow suit. In California, Assemblyman Mark Leno introduced AB 706, a bill that authorizes the state to consider human health and environmental impacts, as well as fire safety, when regulating flammability. This bill would prohibit the most toxic classes of chemicals in fur-

niture, mattresses, and bed clothing (unless the manufacturer can establish their safety) and stop the cycle of replacing one toxic fire retardant with another.

Fire-retardant chemicals in our homes should not pose a greater hazard to our health and environment than the risk of the fires they are supposed to prevent. Equivalent or greater fire safety can be achieved with new technologies and materials, furniture design, and green chemistry.

Detection. Biophysical chemist Arlene Blum, using an x-ray fluorescence analyzer, measures 5 percent bromine from the fire retardant in her couch foam.

References and Notes

[1] J.R. Hall Jr., "U.S. unintentional fire death rates by state" (Fire Analysis and Research Division, National Fire Protection Association, Quincy, MA, 20061.

[2] There are four types of new regulations and legislation under consideration: (i) Federal regulation by the CPSC ("CPSC staff draft standard for upholstered furniture flammability, May 2005"); (ii) U.S. Senate CPSC Reform Act of 2007 (S. 2045) (U.S. Senate Bill 3616); (iii) pending California state regulation 604 to require bedding and pillows to be fire retardant [*Tech. Bull. 604* (State of California, Department of Consumer Affairs, DRAFT, 2005)]; and (iv) bills in four states (Illinois House Bill 1610, New Jersey Assembly Bill 2299, New York Assembly Bill 1417, and Pennsylvania Senate Bill SB 173) to adopt California TB 117 for furniture flammability.

[3] A. Blum, B.N. Ames, *Science* 195, 17 (1977).

[4] M.D. Gold, A. Blum, B.N. Ames, *Science* 200, 785 (1978).

[5] A. Blum *et al., Science* 201, 1020 (1978).

[6] *Report on Carcinogens, Eleventh Edition* (U.S. Department of Health and Human Services, National Toxicology Program, Research Triangle Park, NC, 2005); *http://ntp.niehs.nih.gov/ntp/roc/eleventh/profiles/s061tris.pdf*.

[7] M. Babich, "CPSC staff preliminary risk assessment of flame retardant (FR) chemicals in upholstered furniture foam" (U.S. Consumer Product Safety Commission, Bethesda, MD, 2006), p. 5; available at *www.cpsc.gov/library/foia/foia07/brief/ufurn2.pdf*.

[8] M. Lorber, *J. Exposure Sci. Environ. Epidemiol.,* published online 11 April 2007 (PMID: 17426733).

[9] T.A. McDonald, *Integrated Environ. Assess. Manage.* 1, 343 (2005).

[10] EPA, *Furniture Flame Retardancy Partnership: Environmental Profiles of Chemical Flame-Retardant Alternatives for Low-Density Polyurethane Foam* (EPA 742–R–05–002A, September 2005), pp. 4–2 to 4–5.

Mr. MIERZWINSKI. But we appreciate the opportunity to testify before you, and look forward to working with you, as we move into the holiday shopping season, and the toy buying season. Thank you.

[The prepared statement of Mr. Mierzwinski follows:]

PREPARED STATEMENT OF EDMUND MIERZWINSKI, CONSUMER PROGRAM DIRECTOR, U.S. PUBLIC INTEREST RESEARCH GROUP

Chairman Pryor, Senator Sununu, Members of the Committee: I am Edmund Mierzwinski, Consumer Program Director of the U.S. Public Interest Research Group. U.S. PIRG serves as the federation of state PIRGs, which are non-profit, non-partisan public interest advocacy organizations with one million members across the country.

We are pleased to present our views at this Legislative Hearing on the CPSC Reform Act of 2007, S. 2045. The state PIRGs have long been concerned with the important matters of consumer product safety and the ability of the Consumer Product Safety Commission (CPSC) to protect all of us, but especially the littlest among us, children, from preventable hazards. For example, according to data[1] from the CPSC, at least 20 children died in 2005 from toy-related injuries. Nine of the children died from choking or asphyxiating on a toy, balloon or toy part. One child was killed due to intestinal blockages from small, powerful magnets.

Since 1986, we have conducted toy safety research and education projects to avoid such tragic and preventable deaths and injuries. Our annual *Trouble In Toyland* toy safety reports[2] over the last 21 years have led to at least 120 corrective actions or recalls by the CPSC and manufacturers. These reports have emphasized the hazards posed by choking on small parts, ingestion of magnets and the chronic hazards posed by unnecessary exposure to lead, phthalates and other chemicals known to be toxic.

We say "at least 120 corrective actions" because we believe that our reports have led to more actions than those reported to us.[3] Over the last few years, CPSC has not responded to our Freedom of Information Act (FOIA) requests for information about recalls and enforcement actions taken as a result of our *Trouble in Toyland* reports. While we believe that the CPSC has grossly over-interpreted the notorious Section 6(b) of the Consumer Product Safety Act in denying us information on these toys that have already been prominently reported in the news, and indeed, have had actions taken on, we are pleased that your legislation would drastically improve the public's right to know under Section 6(b).

We were also active in the legislative and regulatory process that led to the passage of the 1994 Child Safety Protection Act, which was the last major Congressional amendment to the CPSC's authority.

Summary

First, Mr. Chairman, we would commend you for your past efforts to improve the CPSC, including the recent enactment of your amendment to the 9/11 law that has temporarily reinstated the lapsed authority of the CPSC to conduct business with only two commissioners.

We believe that your new legislation, the CPSC Reform Act of 2007, S. 2045, is a critical, comprehensive, and long-overdue effort to restore the CPSC from its status as the little agency that couldn't. We have detailed comments on the bill and suggestions for improving it even more.[4]

Recent news about the routine and repeated importation by a major U.S. manufacturer, Mattel, of millions of Chinese toys that grossly failed to meet U.S. safety standards has certainly shined important light on the plight of the CPSC. The CPSC is an agency that, over the years, has suffered both from Congressional ne-

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[1] In addition, approximately 202,300 people sought treatment in hospital emergency rooms in 2005 for toy-related injuries; at least 152,400 (75 percent) of those injured were children under 15 years old and at least 72,800 (36 percent) were children younger than 5 years old. At least 166 children choked to death on children's products between 1990 and 2005, a rate of about 10 deaths a year, accounting for more than half of all toy-related deaths. See Toy Related Deaths and Injuries, CPSC Memo of 5 October 2006, available at *http://www.cpsc.gov/library/toymemo05.pdf*.

[2] These reports and other information about toy safety are available at our website *www.toysafety.net*. Our main website is *www.uspirg.org*.

[3] As of 2002, CPSC had informed us of 105 PIRG-initiated recalls and enforcement actions. We estimate that the last four reports resulted in at least 20 additional CPSC enforcement actions, including four recalls. In some cases, the CPSC has provided us general information to this effect (*e.g.,* "we found that 2 toys on the 2006 PIRG list violated the small parts rule and we have recalled them"), but CPSC has not told us the specific names of the products recalled, even though the products appear on a public list in our report.

[4] The Committee also has had referred to it several other laudable bills to reform the CPSC that have been introduced by Committee Members and other Senators. Our comments on S. 2045, the most comprehensive bill, apply equally to any similar provisions of these bills. We would be happy to provide Committee or personal staff with detailed comments on any of the other bills.

glect and from efforts by opponents of consumer protection—both within and without—to destroy it.

Your bill includes provisions that will accomplish three important goals:

- First, it provides the CPSC dramatically increased funding, staffing and authority to hold corporate wrongdoers accountable;
- Second, it broadens and strengthens the ban on lead, a toxic chemical that causes brain damage and other problems and has no business in children's products or toys at all;
- Third, it strengthens the government's role in ensuring the safety of imported products while making it clear that any company that enters imported products into U.S. commerce is still responsible and cannot shift the blame to some lowest-cost third-party supplier thousands of miles away.

Our Views on Specific Elements of S. 2045

Funding and Staffing

As is well-known, the CPSC started in 1974 with a budget of less than $35 million, which, if merely corrected for inflation, would today be over $140 million. Yet, the agency's 2007 budget is only $63 million and the President's modest 2008 proposals would cut the CPSC, in real terms. Conversely S. 2045 would increase the CPSC budget by about 10 percent each year to approximately $140 million in 2014 while also directly providing additional funds to address its decrepit laboratory and the emerging safety issue posed by nanotechnology. We support these efforts, yet would suggest that while S. 2045's increases recognize that the agency can only absorb so much growth each year, the annual increases could even be tweaked up slightly to reflect real increases of 10 percent each year (that is 10 percent after inflation). We also believe that the bill's proposed staff level increases could be accelerated and given a higher ceiling, since the proposed increase from 400 to 500 employees by 2013 would still leave the CPSC at only about half its 1980 peak employee level. Nevertheless, we support the provisions.

Quorum, Commission Size and Authority

CPSC is responsible for the safety of 15,000 consumer products ranging from chain saws to kitchen appliances to children's toys. Part of the goal of strengthening the agency should be for the Congress to reinstate its 5 Commissioners, as S. 2045 would do. The bill also wisely extends the temporary 2-commissioner quorum so the agency can continue to do the people's business. It limits the power of political appointees and requires the CPSC, an independent agency, to notify Congress concurrently of proposals sent to the executive branch.

We strongly support these provisions, especially the bill's provision (provided that the budget increases go through so that the CPSC can fund the positions) reinstating 5 commissioners as a long-term solution to re-establishing the agency's importance in the eyes of billion-dollar manufacturers that have ignored it, as well as to the public and its staff.

The Public's Right To Know and the Notorious 6(b)

In our discussions with current and former CPSC staff, and in our own experience as noted above, nothing has proved more unnecessarily harmful to the CPSC's ability to protect the public than Section 6(b) of the Consumer Product Safety Act, which gives corporate wrongdoers power over the CPSC's ability to disseminate information about dangerous products to the public. While a consumer can search the National Highway Traffic Safety Administration's databases for information about complaints (even those that have not led to action), the CPSC often cannot even disclose remedial actions it has already taken.

U.S. PIRG will continue to support outright repeal of Section 6(b). Nevertheless, your thoughtful proposal to amend it in numerous ways to limit manufacturer obstinacy and threats of costly litigation has much merit.

We concur with the detailed comments of the Consumer Federation of America that S. 2045's Section 7 amending Section 6(b) should be itself amended in several ways to clarify its effect. In particular, the new language should apply to prohibited acts under all of CPSC's statutes, not merely the CPSA; should not eliminate current exceptions to 6(b)'s limitations and should include an exception for finding that the public health and safety demands immediate notice for information received under section 15(b).

Toxic Lead Hazards

Exposure to lead can affect almost every organ and system in the human body, especially the central nervous system. Lead is especially toxic to the brains of young

children. A child exposed to a single high dose of lead—such as by swallowing a piece of metal jewelry containing lead—can suffer permanent neurological and behavioral damage, blood poisoning, and life-threatening encephalopathy. Exposure to low doses of lead can cause IQ deficits, attention deficit hyperactivity disorder, and deficits in vocabulary, fine motor skills, reaction time, and hand-eye coordination. PIRG studies have found lead levels in children's jewelry at 28 percent by weight or more.

Children are more vulnerable to lead exposure than adults, since young children often put their hands and other objects in their mouths; their growing bodies absorb more lead; and children's developing brains and nervous systems are more sensitive to the damaging effects of lead. Currently, while lead is explicitly banned in paint (at levels based on 1970s science), the CPSC must jump through numerous hoops before it can recall other products containing lead (except those with banned lead paint). Among other regulatory hurdles, it must first determine that levels of lead in any product are "accessible" to ban the product. While, positively, the CPSC is proceeding (through a rulemaking in response to a Sierra Club petition) to ban lead in metal components of children's jewelry, the better, precautionary approach is to simply ban lead in all children's toys and products (including, for example, plastic jewelry).

S. 2045 takes that precautionary approach. It lowers allowable lead paint levels and bans lead, except in trace amounts, in other children's products. Nevertheless, we would urge the Committee to review the recent House testimony[5] of the American Academy of Pediatrics, which offers a comprehensive review of current and historical lead standards and defines trace levels even lower than the laudable proposals in S. 2045. *We concur with these findings from AAP:*

- The CPSC should require all products intended for use by or in connection with children to contain no more than trace amounts of lead.
- The Academy recommends defining a "trace" amount of lead as no more than 40 ppm, which is the upper range of lead in uncontaminated soil. This standard would recognize that contamination with minute amounts of lead in the environment may occur but can be minimized through good manufacturing practices.
- "Children's product" should be defined in such a way as to ensure it will cover the wide range of products used by or for children. This standard should cover toys intended for use by or with children under the age of 12 years.
- The limit on lead content must apply to all components of the item or jewelry or other small parts that could be swallowed, not just the surface covering.
- Legislation or regulations should limit the overall lead content of an item, rather than only limiting lead content of its components. A single product may contain numerous components that could cumulatively contain a dangerous level of lead.

Corporate Accountability

The bill, S. 2045, takes numerous steps to hold corporations accountable for the safety of products that they enter into commerce. Quite simply, today, manufacturers are more afraid of Wal-Mart's (and other retailers) demands for the lowest priced product than they are of threats from the CPSC for breaking the law.

Most importantly, the bill (Section 17) increases CPSC civil penalty authority from the current "business as usual" cap of $1.8 million dollars to a more imposing $100 million. The section also broadens criminal enforcement provisions. Section 15 establishes greater penalties for "repeat importation" offenses. Section 16 would broaden the scope of prohibited acts under the agency's authority. It would also give the CPSC authority that it does not now have to prevent the dumping of products that pose hazards onto other countries.

Section 22 would establish new law creating protection for corporate whistleblowers. While we have not had a chance to evaluate this section in detail and encourage the Committee to contact the Government Accountability Project for a review, this is an important step. No one, whether he or she is an employee of any firm, or of the government, or even a consumer, should suffer the threat of retribution for good faith disclosure of information about product hazards.

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[5] See testimony of Dana Best, M.D., M.P.H., American Academy of Pediatrics at a Hearing on Protecting Children from Lead-Tainted Imports of the Subcommittee on Commerce, Trade, and Consumer Protection of the House Energy and Commerce Committee, 20 September 2007, available at *http://energycommerce.house.gov/cmte_mtgs/110-ctcp-hrg.092007.Best-testimony.pdf.*

Improving Corrective Action Plans Under CPSC Recall Authority

The bill (Section 13) also limits the ability of manufacturers to game the process of recalling hazardous products by taking less action than would be effective at protecting the public. The bill would require CPSC approval of corrective action plans, which now are often poor excuses for protecting the public.

Because the process of a mandatory recall is so difficult, and is subject to numerous delays and possible litigation by affected companies, the CPSC nearly always instead negotiates voluntary recalls. But with the CPSC under pressure to take action as quickly as possible, the company involved doesn't have to agree to aggressively, if at all, remove the recalled product from commerce. It can simply agree, for example, to a "repair" or a "stop sale" of a recalled item, and leave old hazardous product on the shelves, provided any new product meets standards. As we noted in our 2006 *Trouble In Toyland* report, the first major CPSC action[6] concerning the hazards posed by powerful, tiny rare-earth magnets was not a recall, but merely a "replacement" program:

> In November 2005, a 21-month old boy named Kenneth Sweet, Jr. died of blood poisoning and tissue necrosis; an autopsy showed that two separate sets of magnets had pinched parts of his small intestine.
>
> CPSC and [the manufacturer] Rose Art did not recall Magnetix toys on store shelves. Instead, Rose Art told consumers who are "uncomfortable having the product in your home" to return the sets to the company for a free replacement product suitable for children under the age of six. As of September 30, 2006, MEGA Brands [acquirer of Rose Art] had received approximately 13,000 requests for replacements. This means that most of the four million Magnetix toys sold before March 31 have not been returned and could remain in homes across the United States.

"Uncomfortable having the product in your home" is not an adequate product safety standard.

Strengthen Import Protections

For better or worse, we live in a global economy. Manufacturers seeking lowest-cost producers routinely stretch supply chains to China or other countries. While the manufacturer, importer, retailer or distributor is appropriately responsible under the CPSA and other laws enforced by the CPSC for ensuring that any product that it enters into commerce meets U.S. standards (and should not blame some sub-contractor when it does not), Congress should also take steps to better protect consumers from the hazards posed by imported products.

The bill, S. 2045 takes several steps, which we support, to improve import safety.

Section 10 (which applies to all children's products, not only imports), establishes new third party certification for all children's products. The section prohibits their importation without such certification. Importantly, the third party certification is administered under the authority of the CPSC. It would not be as useful were it not. Also, importantly, we would read Section 18 (preemption) as making it clear that mere certification of a product would not grant any immunity or shield from liability under state law. The committee should be wary of any attempts by industry associations to change this.

Section 14 provides for improved identification of importers (and others). Section 20 would require the bonding of any importer, to ensure that it can pay for any necessary recalls, cost of holding at the port or product destruction. Section 19 improves the CPSC's ability to share information with both state enforcers and agencies of foreign governments. We are well aware of the European Commission's concerns over the current limitations on sharing hazard information with them; we believe that Section 19 will ameliorate their concerns.

We would also urge the Committee to review recent House testimony[7] by Public Citizen's Global Trade Watch, which points out that current and proposed trade pacts may limit the effect of your actions to strengthen import safety, or may subject them to trade sanction challenges.

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[6] Child's Death Prompts Replacement Program of Magnetic Building Sets, CPSC release of 31 March 2006 available at *http://www.cpsc.gov/cpscpub/prerel/prhtml06/06127.html*.

[7] See testimony of Lori Wallach, Director, Public Citizen's Global Trade Watch, at a Hearing on Protecting Children from Lead-Tainted Imports, Subcommittee on Commerce, Trade and Consumer Protection of the House Energy and Commerce Committee, September 20, 2007, available at *http://energycommerce.house.gov/cmte_mtgs/110-ctcp-hrg.092007.Wallach-testimony.pdf*.

Relationship to State Laws

U.S. PIRG is a strong supporter[8] of the principle that Federal law should serve as a floor of health and safety protection but that states should be allowed to protect their consumers, workers and environment better. As a former state attorney general, Mr. Chairman, I know you agree that states often act more quickly than Federal agencies or Congress and provide an important complement to Federal efforts. Yet, far too often, the Congress ignores this and trades passage of a weak Federal law for "Federal uniformity" in response to the baseless demands of self-interested industry organizations.

We commend the Committee for the strong anti-preemption language included in Section 18,[9] including its admonishment of former CPSC Chairman Hal Stratton's attempt to invent authority to preempt state causes of action for compensation by consumers burned in mattress fires.[10]

Nevertheless, in the area of state preemption, just as in the area of children's exposure to toxic products, we believe in the precautionary principle. So, we have the following recommendations to amend and strengthen the section.

Ideally, we believe that the language in Section 12 of the Safety Assurance for Every Consumer Product Act, H.R. 3691, more clearly achieves the goals of Section 18 of S. 2045. In particular, that section states:

> "No consumer product safety standard promulgated by the Commission after the date of enactment of the Safety Assurance for Every Consumer Product Act, or any other action taken by the Commission after that date, shall contain a preemption provision which affects any action for damages or the liability of any person for damages under the statutory law or the common law of any State, unless such provision is expressly authorized by statute."

Alternatively, we would suggest a modification to Section 18(a), which includes a complex relationship between sections (a) and (c), as modified by the words "to an extent greater than," which we would suggest could be changed to the following:

> "No consumer product safety standard promulgated by the Commission after the date of enactment of the CPSC Reform Act of 2007, or any other action taken by the Commission after that date, shall preempt any State or local law that would be in addition to the preemption of State regulations permitted under subsection (a), as limited by subsection (c)."

Again, we want to commend the Committee for recognizing the importance of allowing state enforcement, legislation and common law that provide greater protection than Federal law.

Conclusion

We commend you, Mr. Chairman, and your cosponsors for introducing this important legislation. The CPSC Reform Act of 2007, S. 2045, is a critical, comprehensive, and long-overdue effort to restore the CPSC from its status as the little agency that couldn't. We hope that you find our comments helpful. We look forward to working with you and your Committee staff to enact it into law. We would also be happy to discuss other possible actions under the Committee's jurisdiction to protect consumers from hazards. Under the CPSC's jurisdiction alone, for example, we urge you to hold hearings on ATV safety, extending the Child Safety Protection Act to the Internet, improving recall effectiveness and investigating the chronic and developmental hazards from unnecessary exposure to toxic phthalates (plastic softeners) in children's products. Thank you.

Senator PRYOR. Thank you.
Mr. Plunkett?

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[8] See our website resources on why state preemption of stronger consumer and environmental laws is a bad idea at *http://uspirg.org/us-law-policy.*

[9] We also recognize the important provision, Section 21, establishing the right of state attorneys general to bring actions under the CPSA. If it hasn't already, we suggest the Committee seek comment from the National Association of Attorneys General.

[10] We urge the Committee to review the testimony of Professor David Vladeck at a hearing of the Senate Judiciary Committee, "Regulatory Preemption: Are Federal Agencies Usurping Congressional and State Authority?" held on 12 September 2007, for a discussion of this CPSC episode and similar efforts by other Bush agencies to preempt state consumer law even when they haven't been granted Congressional power to do so. Hearing available at *http://judiciary.senate.gov/hearing.cfm?id=2935.*

STATEMENT OF TRAVIS PLUNKETT, LEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA

Mr. PLUNKETT. Good afternoon, Chairman Pryor, Senator Klobuchar and Senator McCaskill.

I'm Travis Plunkett, I'm the Legislative Director at the Consumer Federation of America and I'm going to echo many of Ed's comments here in commending all of you for this excellent piece of legislation. It's a far-reaching and comprehensive bill, it'll strengthen the CPSC, and give it the tools that it desperately needs to protect consumers.

As you've heard repeatedly, the Agency needs to increase its financial and staff resources. We strongly support your proposals toward that end in the bill.

I would suggest that you consider increasing staffing beyond the increase of 100 full-time employees by 2014. You've pointed out already, Mr. Chairman, that the Agency is at about half the number of employees at its peak.

It is true, the technology has improved the ability of employees to be more effective, but as you've also pointed out, it is true that the number of imports that need to be examined in this country have sharply increased, so we'd urge you to consider a staffing increase, although on funding and staffing, you take the Agency far above where it is right now. And it's a very important increase.

On third-party certification, we see that as a crucial part of the bill. The key to making sure products are safe when they enter the stream of commerce is to check for safety at the beginning of the supply chain. We strongly support this provision, and we'd encourage you to apply, it's a voluntary standard adopted by the industry, as well. And we also strongly support the bill's creation of a role for the CPSC in ensuring the testing laboratories meet minimum criteria and test to the highest standards.

A number of the provisions in the bill that increase the accountability of manufacturers, retailers and importers that put unsafe products on the market have already been mentioned. I will just tell you that the Consumer Federation strongly supports a number of those provisions. We'd like to see the cap on civil penalties entirely lifted, but the bill's increases on individual fines and cumulative fines are very significant. The limits will encourage manufacturers to recall dangerous products faster, and to comply more carefully with safety laws.

We also support the bills goal of authorizing civil enforcement by State Attorneys General and not encroaching on stronger State laws. And finally, we support the bill's proposals to strengthen penalties and procedures for criminal violations of the law—this has not yet been mentioned—in particular, removing the so-called receipt of noncompliance requirement in current law will ensure that those who violate the law in a criminal manner, do not get a free pass for a first violation.

For many years, CFA and other consumer groups have urged Congress to remove Section 6(b), excuse me, there has been much discussion of that today. We think it's very important that it, at the very least, be amended in the way that you have suggested. This will put fewer roadblocks in front of the CPSC to releasing impor-

tant crucial safety information in a timely manner. And, we urge you to proceed with this provision.

We've heard a lot of discussion of lead, I would echo Ed's comments that the AAP and others think that allowable levels should be reduced even further. This is groundbreaking, though, in applying the standard to children's jewelry and other children's toys, and we commend you for that.

Finally, let me suggest one significant new piece to improve recall effectiveness, we would recommend that you require manufacturers to provide a means of, directly and quickly, communicating information about recalls to consumers through a registration card. As you move forward with this bill, we encourage you to think about that as an important new provision that could be included in the bill.

Thank you for the opportunity to comment on this bill. We view it as one of the most important pieces of consumer legislation to be offered in Congress in several years, and we look forward to working with you on it.

[The prepared statement of Mr. Plunkett follows:]

PREPARED STATEMENT OF TRAVIS PLUNKETT, LEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA

Chairman Pryor, Ranking Member Sununu and Members of the Subcommittee, I am Travis Plunkett, Legislative Director for Consumer Federation of America (CFA). CFA is a nonprofit association of approximately 300 pro-consumer groups, with a combined membership of 50 million people that was founded in 1968 to advance the consumer interest through advocacy and education. Thank you for holding this hearing and for providing us with the opportunity to speak today.

First, we must applaud your leadership on product safety issues. Your inclusion of language extending the quorum in the Implementing Recommendations of the 9/11 Commission Act of 2007 was critical to passage of that language which has allowed the agency to operate fully for an additional 6 months. We also applaud your introduction of S. 2045. This far reaching and comprehensive bill will strengthen the U.S. Consumer Product Safety Commission and give it the tools it desperately needs to protect consumers from unsafe products.

The Consumer Product Safety Commission (CPSC) is the independent Federal agency charged with protecting the public from hazards associated with at least 15,000 different consumer products. The Agency was created because the marketplace was not adequately policing itself: litigation and various Federal laws were not sufficiently preventing death and injuries from unsafe products. CPSC's mission, as set forth in the Consumer Product Safety Act, CPSC's authorizing statute, is to "protect the public against unreasonable risks of injury associated with consumer products." [1] CPSC's statutes give the Commission the authority to set safety standards, require labeling, order recalls, ban products, collect death and injury data, inform the public about consumer product safety, and contribute to the voluntary standards setting process. CPSC was created to be an agency that acts proactively to protect consumers. Unfortunately, the CPSC's ability to be proactive has been thwarted by a shrinking budget, a lack of aggressive action by the agency, and statutory provisions that create obstacles to the effective prevention of product risks. S. 2045 takes many steps to removing several of these obstacles.

As a framework for discussing some of the most significant provisions of S. 2045, I will focus on CFA's core principles for product safety reform.

1. Strengthen CPSC

A. Increase Budget

With jurisdiction over many different products, this small agency has a monstrous task. In 1974, when CPSC was created, the agency was appropriated $34.7 million and 786 full-time employees (FTEs.) Now, 33 years later, the agency's budget has not kept up with inflation, its deteriorating infrastructure, its increasing data collec-

[1] Consumer Product Safety Act, 15 U.S.C. 2051, section 2(b)(1).

tion needs, or the fast-paced changes occurring in consumer product development. The CPSC budget has also not kept pace with the vast increase in the number of consumer products on the market. CPSC's staff has suffered severe and repeated cuts during the last two decades, falling from a high of 978 employees in 1980 to just 401 for the 2008 Fiscal Year. This is the fewest number of FTEs in the agency's 30-year history and represents a loss of almost 60 percent.

The President's 2008 budget would provide only $63,250,000 to operate the agency. This represents a reduction of 19 FTEs and a small increase of $880,000 from the 2007 appropriation. This increase does not provide for inflation, fails to allow CPSC to even maintain its current minimal programming, and will not allow for CPSC to invest in its research, resources and infrastructure.

Because of this historically bleak resource picture, CFA is extremely concerned about the agency's ability to effectively prevent and reduce consumer deaths and injuries from unsafe products. It is for this reason that CFA strongly supports Section 3 of S. 2045. This section, entitled, "Reauthorization" sets up an appropriations schedule for CPSC through 2015. It increases budget levels by approximately 10 percent each year, ending in 2014 at just over $140 million. Consumer Federation of America supports these gradual increases, as we believe that these increases are the most effective way to strengthen the agency. We have suggested increases of between 10 and 15 percent each year with an end goal of approximately $140 million. Adjusting CPSC's first budget of $34 million to today's dollars would result in a budget of $140 million. CFA also supports S. 2045's provision that appropriates $20 million in 2009 and 2010 for CPSC's laboratory, as well the $1 million during these 2 years for research with other agencies related to nanotechnology.

B. Increase Full-Time Employees

Section 4 of S. 2045 directs CPSC to increase FTEs to at least 500 by October 1, 2013. While we support this increase of 100 FTEs, we hope that the Subcommittee will consider increasing staffing levels even faster, given the extraordinary product safety challenges the Nation is facing. We further support the bill's prohibition of burrowing by political appointees into career positions.

C. Restore Commission to Five Commissioners

Section 5, "Full Commission Requirement; interim quorum," restores the Commission to five members, as was originally required in the Consumer Product Safety Act. We support this provision as we believe that additional members would result in a more robust and dynamic Commission that would strengthen and enhance the work of the Commission, thus better serving the public interest. However, we urge that the full Commission only be restored if the Commission's budget and staff are increased as proposed in this bill. We want to ensure that resources will not be taken away from the much needed product safety work conducted by the agency. This provision also includes a temporary quorum provision that would extend the current emergency quorum of two members for nine additional months after this bill is passed. This Subcommittee may wish to extend this emergency quorum to expire once there is a full complement of Commissioners.

D. Streamline Rulemaking Procedures

The Consumer Product Safety Act, as amended in 1981, requires CPSC to engage in a three-step rulemaking process that is unnecessarily time-consuming. Section 8, "Rulemaking," makes the Advanced Notice of Proposed Rulemaking (ANPR) process under CPSA voluntary rather than mandatory. We support this provision as it allows the ANPR process when justified but would also permit expedited rulemaking when necessary. The Subcommittee should consider requiring rulemaking "benchmarks" that require the CPSC to complete the rulemaking process within particular time-frames, or to submit an explanation to Congress as to why these benchmarks cannot be met. Such requirements could expedite the CPSC's glacial rulemaking process, while allowing the agency to exceed recommended benchmarks when justified, as well as provide notice to the public about the time limits for each stage of rulemaking.

2. Require Independent Third-Party Testing

To make sure that products are safe when they enter the American and global stream-of-commerce, safety must be infused into the earliest stages of the supply chain. For this reason, independent third-party testing of components, as well as final products, must be required. Third-party testing entities must be independent from and have no financial relationship with the manufacturer producing the product. Testing must be conducted to identify design flaws as well as violations of existing regulations, such as those governing the use of lead paint. Components and final products must be tested at numerous stages of production and tests must be con-

ducted randomly throughout the manufacturing process. Products should also be certified that they meet the appropriate standards and should bear a label indicating that they are certified.

Section 10 of S. 2045, "Third party certification of children's products," amends section 14(a) of CPSA and applies to any manufacturer or private labeler of a children's product that is subject to: (1) product safety standard under CPSA; or (2) or a rule under any act declaring a product a banned hazardous product. This would require testing by non-governmental independent third parties qualified to perform tests and would require that certificates be issued certifying conformity to the applicable safety standard or certifying that the product is not a banned hazardous product. While CFA supports this provision, we believe it is a reasonable compromise to require that products also be certified for compliance with all voluntary standards as well. Further, children's products are defined narrowly, as those designed or intended for use by children under 7 years old. However, recognized authorities such as the American Academy of Pediatrics have recommended that children's products be defined as those intended for children under twelve years old.

We support the provision in S. 2045 that creates a role for CPSC to play in ensuring that testing laboratories meet a minimum criteria and test to the highest standards. The CPSC is limited by its current budget, staff, expertise, and distance from off-shore manufacturing to engage in product-testing at the earliest stages of the supply chain. However, we believe that a publicly accountable entity should regulate these third-party overseers to set consistent and high standards. Ultimately the responsibility falls on the manufacturers and/or importers, many of which are based in the United States, to be more fully engaged in testing and policing the component parts that make up their products, as well as their final products.

3. Hold Manufacturers, Retailers, and Importers Accountable and Responsible

Global and American manufacturers, retailers and importers need to take responsibility and be held accountable for safety at every stage of the supply chain. As our economy is becoming increasingly global and the supply chain is becoming more complex with transactions becoming more arms-length, our priority must be that safety never falls through the cracks. Safety should never be "lost in translation" or compromised for a better price.

However, global manufacturers have not been able to comply with existing laws and regulations, such as those banning lead in paint up to .06 percent of weight. While CFA agrees that additional legislation is necessary, such as Senator Pryor's bill requiring independent third-party testing and expanding the ban on lead in all children's products, enforcement mechanisms must be in place to ensure compliance with these laws. Currently, limited enforcement mechanisms are in place. Very low caps exist on the amount of civil penalties the CPSC can assess against an entity in *knowing* violation of its statutes. The current civil penalty is capped at $7,000 for each violation, up to a total of $1.83 million. A "knowing violation" occurs when the importer, manufacturer, distributor or retailer has actual knowledge or is presumed to have the knowledge a reasonable person would have or should have if the person acted reasonably to determine the truth. Knowing violations often involve a company's awareness of serious injury or death associated with its product.

CFA supports completely eliminating this cap on the amount of civil penalties that CPSC can assess. However, we support the reasonable compromise set forth in Section 17 of S. 2045, which increases the cap to $250,000 for each such violation up to a total of $100 million. These new guidelines will encourage manufacturers to recall products faster and to comply with CPSC's statutes in a more aggressive way. Importantly, these new civil penalty limits will act as a meaningful deterrent to non-compliance with CPSC's regulations.

Section 17 also deletes one of the more counterintuitive provisions of the CPSA, which requires "receipt of notice of noncompliance" from the Commission before any person could be fined under the criminal penalty provision. Those who violate the law in a criminal manner should not get a free pass for a first violation. We support the removal of this clause and also support the inclusion of jail time for anyone who knowingly commits a prohibited act as defined by CPSC's statutes, as well as the removal of the "willfully" standard for those who authorize any prohibited act, and the inclusion of asset forfeiture as a criminal penalty. Criminal violators of CPSC's regulations must be punished in a meaningful way for criminal behavior as such behavior compromises the health and safety of our Nation.

Finally, CFA supports the inclusion of Section 15, "Repeated importation offenses," which allows the Commission to identify a repeat offender (after notice and hearing) and to recommend to Customs and Border Protection (CPB) that their import license be terminated. This is a positive step forward; however, this provision

could be strengthened by requiring CBP to follow any CPSC recommendations. Further, "multiple violations" should be defined.

4. Disclosure of Product Safety Information to the Public

For many years, CFA and other consumer groups have urged Congress to eliminate section 6(b) of the CPSA. This section of the Act restricts CPSC's ability to communicate safety information to the public. Currently, CPSC is required to give a company an opportunity to comment on a proposed disclosure of information. If the company has concerns about the wording or the substance of the disclosure they can object. CPSC must accommodate the company's concerns or inform them that they plan to disclose the information over their objections. The company can then sue the Commission seeking to enjoin them from disclosing the information. Thus, this provision creates a time-consuming process between CPSC and the affected company, often serving to delay or deny any potential disclosure.

Section 7 of S. 2045 regarding "Public disclosure of information" does not delete section 6(b), but rather amends it in numerous ways. This amendment requires that any industry response to the CPSC in these circumstances be provided within 15 days and eliminates the ability of a company to institute a court proceeding to enjoin release of the information CPSC may also attach the manufacturer or other entity's comments as an addendum to the release of public safety information. This section of S. 2045 takes an important step forward by instituting a reasonable timeframe for companies to respond to CPSC requests for disclosing information and minimizes the possibility of lengthy and resource-intensive litigation.

However, we would recommend several changes to this provision to make it more effective. First, the new language should apply to prohibited acts under all of CPSC's statutes, not merely the CPSA, so that products and relevant information regulated under different statutes are treated equally. Second, the new language appears to eliminate an existing exception to 6(b) that allows for the disclosure of information relevant to ongoing rulemaking proceedings.

CFA also supports the provision set forth in section 6 of S. 2045, "Submission of copy of certain documents to Congress." CFA, other consumer groups, and Members of Congress have been hindered from having access to CPSC's budget requests to the Office of Management and Budget (OMB). Thus, reinstating Section 27(k) of the CPSA which requires the Commission to simultaneously submit budget requests and legislative recommendations to both OMB and to Congress will illuminate what budget the Commission actually requests.

5. Ban Lead from Children's Products

As you are well aware, lead has increasingly been found in children's products, including toys, jewelry, lunch boxes, bibs, cribs and other items. Lead has been found in products made by large manufacturers as well as in those made by smaller companies. CFA supports a ban on lead in all children's products, which currently does not exist. While lead in the paint used in children's products is limited to .06 percent by weight of lead (a standard set in the 1970s), there is no mandatory law prohibiting the use of lead in children's jewelry or in other children's products. CFA supports a full ban on the use of lead in children's products other than trace amounts. This is because experts confirm that there is no safe level of lead exposure. Serious, acute and irreversible harm can come to children as a result of exposure to lead. Finally, there is no justifiable reason why such a dangerous additive should be used in children's products, as safer alternatives almost always exist.

Section 23 of S. 2045 requires that any product not in compliance with this rule is considered a banned hazardous substance, whether or not the lead is accessible to a child. Section 23 defines the ban on lead in three ways: (1) for toy jewelry, any lead content greater than .02 percent by weight violates the standard; (2) for other children's products, anything greater than .04 percent by weight is in violation; and (3) the current ban on lead in paint is changed from .06 percent to .009 percent. For consumer electronics, the bill directs the Commission to promulgate a rule to reduce exposure to and the accessibility of lead in electronic devices. The day after this Act takes effect, CPSC is required to begin rulemaking for all products that are covered, to determine whether there should be lower limits for lead than required in the Act.

CFA views this provision as a positive improvement over the status quo. However, we note again that experts maintain that there is no safe level of lead. The American Academy of Pediatrics supports a limit of .004 percent by weight of lead for all children's products. We hope to work with the Subcommittee to reduce the acceptable levels of lead even further.

6. Recall Effectiveness

A. Direct-to-Consumer Notification of Recalls

The ability of CPSC to conduct effective recalls of unsafe products is critical to protecting the public from unreasonable risks associated with consumer products. CFA supports requiring that manufacturers (or distributors, retailers, or importers) of products intended for use by children provide with every product a Consumer Safety Registration Card that allows the purchaser to register information through the mail or electronically. Such information should be used by a recalling company solely to contact the purchaser in the event of a recall or potential product safety hazard. Product Registration Cards are required to be attached to car seats to provide a mechanism to directly notify consumers who purchased a recalled car seat. These methods would be more effective than the current approach, which relies on the media to convey the news of the recall.

Consumers who do not hear of product recalls are at greater risk of tragic consequences, including death or injury. By being dependent upon the media and generic forms of notice to broadly communicate notification of recalls to the public, CPSC and the companies involved are missing an opportunity to communicate directly with the most critical population—those who actually purchased the potentially dangerous product. Consumer Safety Registration Cards or a similar electronic system would provide consumers the opportunity to provide manufacturers their contact information enabling manufacturers to directly notify consumers about a product recall.

To improve recall effectiveness, CFA recommends that S. 2045 include a provision that amends section 15 of the CPSA to require manufacturers to provide a means of directly communicating information about recalls to consumers through a registration card, electronically or by other means of technology. Manufacturers, retailers, and importers should be required to report the existence of the recall to retailers and all commercial customers within 24 hours after issuing the recall or warning. All entities within the stream of commerce should be required to post the recall to websites, if in existence, within 24 hours of the issuance of a recall. We suggest that manufacturers, retailers, distributors, and importers be required to communicate notice of the recall to all known consumers. Retailers, after receiving notice of the recall, should be required to remove the recalled product from their shelves and website within three business days or by the time of a CPSC recall announcement, whichever is shorter, and to conspicuously post notice of the recall in their stores for at least 120 days after issuance of the recall.

CFA also supports the concept of section 16 of S. 2045, which allows the Commission to prohibit the export of products if they do not comply with any safety standard, are banned as hazardous, or are the subject of a voluntary recall or other corrective action. CFA supports not merely "allowing" the Commission to prohibit export in these circumstances but rather, urges the Subcommittee to "require" the Commission to prohibit the export of such products The export of recalled and hazardous products to other countries should simply be prohibited.

Section 13 of S. 2045, "Corrective Action Plans," requires Commission approval of corrective action plans and defines a standard for what type of plan is in the public interest. We support this provision as it will strengthen CPSC's ability to obtain a recall remedy that is effective and safe.

B. Bonding

This summer's recall of tires from an overseas importer highlighted a serious problem: some importers may not be able to afford the costs of conducting a recall if safety hazards exist. If a company is benefiting from the sale of their products in the United States, they must be able to prove that they can cover the costs of a recall. All product sellers, including importers, must be required to post a bond or something equivalent to ensure that recalls could be effectively conducted. CFA supports section 20 of S. 2045, which directs the Commission to promulgate a rule to require manufacturers and others involved in the distribution of a consumer product to post a bond (or something similar that is acceptable to the Commission) to cover the costs of a potential "effective recall," holding the product at port, and/or the destruction of the product.

7. Traceability

When the product safety net fails and an unsafe product enters the market, it can be difficult to isolate the source of the problem. For example, a problem may have occurred at the manufacturing phase by a subcontractor of a subcontractor. Tracking this down can be incredibly time-consuming and can delay a meaningful corrective action plan. Further, more than one manufacturer may have used the same subcontractor so knowing the source of the safety failure is critical to isolating the

problem. Thus, products should contain some type of label, mark or number on a product that would directly indicate the source, date and production group.

Section 14 of S. 2045, "Identification of manufacturer imports, retailers, and distributors," requires manufacturers to submit to CPSC any identifying information, such as the retailer or distributor and all subcontractors. This will help CPSC to more readily identify all of the segments of the supply chain. In addition, section 11, "Tracking labels for durable products for children," requires indications on product or packaging that enables a consumer to ascertain the source, date, and cohort. This will be useful for consumers as they attempt to identify whether the product they own may be subject to a recall. CFA suggests improving this provision by requiring this information on both the product *and* the packaging, as packaging materials are often discarded.

8. Preemption

In February of 2006, the Draft Final Rule for Flammability of Mattress Sets ("Draft Final Rule") was made available to the public. Consumer groups opposed this Draft Final Rule not because of its substantive requirements but because of the novel language added to the preamble after the notice and comment periods expired that purported to preempt state common law remedies. CFA, therefore supports the concept that Congress should clarify the reach of CPSC's authority to prevent the Commission from usurping well established state regulatory authority and common law claims.

In conclusion, we support the introduction of this legislation as it represents a number of crucial steps forward in improving and strengthening CPSC's ability to protect the public from harmful products. We look forward to working with the Subcommittee to make this bill law.

Senator KLOBUCHAR [presiding]. Thank you, Mr. Plunkett.

Mr. Korn?

STATEMENT OF ALAN KORN, J.D., DIRECTOR OF PUBLIC POLICY AND GENERAL COUNSEL, SAFE KIDS USA

Mr. KORN. Thank you, Madam Chair.

Senator KLOBUCHAR. For the minute.

Mr. KORN. First off, thank you for having this hearing. We have quite a bit of confidence in this Committee, and in particular the staff sitting behind you on both sides of the aisle. There are often weeks where I speak to the ladies and gentlemen behind you more than I speak to my own wife, which tells me that this Committee is completely focused on consumer product safety and we join you in that effort. And you've been a particular leader in your short time here. We appreciate your support on the Pool Bill and, in fact, you've improved that bill for us.

Senator KLOBUCHAR. Well thank you, and you can tell your wife you talk to her more than me.

[Laughter.]

Mr. KORN. Madam Chair, there are many who feel that the CPSC is a dead agency and that it's failing repeatedly to serve its important mission. I am not one of those people. The CPSC is full of committed staff, who every day work hard to protect and serve its mission.

The CPSC however, is an agency that is withering on the vine; and it is in need of immediate water and fertilizer. And this bill, we believe, is a much needed dose of Miracle Grow.

I won't read through my testimony. I'll go through a few highlight points that have not been raised yet, except as to say this. We believe that the most important provision of this particular bill is its budget increase. Single-handedly, that is the most important thing we can do to improve this Agency, notwithstanding the CPSC Chairman's reluctance. Those of us, who deal with that Agency,

know it needs an infusion of funds and can use an infusion of funds. We're glad to see that Senator Durbin's on this bill also. That tells me that we're probably moving toward the right types of resources.

Another provision, and I think one of the more interesting ones in your bill and Chairman Pryor's bill, is the restoring of the Commission to five members. Apparently the sponsors feel that's important to be an effective agency, and we agree. An agency with five members makes for a more vibrant institution and would promote active discussion, compromise, and even dissent when necessary. And I think all those are good things. We can see that energy and I believe effectiveness in another agency under this Subcommittee's jurisdiction, and that's the Federal Trade Commission.

I also see another advantage to that type of vibrancy and diversification by expanding to five members. And that it allows the President, whoever that might be, and Congress, through its confirmation process, to diversify the expertise on the Committee. And this is how I would envision it. By no means a recommendation, but this is what diversification could mean. You could have a Commissioner with a legal background, a Commissioner with experience in human factors, a Commissioner with knowledge about children and how they interact with products, Commissioners with experience in certain risk areas, such as drowning and fire and burns, a leading killer of kids, as you know for our work on the Pool Bill. And a Commissioner with background in engineering and product design. Again, by no means a recommendation, not my position to do that, but that's the type of diversification we'd like to see.

We see that, by the way, hypothetically or not hypothetically, anecdotally at the NTSB. They've got members with aviation experience, boating experience—let's see, what's the other one—railway experience. So collectively, we see very good expertise at that independent agency, and we think they serve their mission quite well.

Another provision of the bill that hasn't gotten a lot of attention, I'd like to spend a second on it. And that is the civil penalties. Right now, the civil penalties are at $1.8 million. In our view, that is nowhere near enough economic deterrent, in order to promote a manufacturer or a company to do the right thing or an economic deterrent to doing the wrong thing. Now, whether it's $100 million, we can discuss with you and staff as to where that number might be.

And here's a good example. If you've got $50 million of product in the marketplace, and you find out that there's a product hazard with that. And you think to yourself, "Ooh, I need to report to the Consumer Product Safety Commission, but you know that if you don't you will only be fined $1.8 million." Then you're throwing an economic component into that decisionmaking where it shouldn't be. One point eight million dollars, possibly by a civil penalty, or a $50 million recall. That should not be the case. There should be a higher deterrent to that, a company shouldn't be put in that place where they're thinking about that kind of economic ramification when it comes to safety. So we believe something higher.

In the last few seconds, I want to talk about something that was just raised by my colleague to my right. And that is the product

notification or direct notification to consumers, something you mentioned in your opening statement or in your questioning. I think there's a bill pending in the House right now that was just marked up at the House Energy and Commerce Committee, unanimously by bipartisan support. It's a—it's the Danny Keysar Child Product Safety Notification Act, which would basically do what is done with NHTSA, and that is require, on certain products like cribs, playpens, high chairs, and strollers. I think the recent news suggests why it's important to directly notify an owner of a product when they have a recalled product.

So, I would urge the staff and the Committee to consider that pending bill in the House as a nice component to increase recall effectiveness in the CPSC Reform Act.

My time is up. I'll—I'll be happy to answer questions.

[The prepared statement of Mr. Korn follows:]

PREPARED STATEMENT OF ALAN KORN, J.D., DIRECTOR OF PUBLIC POLICY AND GENERAL COUNSEL, SAFE KIDS USA

My name is Alan Korn, and I am the Director of Public Policy and General Counsel for Safe Kids USA, a member country of Safe Kids Worldwide. Safe Kids thanks the Senate Consumer Affairs, Insurance and Automotive Safety Subcommittee, and in particular Chairman Pryor and Senator Sununu for holding a hearing on the CPSC Reform Act of 2007 (S. 2045) and ways to improve the overall operations of the U.S. Consumer Product Safety Commission (CPSC).

I. History of Safe Kids Worldwide

Safe Kids Worldwide is the first and only international organization dedicated solely to addressing an often under recognized problem: *More children ages 14 and under in the U.S. are being killed by what people call "accidents" (motor vehicle crashes, fires, drownings and other injuries) than by any other cause.* Formerly known as the National SAFE KIDS Campaign, Safe Kids Worldwide unites more than 450 coalitions in 16 countries, bringing together health and safety experts, educators, corporations, foundations, policymakers and volunteers to educate and protect families against the dangers of accidental injuries.

Founded in 1987 by the Children's National Medical Center and with support from Johnson & Johnson, Safe Kids Worldwide and its member country, Safe Kids USA, relies on developing injury prevention strategies that work in the real world—conducting public outreach and awareness campaigns, organizing and implementing hands-on grassroots events, and working to make injury prevention a public policy priority.

The ongoing work of Safe Kids coalitions reaching out to local communities with injury prevention messages has contributed to the more than 40 percent decline in the childhood unintentional injury death rate during the past 15 years in the U.S. However, with more children dying from accidental injury than from cancer, heart disease and birth defects, Safe Kids Worldwide and its member countries remain committed to reducing unintentional injury by implementing prevention strategies and increasing public awareness of the problem and its solutions.

II. The Problem: Accidental Childhood Injury

Accidental injuries are a leading cause of death for all Americans, regardless of age, race, gender, or economic status. Annually, an average of 27,100 deaths and over 33.1 million injuries are related to consumer products (although these are not necessarily caused by consumer products). Unfortunately, children make up a large portion of these tragic numbers. Each year, more children ages 14 and under die from unintentional injuries than from all childhood diseases combined. More than 5,300 children ages 0–14 die and there are over 6 million injuries serious enough to require medical care due to unintentional injury.

III. The CPSC Reform Act of 2007 (S. 2045)

In light of the recent news coverage surrounding the CPSC and product recalls, Safe Kids believes this is the perfect opportunity to address children's product safety on a comprehensive basis. Accordingly, Safe Kids applauds Senator Pryor, Senator Inouye and Senator Durbin for sponsoring the CPSC Reform Act of 2007. It is also our understanding that Senators Klobuchar and Nelson contributed extensively to

the legislation and they should also be commended. We believe S. 2045 is an excellent legislative framework to not only remedy the CPSC's abysmal budget, but to also rejuvenate this important Federal agency that has not been reauthorized since 1990. Safe Kids supports many of the provisions contained in the CPSC Reform Act of 2007:

A. Increasing the CPSC's General Budget

Safe Kids is particularly pleased that the CPSC Reform Act of 2007 would dramatically increase the Agency's current operating budget to a sufficient level in order for it to properly fulfill its mission. The CPSC monitors the safety of over 15,000 types of consumer products, including kitchen appliances, sporting equipment, safety devices, home furnishings and art materials, and is charged with an enormous responsibility to keep families safe from injury and death. The CPSC must regulate consumer products, recall them when necessary, educate the public about safe use and behavior, and stay current on new injury product trends.

Given its historically small budget and large statutory mandate, the CPSC has often been effective over the years, but could do much more with additional resources. The CPSC Reform Act of 2007 provides those resources by providing $759 million over the next 7 years—a 58 percent increase over current levels. Safe Kids believes this infusion of funds is *single-handedly the most important reform in the legislation* and we applaud the bill's sponsors for arming the CPSC with appropriate resources in order for it to properly serve its critical mission.

B. Dedicated Funds for Labs and Staffing

Safe Kids also supports the separate authorizations to upgrade the Agency's dilapidated laboratory and to increase its staffing level. This will ensure that the CPSC can accomplish both these important tasks without having to make any difficult decisions about what should be prioritized in the new budget. In addition, having specific amounts of money authorized for the lab and hiring of staff sends the important message that these are priority tasks for the CPSC. Safe Kids agrees with those priorities:

1. Upgrade the CPSC Lab

Safe Kids has consistently advocated for an upgrade to the CPSC's lab facilities. In the past, Safe Kids staff toured the CPSC testing lab located in Gaithersburg, Maryland. The CPSC, among other things, uses this lab to test thousands of consumer products to ensure that they comply with existing voluntary or mandatory standards, or to determine whether or not they pose an unreasonable risk of injury to the American public. Safe Kids staff was impressed by the commitment and expertise of CPSC lab personnel, but was surprised by the poor quality of the lab's conditions. The CPSC to this day, while somehow fulfilling their mission, has done so with less than adequate technical facilities. We believe that the CPSC should have a lab that, at the very least, competes with those found in the private sector and that Congress should provide the funds necessary to upgrade the facility. The CPSC Reform Act of 2007 provides for $20 million for the upgrade of this important facility.

2. Staff to Carry Out Agency Responsibilities

In addition, salaries for staff represent the largest portion of the CPSC's budget. However, the CPSC has gradually had their staffing levels reduced over the years due to budget constraints. This has resulted in fewer and fewer CPSC staff members to carry out the Agency's increasing responsibilities to keep children and families safe from defective and hazardous products. Not only has the Agency lost personnel over the years, but, significantly, the CPSC has lost key staff members through attrition who had in-depth experience and deep institutional knowledge. This is now the time to re-invest in staffing the Agency so that the CPSC, over time, will have an effective team with historical knowledge that can keep up with the fast-changing consumer product marketplace. Safe Kids fully supports the legislation's directive to have the CPSC be fully staffed with at least 500 employees by 2013.

C. Increasing the Civil Penalties for Violations

Safe Kids supports the increase in the civil penalty allowed by the Consumer Product Safety Act (CPSA), as contained in the CPSC Reform Act of 2007. In its present form (under Section 20 of the CPSA), any person who knowingly engages in a prohibited act, as outlined in Section 19, is subject to a civil penalty not to exceed approximately $1.8 million. In some cases, and in particular when larger companies are involved, the $1.8 million cap may not be enough of an economic deterrent to prevent the company from engaging in an unlawful act. For example, a com-

pany that has $50 million worth of product in the marketplace may be willing to incur the civil penalty instead of reporting a defect or injury as required under Section 15 in hopes of avoiding a recall (failing to report any information required by Section 15(b) is a prohibited act under Section 19 and is subject to a civil penalty). Safe Kids has long advocated for an increase in the civil cap to an amount that better represents a deterrent. We support the provision in the CPSC Reform Act of 2007 that would increase civil fines (for all statutes under the CPSC's jurisdiction) up to $250,000 per violation with a cap at $100 million.

D. Restoring the CPSC to a Five-Member Commission

The CPSC Reform Act of 2007 contains a provision that triggers an existing Agency authorization by expanding the Commission to five Commissioners, as opposed to the current membership of three Commissioners. The bill's sponsors feel that the Commission can function more effectively with a full complement of members. Safe Kids agrees; an Agency with five members makes for a much more vibrant institution and would promote active discussion, compromise and even dissent when necessary. We can see that energy, and I believe effectiveness, in another Agency under this Subcommittee's jurisdiction—the Federal Trade Commission (FTC). Due in large part to its full complement of Commissioners (and its adequate budget), the FTC, on the whole, effectively serves its mission by protecting consumers from deceptive practices and preserving a competitive marketplace.

A five member Commission would also allow the President and Congress to expand and diversify the expertise of the CPSC through the nomination and confirmation process. For example, the CPSC could be comprised of the following:

- A Commissioner with a legal background;
- A Commissioner with experience in human factors;
- A Commissioner with knowledge about children and how they interact with products;
- A Commissioner with experience in certain risk areas, such as drowning or fires/burns; and
- A Commissioner with a background in product design and engineering.

This is, by no means, a recommendation from Safe Kids as to who should be part of the Commissioner panel, but more illustrative of the opportunities that a five member Commission can present to the overall Agency structure as well as diversification. The diversification of expertise can be seen at the National Transportation Safety Board whose Board Members have individual, and therefore, collective knowledge in the fields of aviation, railway and boating.

Safe Kids does, however, caution the Subcommittee that expanding the Commission by two members would also result in the need for additional budget resources for staffing, office space and travel. We believe that the budget relief provided in the CPSC Reform Act of 2007 should be used first to improve overall Agency core functions—such as increasing recall effectiveness, marketplace policing and conducting enhanced public education initiatives—*not* using funds to augment the number of Commissioners. While we support the expanded Commission, Safe Kids believes that there other more pressing matters that need to be addressed first before doing so.

E. Enhancing Product Recall Effectiveness

There are many provisions in the CPSC Reform Act of 2007 that would enhance the effectiveness of product recalls and improve the strength of the CPSC compliance staff at the recall negotiating table with manufacturers:

1. Elimination of the Election of Remedies Provision in Section 15 of the Consumer Product Safety Act

S. 2045 eliminates the "election of remedies" provision contained in Section 15 of the CPSA. Safe Kids believes this provision unnecessarily handcuffs the CPSC's compliance staff when they are negotiating a corrective action plan.

Presently, once the Commission determines that a product distributed in commerce presents a substantial hazard and that remedial action is required to serve the public interest under Section 15 of the CPSA, the CPSC may order the manufacturer of the dangerous product to elect (at the product manufacturer's discretion) to either:

- Bring the merchandise into conformity with requirements of the applicable consumer product safety rule; or
- Replace the product with a like or equivalent product; or

- Refund the purchase price (less a reasonable allowance for use).

(Consumer Product Safety Act, Section 15d)

This discretionary election may not always serve the public interest. For instance, if the CPSC is recalling a $75 toaster that poses a serious electrocution or fire and burn hazard, the manufacturer, once ordered to remedy, may elect to refund the purchase price less a reasonable allowance for use. The refund on a toaster that has been in the marketplace for 5 years may have a refund value of $10. This refund may not be a motivating enough factor to encourage the consumer to remove the dangerous product from their household. In this case, the public may be better served by a different remedy—such as receiving a replacement item that is of similar quality or having the recalled product repaired. Safe Kids believes that CPSC compliance officers should ultimately decide what constitutes an appropriate remedy given the totality of the circumstances. We support the change to Section 15 of the enabling statute in the CPSC Reform Act of 2007 that empowers the CPSC to police the manufacturer's elected remedy option.

2. Product Tracking

The CPSC Reform Act of 2007 also contains a provision that would require manufacturers of children's products to place distinguishing marks on products or packaging that will enable the consumer to easily identify whether or not the item has been recalled. This requirement will make it much easier for consumers to quickly identify if a certain product has been recalled and hopefully return or dispose of the item in a timely fashion. Safe Kids supports this sound policy provision.

Historically, recall rates are quite low and much of the problem can be attributed to consumers not even being aware of the recall itself. Recall ineffectiveness also stems from consumers not being able to *easily* determine whether or not the product in their possession is the recalled one. Safe Kids notes that the bill allows the manufacturer to put the distinguishing marks on the product itself or its packaging. We would assume that most manufacturers would choose to put the mark on the packaging instead of the product, especially when the items are particularly small in size. As parents and grandparents can attest to, packaging is most often disposed of when a new toy is brought home. As a result, the tracking information would also be discarded. Safe Kids believes that the distinguishing marks—when at all possible—should be permanently stamped on the product itself so that the tracking information is present throughout the lifespan of the item.

In addition, Safe Kids recommends that all recall notices should highlight the distinguishing marks on the product. The simple existence of the marks is not enough—the recall notices need to incorporate color pictures of where the marks are on the products (or its packaging) as well as any graphics to help the consumer/parent/caregiver determine if there is a recalled product in their home. The CPSC recently released "A Consumer's Guide to the Magnetix Building Set Recall"; this is a great example of the effective use of images and other graphic elements to convey safety information.

3. Support for the Danny Keysar Child Product Safety Notification Act (H.R. 1699)

In its present form, the CPSC Reform Act of 2007 fails to include an effective tool (product registration cards) that would help improve customer notification and, therefore, recall success rates. The Danny Keysar Child Product Safety Notification Act (H.R. 1699), sponsored by Representative Jan Schakowsky, would direct the CPSC to require manufacturers of certain children's "durable products" (like cribs, playpens, high chairs and strollers) to provide consumer product registration cards in order to help facilitate the recall process. This bill was recently unanimously approved by the full House Energy and Commerce Committee. Registration cards, in some circumstances, can be an important tool to help consumers become aware of potentially dangerous products in their home by allowing the manufacturer of a recalled product to directly notify the purchaser of the product about the recall and the remedial action warranted. We note, however, that the Danny Keysar Child Product Safety Notification Act would not require registration cards for all children's products; the requirement would only apply to products inextricably interwoven in a child's daily life. This tailored use of registration cards makes the Act very practical and targeted to only those products that, if they contain a design hazard, pose significant expo-

sure to death or injury. We urge the inclusion of H.R. 1699 into the CPSC Reform Act of 2007.

4. Authority to Re-Visit a Negotiated Corrective Action Plan

The CPSC Reform Act of 2007 contains a much needed provision that enables the Agency and in particular, its compliance staff, to revisit an implemented recall corrective action plan that has not been effective. This is a particularly important tool for those recalled products that have a serious hazard and it can be determined that the recall effectiveness rates are insufficient (*i.e.,* cribs that pose a strangulation or a playpen that unexpectedly collapses). Posed with this scenario, the CPSC can require the manufacturer to more aggressively re-publicize the recall with posters, paid advertising or an additional video news release, among other things.

The CPSC Reform Act of 2007 also allows the CPSC to revoke completely a negotiated corrective action plan if it determines that a manufacturer or distributor has failed to substantially fulfill its action plan obligations. The manufacturer/distributor would then also be required to stop selling the product. Safe Kids believes that this provision may be redundant. We believe that once a product is subject to a recall, the manufacturer/distributor is already prevented from continuing to sell that product or must sell that product in its repaired form. We do believe, however, that "failing to comply substantially with [manufacturer] obligations under [a recall] action plan" should be considered a prohibited act under Section 19 of the CPSA. This would, in turn, trigger the authority to administer the civil penalties provision. Exposure to civil penalties provides an extra incentive for manufacturers/distributors to aggressively comply with an action plan in the first place.

F. Third-Party Testing/Certification and Ban on Children's Products Containing Lead

The CPSC Reform Act of 2007 would require third-party testing certification to ensure that children's products comply with any applicable product safety standards. It would also virtually ban lead in children's products, children's jewelry and consumer use paints. Associations, manufacturers, retailers and many consumer groups all agree that these are two concepts whose time has come. Add Safe Kids to this long list.

We also have two concepts to add to the legislation. First, Safe Kids believes that the testing required by Section 10 of the CPSC Reform Act of 2007 should be done throughout the manufacturing process and on several lots to ensure that all products that may find themselves in the marketplace comply with applicable safety standards. The second involves the bill's provision that requires the Government Accountability Office to conduct periodic audits of third-party testing labs. The audit procedure described in the CPSC Reform Act of 2007 addresses the expertise and qualifications of the third-party testing labs. Safe Kids believes that this audit protocol should be expanded to include a periodic assessment of the financial independence of these facilities. This will ensure that the certification labs are truly and continuously independent.

IV. Conclusion

The CPSC has used its relatively small budget and staff to accomplish an incredibly important task—keeping children safe from defective and hazardous products. As product-related injuries still exist and can be prevented, the CPSC is needed now more than ever to protect consumers, families, and children. Safe Kids commends Chairman Pryor and Senator Inouye, along with the other sponsors, for their introduction of the CPSC Reform Act of 2007 and we look forward to working with this Subcommittee on any efforts designed to protect children from product-related hazards.

Senator KLOBUCHAR. Thank you, Mr. Korn.

Mr. McGuire, with the Association of Home Appliance Manufacturers. Thank you.

STATEMENT OF JOSEPH M. MCGUIRE, PRESIDENT, ASSOCIATION OF HOME APPLIANCE MANUFACTURERS; ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. MCGUIRE. Thank you, Senator. On behalf of the NAM CPSC Coalition, I'd like to thank you for this opportunity.

NAM is the Nation's largest industrial trade association. I am President of the Association of Home Appliance Manufacturers, which represents producers of major portable and floor care residential appliances and their suppliers. I'm also a parent and youth sports coach and, quite honestly at times, obsessed with safety.

The Coalition is committed to ensuring that the U.S. marketplace provides safe products to Americans. Government, industry, and the public have an opportunity to do something about enhancing product safety. We should stay focused on the core issues and problems, and fashion public resources and solutions to address them.

We support enhancing the resources and the authority of the Commission to increase its effectiveness. Companies that work with CPSC recognize that it is thinly staffed, that many veteran employees are retiring, and that its information technology and laboratory are grossly inadequate. Although we believe that the American marketplace is safer than ever and the CPSC does a good job in leveraging its resources, the perception of many consumers is the opposite. This troubles us, as our economic viability depends on the confidence of the U.S. public in our products.

But product safety is not just a Chinese issue, it pertains to all links in the supply chain, whether domestic or international. We support a number of general and product-specific legislative measures to increase CPSC's ability to carry out its mission. S. 2045 contains many provisions our Coalition supports and we applaud Senator Pryor and others, including you, for your involvement in these.

However, the bill does contain some burdensome and troubling provisions, which would detract from CPSC's mission, increase litigation, and undermine the critical open relationship between CPSC and industry.

The system generally works because—works well—because industry and other groups voluntarily develop new consensus standards and report problems voluntarily to the CPSC. The Agency needs more resources to do its job more effectively and to take advantage of existing statutory authority. For example, we support a variation of Chairman Nord's fast track rulemaking, to adopt a Federal mandatory rule from selective safety-related provisions of consensus standards. We recommend this action, where the consensus standard is up to date and protective of safety and where a substantial number of firms are not complying with it. CPSC should show that a mandatory standard will significantly increase the safety of the product and decrease possible injuries and deaths.

In order not to undermine the private sector safety standard structure, the Commission should only adopt key safety aspects of these standards and rely as much as possible on the standards development organizations for updates, interpretations, and certifications under these standards.

We also support the concept behind the provisions in S. 2045, which would authorize CPSC to require specific products sold in our marketplace to show conformance through testing with safety standards. We strongly applaud making it a violation of Federal law to knowingly and willfully falsely use a mark or claim of certification.

My written testimony contains many other of the provisions in which we support. I would also now like to talk about a few areas where we have some concerns.

For example, whether deliberate or not, the bill would eliminate due process protections under Section 6(b) of the Consumer Products Safety Act for manufacturers. The bill is designed to expedite CPSC release of product safety information to the public by eliminating the opportunity of manufacturers to show that specific documents are of such low validity and accuracy, that release would be unfair.

Under the pending legislation, the result would be a data dump of information of no value and little validity, but which can be used to gain leverage in litigation by competitors and for other inappropriate purposes. It will be a disincentive for manufacturers and retailers to voluntarily submit data and submit it early. The reality is that the delays in releasing information to the public by CPSC are not due to manufacturer objections, but to the Commission's outdated technology and search techniques, which can be improved with increased funding.

Second, we oppose the proposal to allow states to enforce provisions of Federal product safety laws through litigation. States already have the ability to bring actions under Federal and State laws. This provision would not improve CPSC effectiveness, but rather would create an enormous new field of litigation and erect huge barriers to industry's cooperation with the Commission. It would also impede commerce by encouraging multiple State product safety agencies.

Third, we oppose the provision that requires CPSC to adjudicate employee-employer disputes. The bill would divert significant Commission resources into investigating whistleblower retaliation allegations. We support enhancing CPSC resources for tasks needed to promote product safety—fieldwork, research, faster standards, and information dissemination and education. We oppose a new form of litigation driven by shared penalties, compensatory damages, and attorney fees.

Fourth, we oppose the bills proposed penalty provisions. Today, virtually all penalties are agreed to voluntarily, but S. 2045 would increase the maximum cap to $100 million and per violation fines up to $250,000. This penalty structure will totally change the existing dynamic, where instead of negotiating recall terms expeditiously with CPSC, private lawyers will spend time advising their clients of the benefits of minimum cooperation with the Commission and other defensive postures. The results would be an unproductive regulatory environment, rife with diversionary litigation when so many dollars are at stake.

[The prepared statement of Mr. McGuire follows:]

PREPARED STATEMENT OF JOSEPH M. MCGUIRE, PRESIDENT, ASSOCIATION OF HOME APPLIANCE MANUFACTURERS; ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. Chairman and Members of the Committee:

Thank you providing me the opportunity to testify on behalf of the National Association of Manufacturers ("NAM") regarding S. 2045, the Consumer Product Safety Commission Reform Act of 2007. The NAM is the Nation's largest industrial trade association, representing large and small manufacturers in every industrial sector and in all 50 states.

I am President of the Association of Home Appliance Manufacturers ("AHAM") which represents the producers of major, portable, and floor care residential appliances and their suppliers. AHAM is a member of the NAM, where I have served in the past as Chairman of the Council of Manufacturing Associations, a division of the NAM comprised of more than 200 trade associations. An additional part of our NAM membership is AHAM's participation in the NAM CPSC Coalition. It is in that capacity that I appear before you today. On behalf of the Coalition I thank you for your leadership in addressing consumer product safety through this hearing and others and in seeking legislation to improve the effectiveness of the CPSC.

All of AHAM's 165 members are regulated by the Consumer Product Safety Act ("CPSA") and the other Federal safety laws administered by the Consumer Product Safety Commission ("CPSC"). AHAM and its members work cooperatively with CPSC on policy and individual product issues. It is the appliance industry's most important regulatory relationship, and justifiably so, because consumer safety is the most critical obligation we have to our customers. The NAM CPSC Coalition also is committed to ensuring that the U.S. marketplace provides safe products to Americans.

The NAM CPSC Coalition supports enhancing the resources and, where necessary, the authority of the Commission to increase its effectiveness. To that end, we have aggressively supported increased appropriations for this Commission in this Congress, and advocate that these increased dollars be directed to enhancing the CPSC's personnel dedicated to product testing, evaluation and enforcement and to improved technology and facilities. In fact, we might be the only industry group to lobby the appropriation committees for agency funding, none of which will be spent on or granted to our members. Companies that work with the Commission recognize that it is thinly staffed, that many veteran employees are retiring, and that its information technology and laboratory are grossly inadequate. Modern technology makes it possible for a smaller Commission to be more productive than the larger Commission of the 1970s, but 21st century technology and resources must be put in place.

We also recognize that there is a crisis of confidence in the safety of consumer products in the United States marketplace. Although we believe that the American marketplace is safer than ever, and that the CPSC does a good job in leveraging its resources, the perception is gravely troubling to U.S. manufacturers because their economic viability depends on the confidence of the U.S. public in their products. To some extent, the proportion of recalls from products manufactured in China, for example, reflect its growing market share in key consumer product categories. American consumers have benefited significantly from the efficiencies achieved by manufacturing many consumer products in China and other countries. There are unique challenges ensuring that foreign governments are performing their legitimate regulatory functions.

Well before the publicity about product recalls this last year, AHAM has worked closely with the CPSC and with the Chinese government and industry to enhance the safety processes in Chinese manufacturing. We have been involved in a number of substantive meetings in China with national and regional government officials and manufacturers to emphasize the need to meet government mandatory and industry consensus standards and to build safety evaluation into every aspect of manufacturing and testing. Obviously, we support stepped-up efforts to ensure that Chinese producers throughout the supply chain are meeting the appropriate standards of safety and quality. The Coalition supports expanding U.S.-Sino joint programs and applaud regulatory initiatives such as the recently announced agreements in several product sectors. We believe that these programs are critical to advancing safety and that ongoing funding for international outreach and education is critical to CPSC's mission.

In addition, the Coalition supports a number of general and product-specific legislative measures to increase CPSC's ability to carry out its mission. As I mentioned earlier this includes increased funding. S. 2045 contains a number of provisions our coalition supports and we applaud you and your staff for seeking improvements.

However, we also believe S. 2045 contains some burdensome and troubling provisions which would detract from CPSC's mission, significantly add to the litigiousness of our society and undermine the critical open relationship between CPSC and industry. The system generally works well because industry and other groups voluntarily develop new consensus standards and report problems voluntarily to the CPSC. But, much of S. 2045, as presently drafted, could very well result in more litigation instead of open dialogues within a relationship of confidence.

Further, when we consider reauthorization and imposing new obligations on industry, particularly imported products, we need to weigh whether we are achieving significant enhancements of safety or whether new non-tariff barriers are being erected. We absolutely agree that imported products should be designed and manufactured just as safely as U.S. products. But, to impose trade barriers without regard to the benefits to American consumers of trade and integrated design, production and distribution of consumer products would be a mistake.

There are proposals in S. 2045, Acting Chairman Nord's "PRISM" proposal, and in proposals developed by NAM members that we believe will, along with greater resources for the Commission, significantly improve the ability of the Commission to carry out its vital mission.

For example, we support a variation of Commissioner Nord's "fast track" rulemaking to adopt as Federal mandatory rules selected safety-related provisions of consensus standards. We believe that with greater resources these rulemakings could be conducted under existing law. We can support, for example, eliminating the need for an advance notice of proposed rulemaking and to decrease somewhat the substantive determinations that the Commission must make in adopting in whole or in part certain consensus standards. We recommend this action where there is a solid record that the consensus standard is up-to-date and protective of safety, that a substantial number of firms in the marketplace are not complying with the standard and that there is a substantial basis for believing that making the consensus standard mandatory will significantly increase the safety of the product and decrease possible injuries and deaths.

In order to maintain and not undermine our private sector safety standards structure, we advocate that the legislation make clear that the Commission should only adopt key safety aspects of these standards, expedite revision of the Federal standard when the consensus standard has been revised, and rely as much as possible on the standards development organization's interpretations and certifications under these standards.

We also support the concept behind provisions in S. 2045 which would authorize the CPSC to require specified products sold in our marketplace to show conformance through testing with standards. This presents a challenge with some 15,000 products under CPSC jurisdiction. However, we strongly applaud making it a violation of Federal law to knowingly and willfully falsely use a mark or claim certification.

Although a globalized market may require the sharing of vital safety data with foreign governments and state and local authorities, this *must* be done in a manner that protects intellectual property and confidential business information and ensures that it is not used to prematurely instigate litigation or to unleash public allegations about non-public investigations. Certainly, firms should supply, if requested and known, to the CPSC information on their suppliers, distributors and retailers.

We can support, with some modification to the legislation, revisions to the CPSC's authority to ban exports of recalled products. However, there are limited cases where foreign countries have protective but different standards. U.S. firms should not be banned from manufacturing and exporting a product compliant with those foreign laws.

In the same vein, we support clarifying that it is a violation to knowingly sell a recalled product or to intentionally build up inventory of a product before new mandatory standards go into effect. Further, importers who repeatedly import unsafe products should not be allowed to participate in our marketplace and CPSC referral to Customs is appropriate. We also support a carefully tailored asset forfeiture provision and less use required of ANPR's in order to expedite rulemakings.

The NAM Coalition supports a number of product-specific proposals which its industry associations and companies have brought forward. Much of this legislation relies on and enhances existing consensus standards and certification programs. The Toy Industry Association and The American National Standards Institute, for example, have a recently announced framework for a new mandatory testing requirement for toys sold in the U.S. That industry is working with the Congress to adopt legislation to ensure industry-wide adherence to mandatory testing, standardized testing procedures, and laboratory certification program for toys. Additionally, The Fashion Jewelry Trade Association advocates a national standard for jewelry modeled after laws in California and Minnesota to address concerns about lead content.

The appliance industry supports Federal action to ensure the proper installation of cooking ranges with UL, ANSI and building code mandated anti-tipping products and equivalent devices. Although very infrequent, range tipping accidents can be avoided with the proper installation of these safety devices. Many building codes already require this installation, but we know that there are installers and landlords who often fail to install these devices. In many cases, homeowners resist the installation of the devices. Therefore, my industry proposes that it be a violation of Federal law for a person, at least a commercial installer or landlord, to install a range that is not compliant with the UL standard and building code provisions.

I would like now to address provisions of S. 2045 that the Coalition either opposes or has suggestions of modification.

Whether deliberate or not, S. 2045 would eliminate protections of Sections 6(b) of the Consumer Product Safety Act. Section 6(b) supplements the Freedom of Information Act and is specifically tailored to the realities of the information that the CPSC receives and generates internally. The CPSC receives a huge amount of information from consumers, doctors, fire investigators, competitors and others which is raw, unfiltered, and upon analysis proves to be either inaccurate—often identifying the wrong product or accident cause—or is unfair, unscientific or technologically flawed. In turn, internal, preliminary evaluations done by the Commission may be based on such incorrect information, necessitating further discussion and review of accurate data.

Now, in and of itself, it is not a bad practice for the Commission to receive huge amounts of data, regardless of its quality, so that it can see early trends and spot incipient problems. In fact, a major initiative of the Commission with some of the largest retailers allows for the submittal of mostly raw and unevaluated consumer complaints and other safety related information to the Commission so that it can be integrated into its databases. Very little of this information proves to be useful for compliance purposes, but it does give the Commission a better view of what is happening in specific product areas.

Under current law, firms are informed when information about their products is to be publicly released and are provided the opportunity to show that specific documents are of such low validity and accuracy that release would be unfair. Under the pending legislation, this system would be eliminated and many thousands of documents could be released which contain information of no value and little validity but which can be used to gain leverage in litigation, by competitors and for other inappropriate purposes. A huge barrier would be placed in the way of manufacturer and retailer cooperation with the Commission through the special retailer program. It also would impede the day-to-day filings under Section 15 where the Commission encourages firms to submit information even if they do not believe that a substantial product hazard or defect exists. The Commission should continue to ensure that information it publicly releases is not inaccurate or misleading.

Delays in releasing information to the public are mostly due to the Commission's outdated technology and search techniques, which can be improved with increased funding, not the limited opportunity for industry to respond to a proposed release. A high percentage of manufacturers do not even comment on proposed disclosure and the CPSC has "fast track" disclosure authority for imminent hazards. *We adamantly oppose the evisceration of Section 6(b).*

We oppose the proposal to allow states to enforce the provision of the Federal product safety laws through litigation. We support greater resources for the CPSC and other forms of partnership with states. Allowing, however, state officials to bring lawsuits against firms which could be based on totally unproven allegations of failure to comply with the law would create an enormous new field of litigation and erect huge barriers to industry's cooperation with the Commission. *We oppose the "Balkanization" of the U.S. market into 50 state CPSCs.* Combined with new expanded civil and criminal liability provisions, the result will be confusion and litigation. No state official should have the authority to interpret or reinterpret Federal regulation or policy as administered by CPSC.

Similarly, we are not aware of incidences where company employees have been punished for bringing consumer product safety allegations to their company's attention. Yet, S. 2045 proposes diverting significant Commission resources into investigating whistleblower retaliation allegations. We support enhancing CPSC resources for tasks needed to promote product safety—field work, research, faster standards, and information dissemination, and education. We oppose a new form of litigation driven by shared penalties, "compensatory damages" and attorney's fees. *Developing new forms of Federal torts is not the solution to enhancing the safety of products. We already have an extensive litigation in the product liability field and enhancing it will not result in increased product safety.*

We understand that many in the Congress believe that the current level of penalties per violation and the maximum cap under the CPSA need to be revised. We believe that the legislation adopted by the House Commerce Committee last week, H.R. 2474, makes an appropriate adjustment to the maximum cap by increasing it to $10 million while requiring the CPSC to adopt a penalty policy using relevant factors. Today, virtually all these penalties are agreed to voluntarily, but S. 2045 would increase the maximum cap to $100 million and per violation fines of up to $250,000. This penalty structure will totally change the existing dynamic where, instead of negotiating with CPSC, private lawyers will spend time advising their clients of the benefits of minimum cooperation with the Commission and other defensive postures. The results would be an unproductive regulatory environment, rife with diversionary litigation when so many dollars are at stake.

The real penalty to companies that violate standards or make defective products is the cost of the recall and the damage to their reputation, *not* the penalties. The levels of penalties in S. 2045 will be crushing to many small and medium sized U.S. firms, and as a practical matter will not be imposed on foreign firms which manufacture products for export but are not active in our marketplace.

There are a number of other proposed provisions in S. 2045 which we oppose. For example, it is a violation of due process to dilute the "knowing and willful" requirement while at the same time expanding criminal penalties. Reversing the current preemption of Federal consumer product safety standards will only promote the creation of multiple, conflicting and confusing requirements and undermine the need for safety and uniform standards critical to the national and international marketplace.

Some of the proposals require technical fixes and we will gladly work with staff on these. For example, the definition of children's products is so broad that it could inadvertently include many non-juvenile, conventional products for adults such as queen or full-sized beds, floor coverings or household furniture routinely used by children 7 years or older.

Several proposals in the legislation would authorize the CPSC to micromanage recalls in areas, such as choice of corrective action remedies, where it is much more productive and efficient to allow the companies to select the best manner to proceed. Nor should "voluntary" recalls become mandatory, thereby undermining the salutary process of encouraging "fast track" voluntary corrective actions.

We believe that our position places safety first but opposes unnecessary new mandates, and litigation. We look forward to working with you and the Committee on adopting beneficial and reasonable CPSC reform in this Congress. I would be glad to answer any of your questions or follow up with any requested information.

Senator KLOBUCHAR. Mr. McGuire, your time has expired and we have a vote. So I'd like to let Mr. Thompson speak so he can get through his testimony, if that's all right. Thank you very much.

Mr. Thompson with the retailers.

STATEMENT OF AL THOMPSON, VICE PRESIDENT, GLOBAL SUPPLY CHAIN POLICY, RETAIL INDUSTRY LEADERS ASSOCIATION (RILA)

Mr. THOMPSON. Good afternoon, Senator Klobuchar. My name is Al Thompson, I'm the Vice President of Global Supply Chain Policy for the Retail Industry Leaders Association or RILA. But more importantly, I am the father of two young children, so the issue of product safety, and particularly toy safety, is one that carries personal importance to me.

RILA represents the largest and fastest-growing companies in the retail industry. Our members provide millions of jobs and operate more than 100,000 stores and distribution centers domestically and abroad.

As Congress considers how to protect consumers, particularly children, from dangerous products, I want to outline some of the public policies that RILA supports and we welcome their inclusion in S. 2045.

We support increased funding, Federal funding, for the Consumer Product Safety Commission or CPSC, as mandatory recall authority for the CPSC and a legal prohibition against knowingly selling a recalled product. We support the proposal to include tracking information on children's products to promote traceability. We support the increased lead standards in this bill. And we support the establishment of clear and predictable safety standards. On this note, we welcome the definition of a children's product in the legislation, because it is clear and workable.

RILA members are strongly committed to assuring the safety of products sold on their shelves. In light of recent incidents, many of our members have enhanced product testing. For example, some retailers are now requiring testing for all toys, regardless of the manufacturer. Others are implementing more rigorous protocols to confirm the safety of toys through multi-layered testing and documentation. Our members have also reviewed and strengthened their internal policies and procedures for product testing, supplier compliance, and the sanction for non-compliant suppliers. Our members are also seeking better government standards and guidelines for product safety.

RILA believes that ensuring product safety is a shared responsibility. Retailers have vigorous quality assurance requirements and enforcement mechanisms for their suppliers that manufacture goods for their stores. RILA members require their suppliers and manufacturers to understand and adhere to U.S. Government standards and regulations for particular products they produce; to operate secure factory environments and rely on known and approved subcontractors to produce safe, quality products; to maintain and document production processes that conform to the safety standards, beginning at the design phase and continuing through the completion of the finished product; and, to open their factories and production processes to periodic and, in some cases, unannounced quality and safety audits.

When a product is recalled, retailers take prompt action to remove the products from the stream of commerce and properly dispose of them so they are not resold. After implementing a recall, our members also review their suppliers testing protocols to minimize the potential for future problems and take appropriate action or levy sanctions as needed.

A successful safety regime requires a close partnership between the private sector and the U.S. Government, as well as other governments. While we welcome certain provisions in S. 2045, RILA is also concerned that some provisions in the bill may undermine the critical cooperation that currently occurs regularly between the private sector and the CPSC. We believe Congress should exercise its authority under the Commerce Clause of the Constitution, to create standards for toy safety that are consistent, national in scope, and with a uniform enforcement mechanism.

In many cases, our members sell the same items nationwide. For example, an Elmo doll sold at one of our member stores in Arkansas, is likely to be the identical to an Elmo doll sold in the same company store in Texas. These two products are manufactured from the same design, they come from the same factory, and may enter our country in the same container. Yet this legislation would

support disparate civil enforcement mechanisms for these identical products.

The State enforcement remedies in this bill, would also expose companies to unlimited liability. The proposal to increase criminal penalties and to substantially increase civil penalties would create a defensive posture in the private sector that could create disincentives for this type of self-disclosure. Many of the issues concerning product safety have come to light because companies have stepped forward to identify problems, immediately report them to the CPSC, and work collaboratively with the CPSC to take corrective action.

Similarly, the bill's proposals to release confidential information disclosed by companies to the CPSC to other government agencies would create disincentives for companies to be forthcoming with information. RILA would support a requirement that safety testing labs also be credentialed by the CPSC or an independent third-party, such as the American National Standards Institute or ANSI. At a time when media reports that many independent labs are capacity constrained, RILA urges you to consider policies that would allow our member's state-of-the-art labs and their highly trained employees to remain part of the safety process.

We appreciate the opportunity to testify before you today, and look forward to answering your questions.

[The prepared statement of Mr. Thompson follows:]

PREPARED STATEMENT OF AL THOMPSON, VICE PRESIDENT, GLOBAL SUPPLY CHAIN POLICY, RETAIL INDUSTRY LEADERS ASSOCIATION (RILA)

Good afternoon Chairman Pryor, Ranking Member Sununu and Members of the Committee. My name is Al Thompson, and I am the Vice President of Global Supply Chain Policy at the Retail Industry Leaders Association, or RILA.

RILA represents members including the largest and fastest growing companies in the retail industry, which together account for more than $1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores and distribution centers domestically and abroad.

At RILA, I am responsible for representing the industry on all policies that impact our member companies' global supply chains. This includes issues involving transportation, logistics and security. In addition to my work at RILA, I also am the father of two young children, so the issue of product safety, and particularly toy safety, is one that carries both personal and professional importance for me.

RILA appreciates this opportunity to submit testimony on Chairman Pryor's legislation, S. 2045, the "CPSC Reform Act of 2007," and to showcase the steps that our members are taking to ensure product safety and integrity all along the supply chain. Our industry knows that it has no higher duty than assuring the safety and quality of the products it sells to its customers.

RILA believes that ensuring product safety is a shared responsibility between and among manufacturers, retailers, this government, and other governments. Through rulemaking and laws, Congress and the Administration can provide guidelines that are clear, uniform and national in scope, so that manufacturers can better-issue detailed specifications to their suppliers and enforce those specifications with tests, audits, and follow-up. We commend Chairman Pryor, his cosponsors, and this Congress for taking quick action to promote the safety of consumer products.

But before I fully describe the processes and product safety procedures that our members have in place, I want to describe some of the steps that our individual member companies have taken to ensure greater accountability from manufacturers in light of several recent high-profile product recalls.

Because no two RILA members sell exactly the same merchandise, they each have slightly different protocols and procedures for evaluating the safety and integrity of supplier operations, as well as the safety of products on their shelves. In light of recent incidents, many of our members have:

- Enhanced product testing;

- For example, some retailers are now requiring testing and verification of safety compliance for all toys, regardless of the manufacturer. Others are implementing more rigorous protocols to confirm the safety of toys through multi-layered testing and documentation.

- Reviewed their internal policies and procedures for product testing, supplier compliance and the sanctions for noncompliant suppliers and manufacturers; and
- Joined with other allies seeking better government standards and guidelines for product safety, with a particular focus on products manufactured for children.

Before I provide specific comments on S. 2045, I want to share with you some of the steps our members take to assure the safety of the products on their store shelves.

Retailer Efforts to Assure Safe Products

RILA members have a strong commitment to provide safe, effective, and affordable goods for their customers. We believe that ensuring product safety is a shared responsibility. As such, retailers have vigorous quality assurance requirements and enforcement mechanisms for their suppliers that manufacture goods for their stores.

In particular, RILA members are actively working to reassure consumers that products, including toys and children's products, sold in their stores are safe. RILA believes that the most effective way to ensure safe products is to focus on the design and production of products so that product safety is built into products as they are made.

To assure product safety, many RILA members require their suppliers and manufacturers—through contracts and product specifications—to:

- Understand and adhere to U.S. Government standards and regulations for the particular products they produce. Many of our members' specifications actually exceed U.S. Government standards;
- Operate secure factory environments, and rely on known and approved subcontractors to produce safe, quality products;
- Maintain and document production processes that conform to safety standards beginning at the design phase and continuing through completion of the finished product; and
- Open their factories and production processes to periodic unannounced quality and safety audits.

Retailer Actions in the Event of a Recall

When a product is recalled—either at the insistence of the government or a supplier—retailers take action:

- To immediately remove the product or products from the stream of commerce, and properly dispose of them so that they are not resold; and
- To notify purchasers, when possible, that they should return the product for a refund or replacement.

These prompt actions are the result of protocols that virtually every RILA member has in place to respond to a recall and protect consumers.

- RILA members proactively monitor and research recalls and U.S. regulatory agency alerts to keep apprised of product safety issues. Some retailers have an entire department devoted solely to this effort;
- As soon as a product recall is initiated, RILA members implement existing recovery plans to remove the subject merchandise;
- Retailer inventory systems produce an error message at the point of sale if such products reach check-out cash registers, preventing recalled products from being inadvertently sold to consumers; and
- After implementing a recall, RILA members review their suppliers' testing protocols to minimize the potential for future problems, and take appropriate action, or levy sanctions, as needed.

Comments on S. 2045, the "CPSC Reform Act of 2007"

RILA welcomes the opportunity to review and comment on S. 2045, the CPSC Reform Act of 2007. Retailers place the highest priority on the safety and quality of the products they sell to their customers, regardless of whether the products are produced domestically or abroad. Optimally, retailers seek to identify and remedy any product safety problems long before the product enters the supply chain or reaches U.S. stores. Therefore, RILA believes the critical point in the supply chain

where product safety compliance efforts should be focused is at the point of design and manufacture.

Prior to the introduction of this legislation, RILA was on record supporting government reforms that could better ensure toy safety. We are pleased that this legislation contains many provisions that our members strongly support. We look forward to working with Chairman Pryor and Members of the Committee to support these important provisions.

- RILA applauds the substantial increases in CPSC funding contained in this bill.
  - RILA would welcome provisions that ensure that increased resources are used to accelerate the recall timeline and to promise better dissemination of recall information to the public.
- RILA welcomes the proposal to reduce the lead limits in children's jewelry to 200 parts per million (ppm), in surface coatings to 90 ppm, and in children's products to 400 ppm.
- RILA supports the proposal to include tracking information on children's products so as to identify the source, date, and cohort of production of the product. In fact, some RILA members already provide this type of information on their products.
- RILA supports the proposals to eliminate the requirement for advanced notice of proposed rulemaking and to place the Federal Hazardous Substances Act (FHSA) almost exclusively under CPSC jurisdiction. These proposals will help to streamline product safety enforcement.
- RILA would support a requirement that safety testing laboratories be credentialed by the CPSC or an independent third party such as the American National Standards Institute (ANSI).
  - We are concerned, however, that the bill's requirement that the labs themselves be independent is a step backward. At a time when the media reports that many independent labs are capacity constrained, RILA urges you to consider policy alternatives that will allow our member's state-of-the-art labs and their highly-trained employees to remain part of the product safety process.
- RILA welcomes the definition of "children's products" in the bill because it is clear and workable, and helps companies to better understand the scope of products that would be subject to increased standards.

RILA is concerned, however, that some provisions in the bill may undermine the critical cooperation that currently occurs regularly between the private sector and the CPSC.

- We believe that Congress should exercise its authority under the Commerce Clause of the Constitution to create standards for toy safety that are uniform, consistent, and national in scope with a uniform enforcement mechanism.
  - The particular items that our members sell are virtually uniform nationwide. For example, an Elmo doll sold at one of our members' stores in Arkansas is likely to be identical to an Elmo doll sold in the same company's Texas store. These two products are manufactured from the same design, they often come from the same factory, and they may even come into our country on the same boat and in the same container. Yet, this legislation supports disparate civil enforcement mechanisms that would treat these two identical products differently.
- The remedies allowed through state enforcement include damages, restitution, compensation, or other relief, and would expose companies to unlimited liability.
- While we recognize that whistleblowers play an important role in ensuring corporate accountability, we urge Congress to carefully consider the implications of a whistleblower complaint adjudication process that would divert resources from the CPSC's efforts to develop better standards and better enforcement mechanisms.
- Many of the issues that have been before Congress concerning product safety are the result of companies that stepped forward to self-identify problems, report them to the authorities, and work collaboratively with authorities to take corrective action. The proposal to impose criminal penalties and to substantially increase civil penalties would create a defensive posture in the private sector that could create disincentives for this type of self-disclosure rather than collaboration with government regulatory agencies.
- Similarly, the bill's proposal to release confidential information disclosed by companies to the CPSC to other government agencies undermines the self-re-

porting protocol in place today. We believe this provision will create disincentives for companies to be forthcoming with information. The bill would eliminate the confidentiality between the CPSC and private industry. Disseminating confidential design, sourcing, sales, and product information to any government agency, domestic or foreign, increases the likelihood that this information will be disclosed to competitors.

Conclusion

RILA appreciates the opportunity to provide comments to the Committee as it considers S. 2045 and other proposals to improve product safety. RILA stands ready to work with Congress and the Administration to enact policies that strengthen consumer confidence and advance the production of safe, high-quality products that are affordable and readily available for consumers.

Thank you for the opportunity to testify today.

Senator KLOBUCHAR. Thank you, Mr. Thompson, for your timely completion of your testimony. Senator Pryor has returned, our Chairman, and we are going to go vote and then come back. So we will be in recess for about 15 minutes and we will return for questions. Thank you.

[Recess.]

Senator PRYOR [presiding]. Let me go ahead and reconvene the Subcommittee here. I'm sorry, we got called to a meeting off the floor here that we had to attend, but thank you all for your patience and—I'm sorry, I got pulled out right before we broke because I was trying to listen to everyone's testimony.

Let me go ahead and dive in with some questions. And Senator Klobuchar's on her way, as well. Let me dive in with a few questions.

For the first three witnesses we had, all of you all talked a little bit about how you'd like to see some changes in the legislation. You'd like to see one thing strengthened or one thing approached a little differently. And then the other two witnesses, you all said the same thing but related to different sections of the bill or in different ways. And I think that underscores the point of what we're trying to do here, which is find that balance. So, I just want to, again, encourage everyone here and all of your members and everyone to please come in and talk to the Committee staff, my staff, and all of the Senators' staffs to try to work through some of these issues because we really would like to move this.

And like I said a few moments ago, we've had a lot of meetings with some of your members and some of you all specifically, but also we talked a lot about concepts. It's time for us to move to the concrete and try to actually do some drafting and if there are going to be some revisions or some concrete suggestions, we certainly would like to hear from people with very specific, even, language to try to help us move this process forward.

Let me ask, if I may, Mr. Plunkett, about the fast track authority that Chairwoman Nord talked about. Does her approach concern you, and do you see her approach as inconsistent with the bill that we've drafted?

Mr. PLUNKETT. Sir, this would be the fast track, what she deemed to be fast track authority that involves, essentially a separate private negotiation——

Senator PRYOR. Right.

Mr. PLUNKETT.—to, at the request of the manufacturer. I don't see it as inconsistent, Senator. We don't, in fact, see the provision

of confidential information, in some cases, as inconsistent with—with the notion that the Consumer Product Safety Commission should not be encumbered in any way, especially regarding important safety data in releasing that data as quickly as possible to the public. I think you can find a balance there that—that encourages industry to come forward, but corrects what we all acknowledge, or most acknowledge, are serious problems with the current product safety system, that don't, as we heard earlier, create enough disincentives to improper activity.

I think you have largely hit on the right balance here. You've removed or excuse me, increased civil fine capability, you've mitigated some of the problems with 6(b). And I would suggest that if, NAM in particular, is concerned about increasing litigation under this proposal, they should support removing their essential, what is essentially a private right of action under 6(b), that virtually invites them to sue, to stop release of public information by the Consumer Product Safety Commission. I think the bill hits on the need to increase, make more strong enforcement efforts by the CPSC, while still allowing the kind of private efforts that Commissioner Nord spoke about.

Senator PRYOR. Let me ask, if I may—I don't know—Mr. McGuire, would you like to respond to that at all, since they mentioned NAM?

Mr. MCGUIRE. Well, as far as the last point went, on the 6(b) point that was just made. Our concern there is that, I think what, it seems to me what you're after is to get at the delay in the release of information to the public. And we certainly are not opposed to that. What we don't want to do is remove some safeguards that allow the CPSC to determine whether the information that's to be released is valid, misleading, incorrect, or unfair. If that provision is removed, then the information going out to the public could be misleading and huge in volume. And that might create a disincentive for manufacturers and retailers to continue submitting data early now. We're encouraged now to submit, whether you're in doubt or uncertain, if there's a problem, submit the data. So we're doing that.

So, it's seems like, there's a feeling that the reason there's a delay in getting the information out is because manufacturers are holding it up by reviewing it. That is not the case at all. The case is, CPSC needs more trained people to look at this data, to determine what's valid, what's not valid and then release it. And we're fine with that.

Senator PRYOR. There again, to get to the balance that we're trying to strike in the bill, we're trying to increase their personnel there and help them retain and recruit great employees to help with that problem as well. So we're trying to find that balance when it comes to the staffing needs there.

Let me ask you, if I may, Mr. Thompson, about corrective action plans. Could you tell me generally how that process works at the CPSC and, what the experience has been with corrective action plans?

Mr. THOMPSON. Yes, sir. Generally, as was mentioned, when one of our members, particularly if it's a product made for their product label, finds that there is an issue, they will report that information

to the CPSC. And then, if it's something, in the example of lead paint, then they want that on a fast track to be able to get that information out because there's no need to determine, kind of, or evaluate whether something poses a safety hazard or not. In the event that it's not clear and if our stores feel that there could be a problem, they report that information to the CPSC and try to work with them to make a determination, so, that information can get out to the public.

I would also say, as soon as we report, our stores report to the CPSC, they remove that product from the stream of commerce. And do what they have to do to ensure, not only that that product can't be sold in a store, but also that it can't be sold online. I think, in addition, and maybe the resource issue when it comes to it. I think some of our members would like to maybe see the legislation focus on, kind of, the process from CPSC standpoint, to ensure that the departments within the agency are actually coordinated, and also working together to get that information out in a timely fashion.

Senator PRYOR. Has that been a problem?

Mr. THOMPSON. In some cases it has been.

Senator PRYOR. OK. Well, that's good information. We need to know that.

And you all, both—I know, Mr. Thompson, you specifically have talked about the proposed criminal penalties. And I understand how criminal penalties give people heartburn. Believe me, I understand that. But, you know, there are criminal penalties that exist right now under the CPSA and the culture at the CPSC has been to only use the criminal penalties in very extreme cases. Are you familiar with any of the cases that they've used those in?

Mr. THOMPSON. No sir, I'm not.

Senator PRYOR. As far as I know, unless you all will correct me on this, it's only been in one case that they've ever used it in 35 years. And so, just the culture there is that they're very, very reluctant to use that. Are you concerned that by beefing up the criminal portion of the bill, that they'll use it more? Is that a fair statement of your concern?

Mr. THOMPSON. I don't think that's—that's the concern. And I think—and I'll caution right now—I'm not an attorney so criminal penalties are not my expertise. I think there's just a concern that the language right now as written, may be a disincentive for people to come forward quicker with information to the CPSC because they are concerned about how that would come back on them. But I don't think it's, the concern is on the idea of what the CPSC would choose or choose not to do.

Senator PRYOR. OK.

Mr. McGuire, do you have a comment on that?

Mr. MCGUIRE. Senator, it's my understanding that the bill, with respect to criminal penalties, would lower the standard for when they would be applied, and potentially bring in a much broader net of directors and others and companies. And our concern is that that would have a chilling effect of the cooperative approach that companies have with the CPSC in negotiating recall actions and submitting data early and often.

Senator PRYOR. Yes. I understand that in the abstract, but, you know, given the nature of this Commission and given its track

record over the years, they could have done that before, but apparently they've only done it in one case in their history.

So, I'd love to sit down with you or your industry or your company further and talk more about that. But, you know, we ought to talk about that. But I'm not sure you're going to see a big increase in the criminal prosecutions under this Act. But we can talk about that and we can see. I understand, again I understand what causes people heartburn, I really do.

Senator Klobuchar?

Senator KLOBUCHAR. Thank you, Chairman Pryor.

As you all know, I'm very interested in making it easier for parents to identify toys when they have been recalled and I just wanted to get your thoughts on this. I understand that not every toy, a little pick up stick, can have the label on or the mark or demarcation. I don't think you'd necessary want to label it, because it would be pulled off. But most toys, including our little tree here that the child ate the paint off of, could have a batch number or date number at the bottom. And so that's why I'm interested in the toy, so it makes it easier for the parents.

But also on the packaging—because I understand and maybe, Mr. Thompson, you can correct me if I'm wrong. For some of the retailers, they would need that because the minute they hear about a recall, they're able to put it in their computer system and they can't run out, run up any of the—and this is what Target has told me and Toys 'R' Us—that they can stop that from happening at the point of sale. Is that right?

Mr. THOMPSON. Yes, ma'am, that is correct. Once the recall notice goes out, our stores put in a "block of sale." And it, not only in their physical stores, but on the Internet as well.

In, to respond to your question on traceability, I think that's something that our industry's looking at moving forward on very quickly. Because we do feel that it will be helpful to better identify products that need to be recalled.

And I can speak personally on this as a parent. I think when we were dealing with the Mattel products recall. In our case, it was Elmo and Diego. It was very helpful to make——

Senator KLOBUCHAR. It's always interesting to hear people's choice of toys.

Mr. THOMPSON. My one-year-old, Elmo's his favorite word, so we try to satisfy him.

It was very helpful to be able to look at some of the toys that had marks, to make a determination whether or not we needed to send that toy back or not. And I think better improving the ability, better improving traceability will go a long way to helping parents and consumers be able to make a determination on what they need to send back.

Senator KLOBUCHAR. And so, are you aware of some retailers that aren't the major ones, that might not have that ability in a computer system and would have to actually check on the shelves or, for instance, on eBay, if people are selling things?

Mr. THOMPSON. I could speak to, at least some of our smaller retailers that, in addition, if they don't have the "block of sale" capability, even though I think the overwhelming majority of our members do. They also post signage, they put the—the picture of the

toy up. So they do what they can to ensure that once a consumer walks into their store, that they know that this product has been recalled.

Senator KLOBUCHAR. I'm just trying to get to the desirability of not just having it on the toy, but also on the packaging.

Mr. THOMPSON. I think the—I think if you—you can do it in a way where you can put it in multiple places, as long as it's feasible, I think we would be for that. I think, in some products I think our companies would like to see it on the packaging as well, just to make it easier for the consumer.

Senator KLOBUCHAR. Mr. McGuire, any response?

Mr. MCGUIRE. I think it's a reasonable idea. I can only speak to appliances and virtually all of the home appliances have a date of manufacture or some sort of indication on them, as to when they were manufactured. And it seems reasonable that all products have some sort of labeling or demarcation that the manufacturer or the retailers could work out with the Commission so that it made sense for retailers, consumers, and the—and the people in the commerce.

Senator KLOBUCHAR. Thank you. I appreciate that. And if you could share with your members in the toy area, that we are, what we do have in the legislation, to the greatest extent feasible, understanding that there are certain tiny toys that you're not going to be able to put a label on or mark I should say, but you could on the packaging.

I wonder if any of our consumer representatives here, Mr. Korn, Mr. Plunkett, and Mr. Mierzwinski—whose name is almost as hard as mine—might want to talk a little bit about this identification issue.

Mr. MIERZWINSKI. Well Senator, I'll just be brief on that and maybe Alan or Travis would want to go into detail. But we'd—we'd obviously support product traceability. When PIRG finds toys and we deliver them to the CPSC, often some of the worst dangers are the very small cheap toys. And they may not have any kind of manufacturer mark of any kind of them. So, we all support that.

I wanted to make a comment on something earlier, that has been brought up, kind of, all through the whole hearing. And that is the issue of recalls. I think that underlying the whole discussion of recalls is that every product that is recalled is actually taken off the shelves.

In fact, because of the voluntary nature of recalls, that is not always the case. Senator Durbin brought up the cribs. The cribs were not taken out of the people's homes. You could not bring your crib back. They sent you a little envelope full of little parts and you had to fix your own crib.

Mr. Korn has with him the Magnetix toys from Rose Arts. Those toys were not recalled, even though young Kenny Sweet died when he swallowed several of those toys and they—they—the magnets bound together in his intestine. They simply issued a replacement program. The old toys stayed on the shelves. That's why the provision in the bill, the corrective action provision that strengthens the CPSC's authority, we think is a very important one. Because it gives you more leverage in the negotiation of recalls to force the manufacturer to do a better job of getting the hazards off the shelves.

Senator KLOBUCHAR. Mr. Plunkett?

Mr. PLUNKETT. On the traceability issue, Senator. In our testimony, we recommend that the bill be improved by requiring the traceable code on both the package and on the toy.

Senator KLOBUCHAR. And I agree with you on that.

Mr. PLUNKETT. And I think you've hit—you've already hit on why that's important. I'll just add one more thing. My son had two toys that were recalled, both were gifts. And in one case, the gift, the packaging was removed from the gift as part of a birthday party bag that, you know, that the present was put into. So we had no way—if the code had only—in such a circumstance, it was only on the package, we would never be able to trace the product.

Senator KLOBUCHAR. And I also believe that it leads to more anxiety for parents, if they're trying to figure out—they hear about a recall, they look on a website—and if they could know, then they could—they'd feel like at least they're doing the right thing for their kids.

So, Mr. Korn?

Mr. KORN. Thank you, ma'am. The bill as it's written right now does have an "or" provision in it that—I think that's a pretty easy change that we would support, to make it an "and," to get to that situation where, if the packaging is thrown out and you can do some identification in the home, which is where the difficult problem is.

It is a—retailers do a generally good job of getting their product off the shelves. It's getting them out of the daycare centers, out of the homes that is the difficult task. These are just recalled products in my home. I pay attention to these types of things. That's where the recalled products are. I can almost guarantee you we can go to the Senate daycare center and we could find three or four, possibly more, recalled products in there. People just don't know.

Number two is, and Chairman Pryor missed this conversation when he was out, so I just want to emphasize it for 1 second. There is—there's a bill pending in the House, child safety seats come with product registration cards. So that when there's a recall, the manufacturer directly notifies the owner of that product that there has been a recall. Or better yet, can direct mail the repair item, if that's the best way to go.

There's a bill pending there in the House, that came out of the House Energy and Commerce Committee, unanimously with bipartisan support, just marked up last week, that would require this kind of thing—not on all toys or products. I think it's impractical for some of these type of things. But for cribs, playpens, other durable products, those products that are inextricably interwoven in a child's life. And I think there's some use there and I can provide that legislation to your staff.

And then finally, there's a provision in your bill that's very good, that allows the compliance staff at the CPSC to revisit a recall that has not been effective. And maybe work with the manufacturers again to say, "You know, what we did last time wasn't good enough. We still have cribs our there, we still have playpens out there. Let's revisit it, and give it another try."

I—we also might want to think about adding to Section 19, the prohibitive act section, failing to substantially comply with the corrective action plan, could be a Section 19 prohibitive act. So——

Senator KLOBUCHAR. Mr. Thompson, just one last question that was raised. Mr. Mierzwinski raised this issue of the concern about some of the recalled products being on the shelves. And I know that a lot of the retailers, as Mr. Korn mentioned, have been doing a good job, but I've heard from the retailers their concern about the average time it takes for the Consumer Product Safety Commission to recall a product after a problem was reported. Do your members feel that it's an acceptable amount of time?

Mr. THOMPSON. I would think that they do not believe that. It's, right now in most cases it's an acceptable amount of time. And I think——

Senator KLOBUCHAR. I think it's approximately 6 months, is what I've heard.

Mr. THOMPSON. It does depend, but I know on one recent case, it was 6 months. And we just felt that, in many ways, that is way too long. And it gets to the point of what Mr. Korn was saying, is we will, once we determine there is a problem, we will remove, our stores will remove that, those goods from the shelves.

But to get to the point of where you need to get that information out to the public so it can get out of the daycare centers and the homes. CPSC generally frowns upon retailers from taking that action on products that are under their jurisdiction. They feel that is their responsibility. So we are waiting on them to be able to do that, so we not only can, so we can also prepare to receive those goods back from our customers.

And any measures that, the legislation needed to streamline that process and make it quicker and more effective, even on the—even on the fast track, will be helpful. Because we don't want to have to follow up and rely and wait months, and months, and months with CPSC, to be able for them to announce a recall notice.

Senator KLOBUCHAR. Thank you very much.

Senator Pryor?

Senator PRYOR. Thank you, Senator Klobuchar.

Let me come back to a point that I made earlier with acting Chairwoman Nord. And that is, I have a letter here from the Consumer Product Safety Commission and it's actually dated August 12, 2004. And what they are doing is they are forwarding a complaint that they received in their office, at the CPSC. They're forwarding it to NHTSA, the National Highway Traffic Safety Administration.

And one of the things I just want to point out for our witnesses and for the record, is that this e-mail that is the complaint itself, about a car seat, was posted on the Internet, posted on NHTSA's website. And what they do, is they black out the personal information and they show the world—anybody that wants to look—that there has been a complaint about a certain type of car seat. This is before they do a recall or before there's any action taken.

But the question I would have, especially for our two manufacturers here and retailers here, is why not allow—or even require—the Consumer Product Safety Commission to have that same type of transparency. The reason I say that is NHTSA, in this case,

doesn't comment on it. They don't verify it or try to say it's true or not true. But they post it so that people who are interested can look and find out what kind of complaints are out there. So, Mr. McGuire, do you have any thoughts on why we shouldn't have that same type of policy over at CPSC?

Mr. MCGUIRE. In general, I think that type of policy is a good idea. What you want to do is make sure that, in this case—I'm not familiar with this particular example you're talking about—but you'd want to make sure that confidential business information is protected. And you would also want to make sure the e-mail, if it's an e-mail complaint, is, has some validity to it, that's it not a complete mistake or misidentification of a product or a brand or a company.

But CPSC has the authority today. I was talking earlier about Section 6(b). And manufacturers have the right to talk to CPSC before they release certain information to the public that might be unfair. But CPSC, if they believe there is a danger of a violation, they can—they can go ahead over our objection or anyone's—and release that. We're not opposed to CPSC sharing more information with other governments, foreign governments or other agencies. But I think protections need to be maintained and that's an area where we would be happy to work with you and your staff to get a balanced approach.

Senator PRYOR. Good. What would you like to——

Mr. PLUNKETT. I think the issue isn't necessarily, it's putting protections in the legislation that ensure that proprietary information and confidential business information is—is protected. And if it's, basically, blocking out that information or not listing specific names or manufacturers, I think that's something we'd be interested in. Because we've also dealt with this in the House, but I think it's just ensuring that the legislation does protect proprietary information.

Senator PRYOR. OK, great.

Let me just say that, Mr. Thompson, in your testimony, in your written testimony, you talked about the need to speed up the recall timelines, which you've mentioned as well, and create better dissemination of recall information to the public. I think those are worthy goals. We're trying to do that in the legislation, but do you have a different approach or, how would you recommend that those goals best be accomplished? What should we do? How can we improve the process that's there now?

Mr. THOMPSON. I think it's, you know, I know Senator McCaskill was mentioning the IG, but I think it's making sure that, in addition to that, with the resources, that there is some type of plan to ensure that the processes within CPSC are going to be inline with that. So that the departments are actually working better together, whether it be the Compliance Department and the Public Affairs Department, but just ensuring that their processes are working in a harmonious fashion to get that information out.

I think another thing that has to be looked at, in addition to making sure they have the resources and the people to make these determinations, is how do they better communicate with the public. And that can be done in numerous ways, but as a parent I'd like to necessarily not always find out about recall information through

the newspaper or the media. I think I'd like to have some of that information from CPSC. And whether they do that over the Internet or find a way to do that for, you know, underserved communities particularly, I think they have to find a better way to do that.

So, I think it's definitely more bodies, I think it's definitely better technology, but if their processes aren't improved internally, to not only make determinations and get information out, the problem's still not going to improve as it should.

Senator PRYOR. You know, you've really put your finger on something that is a real challenge. And that is how are people notified? I remember when my children were younger, they had those Star Wars light saber toys, where they went out and beat people up in the front yard, you know, that kind of thing. And——

Senator KLOBUCHAR. Again, people's choices of toys are interesting, Senator Pryor.

Senator PRYOR. They light up, you know, they make noises, all that. It's great.

But anyway, our kids were out there playing 1 day in the yard and my sister-in-law came over and she said, "You know, I think I saw something on the news that those have been recalled." Well, how does a parent find out that information? You know, where do you go? I mean, you don't even know where to start.

And so, what we did in Arkansas is we actually started a website called *childproductsafety.com,* and all we did is take the information that the CPSC was releasing on their website and NHTSA and maybe one or two other agencies. And basically, we just put a new face on it and tried to promote it in Arkansas so that people would have one place where they could go. And it was kind of a seamless deal; wherever the information was coming from, it was really easy to access.

I mean, that's how we tried to do it. And I'm not saying it was perfect, but, we were trying and we promoted it and we got good feedback on it. But it really is hard to get that information out.

And the other thing I was just going to say about the Attorneys General, is, having been one and I'll admit a little bias here because I really saw the value in 4 years in that office, I saw the value of what states can do when they all work together. But when we sat with the Consumer Product Safety Commission several months ago as we were starting this process on this legislation, they told us that, I believe at that point, the number one action that they had out there was on lighters.

Did we get the number on this?

And from 1997 to 2005, there were 352 incident reports related to lighter failure. Sixty-five percent of these lighter failures resulted in fires, and that led to four deaths and then a number of serious injuries. And so the CPSC is really focused on these lighters and as it turns out, the lighters that they're most focused on, the lighters that have the problem are imported from China.

And, so we talked about that and I remember, in listening to Chairwoman Nord and the CPSC staff talking about that, I was just thinking, wouldn't it be good—instead of having one agency here in Washington trying to deal with lighters all over the country, being sold in convenience stores and grocery stores and other

places all over the country—wouldn't it be good to have 50 district offices, so to speak, State offices for the CPSC to go out after some of these incidents that are happening in their states and happening in their communities?

So, I think that, it's almost like putting more cops on the street, in that if we build the right framework around it, I think that the public would really be served if Attorneys General had the authority to enforce this law. I think that would help in the Federal-State collaboration, but I also think that these Attorneys General around the country have a lot of background and expertise that they can offer in this area.

Almost every AG, out of 50, probably 44, 46, something like that, have some sort of consumer authority right now. We had what we called the Deceptive Trade Practices Act. And so, we had a Consumer Protection Division and many, many other states had something very similar. So, it just seems that you have a ready resource there, that's willing and able to step in and help with this challenge that we see around the country.

So, just before we move on, does anybody have any comments on the State Attorneys General issue? Because the previous panel did.

Mr. PLUNKETT. Senator, there is just a great deal of evidence in the last decade that what you say is absolutely true. We have Federal agencies and Federal law. The resources of those agencies are limited. Where we have states involved in enforcing those laws, we have better enforcement and better consumer protection. When it comes to telemarketing, when it comes to securities, in many cases—over a wide variety of agencies and products and services, it's as close to received wisdom as I have, given my experience in Washington. I think you're absolutely correct.

Mr. MIERZWINSKI. Senator, I would add, I'd be happy to try to put the data together, but there are a number of existing Federal laws where Attorneys General already have this authority. And so, this is not a new idea, it's an important idea. But I will say that in the last couple of years in my advocacy, that the industry lobbies have been trying to remove Attorney General authority in places where it currently exists to enforce Federal law. So I'm not surprised that they're trying to prevent Attorney General authority from being added to Federal laws.

It's a tremendous benefit, as Travis pointed out, to have 51 consumer cops on the beat instead of one. And Attorney General enforcement is strongly supported by every single consumer organization.

Mr. PLUNKETT. And there are several very good examples of Federal agencies working closely with—as you well know, Senator—with State Attorneys General, such as the Federal Trade Commission on a number of other statutes.

Mr. MCGUIRE. Senator, I already spoke a little bit on this and I realized I have two former prosecutors up there, so I'll be careful. But we are not in any way——

Senator KLOBUCHAR. We don't have jurisdiction over you.

[Laughter.]

Mr. MCGUIRE. OK, well then let me really—we are not trying to remove any existing authorities from State Attorneys General and

we're all for having more cops on the beat. We're all for more resources.

Our concern is over different interpretations and different enforcement actions and that's a different thing. So, I think we're with you quite a bit in your desire to make the agency more effective and have more resources put in. And I think there are a lot of things that technology can do in the areas of recalls and notification and education.

Senator PRYOR. Thank you.

Did you have any other questions?

Senator KLOBUCHAR. Just to finish up, I wanted to go back to the reason that we put this lead standard in, and I know there's some debate on where it should be set. And I don't quite want to go in there for the trace levels. We can talk about that later. But I mostly was focused on the reason that we tried to do this as opposed to a line for rulemaking, which some of the earlier bills had done.

And it was my impression, based on my discussions with Commissioner Nord, as well as people who've practiced in this area, that putting this in the rulemaking process could be untenable. At the same time, we wanted to allow for rulemaking if, for certain products, or a change in science, it was determined that the trace lead level at which we set it was too high.

So, what we ended up doing in this bill was to set it at the .04, I think its parts per million, and the .02 for jewelry, and then allow for rulemakings if the CPSC would like to go beneath that level for certain products.

And I'll tell you where I came down on this. I felt that if we didn't do that, even though it was a little risky to go out there with a trace level, we would be just stuck waiting and waiting and the consumers would be waiting, in terms of having a standard. And mostly the CPSC, with its limited resources, would be waiting to be able to enforce it.

So I mostly wanted to hear from the consumer advocates about your feelings about the idea of, regardless of where the trace level is set, about putting an actual Federal standard into law.

Mr. Korn?

Mr. KORN. I think it's certainly the prerogative of Congress and you can do that instead of going through the rulemaking process at the CPSC. Just like you can control the jurisdiction of the CPSC by declaring something a consumer product or not, so that the CPSC can work toward making it a safe product. You can also declare something banned and lead in toys is something that you'd certainly have the prerogative to do, and we're supportive of that.

And I don't think there's very much disagreement amongst anybody, as to whether or not that's the way to go now. I mean, I think almost everybody is in agreement there. So, I think you've crafted a good piece of legislation there.

Senator PRYOR. Thank you.

Mr. KORN. I'll mention one other thing. While sitting here, I got an e-mail notice from the Consumer Product Safety Commission about eight additional recalls today, about lead in products.

Senator KLOBUCHAR. And now you're going to go home and look?

Mr. KORN. Yes, you have to. But you can sign up. Senator—Chairman Pryor, you were mentioning how does the parent know?

You can sign up for this recall alert and get them right away, you know, if you have the computer access. That's an issue there, but it's a good way to get information.

Senator KLOBUCHAR. Mr. Plunkett?

Mr. PLUNKETT. I would just add one thing. We agree that your approach is a good way to start here. Regarding the inevitable question of enforcement, it's come up in terms of lead paint, where we have a standard already and poor enforcement track record.

Let me point out that two of the measures in your proposal will help there. The civil fine provision that we've already spoken about, and the third party testing provision that we're, that has already been mentioned at length.

So, you all are not only setting a better standard, you are improving the chances that those standards will be well enforced.

Mr. MIERZWINSKI. Senator, I just want to echo that your—your approach is absolutely the better approach, than to give this to rulemaking. And we strongly support that. And, as Alan pointed out, there is precedent for Congress banning—banning certain products that are hazardous on face. And by avoiding the long, drawn out rulemaking, it's the right way to go. Everybody agrees that getting lead out of the environment is the way to go. And if Congress does it, you do it cleanly.

The second problem, of course, is that CPSC rulemaking, they don't have the resources as you've heard and as you know, and a rulemaking takes forever. So, it's—it's absolutely the right way to go. And I, we believe that it's, was worth pointing out to the Committee that there are groups that are suggesting higher or better trace levels, and we hope to work with you on that. But we absolutely like what you guys have done.

Senator KLOBUCHAR. OK. Thank you.

And I, again, wanted to thank these retailers and manufacturers who have been willing to work with us on this. Mattel testifying at the last hearing we had. Toys 'R' Us appearing there from the retail standpoint. It was very helpful, gave us information, and it's helped us as we craft this bill to make sure that it's smart from a consumer standpoint but also practical to implement.

And thank you again, Chairman Pryor, for your work.

Senator PRYOR. Thank you.

I'm finished with my questions. And I want to thank Senator Klobuchar for being here and participating and helping draft this legislation.

But I do want to make four points in closing. One is, that we've talked about the State Attorneys General and the CPSC. And again, we're trying to find the balance. We've talked about that a lot today. And under our language that we've drafted into the bill, the states would have to give the CPSC 60 days notice before they proceed. And also, the CPSC has the right to intervene in the litigation. So again, we feel like that's a Federal-State balance there and there's a little check and balance, which we think is the right balance. We hope it is.

The second thing I was going to say is, I know there's a concern about information sharing and too much information going out, especially proprietary information. Well, Section 6(a)(3) of existing law, covers that. And we don't change that. Basically it says, in

summary, not to read the whole thing, but basically, manufacturers, you know, are protected from the release of confidential information.

And again, you all can look at that. We don't change that. We do change some of the things around that—that you may want to look at, but again, we're trying to find the protection that—we're trying to be sensitive to proprietary sensitive information.

And the third point I'd make is, what I said in the very beginning. Now's the time to come in and talk about these things and try to shape this because we would like to move this legislation. I've talked to Senator Inouye today, and he told me that he's prioritizing this and he wants to try to get it out as quickly as he can. So, don't wait, and don't think that this is going to take weeks or months to get going. I mean, we're starting right now. We've been working on this for a good while, but we are moving. The train's leaving the station. So, we encourage everybody to come in and weigh in and sit down and talk through this, with us.

And the last point is, I just want to say thank you. Because you all have been great. The fact that you've spent so much time here with us today and so much time in preparing. And like I said in the beginning, industry has really responded to a lot of these recalls in a very positive, proactive way, and we appreciate that. That's not been lost on this Subcommittee or the Committee. There are a lot of great companies out there that are really trying to address this in their own way. But I still think there's a need for comprehensive reform. I think most Senators and Congressmen would agree with that as well and would try to reauthorize CPSC in a way that prepares it to meet the challenges that we face today.

Again, I want to thank you all for being here today and participating. We're going to leave the record open for 2 weeks to allow Senators to provide written questions. We appreciate you all getting back with us as quickly as you can on those. And if there are documents or studies or whatever you all have—someone mentioned that before—if you want to submit those for the record, we'll be glad to accept those.

So with that, we're going to adjourn the hearing and just say thank you very much.

[Whereupon, at 6 p.m., the hearing was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM CALIFORNIA

Chairman Pryor, I want to thank you for all of your hard work on this bill that is so important to our children and families.

As both a parent and a grandparent, I have been incredibly distressed by the seemingly endless stream of reports about defective and dangerous children's toys and products.

Forty percent of all consumer products, nearly $250 billion, were imported into the United States last year from China.

The Consumer Product Safety Commission currently employs only 420 full time employees responsible for ensuring the safety of well over 15,000 products totaling $614 billion.

The products CPSC monitors range in diversity from baby products to playground equipment to cell phones. Given that range of responsibility for protecting consumers and a budget of only $63 million annually, I worry that we simply have not done enough to ensure the safety of products coming in through our borders.

As foreign imports soar, now is the time for us to step up our efforts to ensure that the food we consume and the products we use are as safe as possible.

I am pleased to see this bill significantly increases the authorized funding amount for the CPSC each year through 2015 and provides for penalties for violations of this Act.

While I am glad to see this bill gives the CPSC authority to ban the export of dangerous products that are unfit for sale in the United States, I believe we must do more to ensure that no children anywhere are exposed to dangerous toys.

I also favor strengthening the recall provisions of this bill so consumers are given the proper information necessary to ensure the safety of their families.

I again want to thank Senators Pryor and Inouye for all of their efforts on this important bill.

Thank you, Mr. Chairman.

PREPARED STATEMENT OF AMERICAN COUNCIL ON ELECTRICAL SAFETY (ACES)

The American Council on Electrical Safety (ACES) would like to insert, for the record, information on an existing program, administered by the U.S. Department of Labor, OSHA, titled Part 29, Section 1910.7, Definition and requirements for a Nationally Recognized Testing Laboratory. The fundamentals of this program could offer assurance that consumer electrical products in the United States will provide a significant amount of safety to persons and property.

The American Council on Electrical Safety (ACES) is an organization of individuals, organizations and Government officials responsible of assuring the safety of electrical products in the United States. Our members include accredited certification and testing laboratories that test all types of electrical products to assure they comply with U.S. safety standards. Additional members include inspectors and authorities having jurisdiction. Once a product is determined to comply with an applicable standard it is critical that we assure that the product *continues* to comply. This is done by regular follow up visits at the factory and market surveillance in the various distribution outlets.

All of the test laboratories are accredited by the Department of Labor (OSHA) under the Nationally Recognized Testing Laboratory (NRTL) program.

Although the OSHA–NRTL program is an excellent and effective program, authority is only granted for workplace products. *Consumer products are excluded.* Under the proposed bill for the CPSC to establish testing laboratories, much of what they do will duplicate what already exists in the U.S. However the most important ingredient of assuring continuous safety is market surveillance and factory follow up visits. This is the only way to assure that products continue to comply. Under the sys-

tem presently in place there are over 10,000 electrical inspectors; full time to assure that U.S. safety standards on work place electrical products, is continually assured.

The use of the existing inspection agencies, accredited testing laboratories and certification bodies will greatly improve the success of the Act you are proposing.

PRESS RELEASE OF CONSUMERS UNION—NONPROFIT PUBLISHER OF CONSUMER REPORTS

For Immediate Release, Thursday, October 4, 2007

Consumers Union Urges Reforms for CPSC; Supports Provisions in "The Consumer Product Safety Reform Act of 2007"

Washington, D.C.—Consumers Union, nonprofit publisher of *Consumer Reports* magazine, commended the Senate Commerce Subcommittee for Consumer Affairs, Insurance, and Automotive Safety for holding a hearing on comprehensive legislation to strengthen the Consumer Product Safety Commission.

According to CU, this legislation, S. 2045, recently introduced by Subcommittee Chairman, Mark Pryor, and cosponsored by Senators Durbin, Klobuchar, Inouye and Nelson, takes important steps in correcting the current shortcomings of the CPSC and recognizes the need for fundamental reform of the agency.

In a letter to the Subcommittee, CU outlined their support for the bill. Janell Duncan, Senior Counsel for CU noted that, "The bill puts in place important protections for consumers against unsafe and dangerous products."

"The recent onslaught of unsafe products imported into the United States has brought into focus the challenges faced by the Consumer Product Safety Commission. These events have clearly illustrated that the Commission lacks the staff, resources and legal authority to keep unsafe products out of the marketplace," cowrote Donald Mays, Senior Director of Product Safety Planning and Technical Administration for CU.

Some of the provisions CU praised include those providing for more tools and resources for the CPSC, creating a third-party certification of children's products to ensure that products comply with safety standard or Commission rules (CU urged this be extended to all products), and a ban on children's products containing more than "trace amounts" of lead.

A copy of the letter follows:

CONSUMERS UNION
October 3, 2007

Dear Chairman Pryor:

Consumers Union (CU), publisher of *Consumer Reports* commends you for your introduction of "The CPSC Reform Act of 2007" (S. 2045). This legislation is designed to strengthen the power and authority of the Consumer Product Safety Commission, a critically important Federal agency charged with ensuring the safety of over 15,000 products.

The recent onslaught of unsafe products imported into the United States has brought into focus the challenges faced by the CPSC. These events have clearly illustrated that the Commission lacks the staff, resources and legal authority to keep unsafe products out of the marketplace. Although U.S. imports from foreign countries have doubled in the past year, the CPSC budget for Fiscal Year 2007 culminates a two-year reduction of full-time employees from 471 to 420. In 2008, the number of full-time employees is expected to reach a low of 401. This agency—starved for resources—has been unable to do its job. Your legislation would reduce this trend, by authorizing the appropriation of an infusion of funds to the Commission, beginning with a budget of $80,000,000 in FY 2008 and increasing yearly to a level of $141,725,000 in FY 2015.

As shown by recent violations of U.S. product safety laws, and repeated violations by some well-known companies, large manufacturers and retailers may look at penalties as simply a cost of doing business. Current civil penalties for companies that fail to comply are inadequate to serve as an effective deterrent. Your legislation would increase civil penalty caps for certain individual violations to $250,000, and raise the maximum civil penalty to $100,000,000. Although we believe the cap should be eliminated to provide maximum deterrence, this increase should cause companies, large and small alike, to think twice before selling unreasonably dangerous products, or failing to report possible product risks to the CPSC.

Transparency is very important when products are suspected of posing unreasonable risks of harm. We therefore strongly support the provisions of this legislation that would eliminate Section 6(b) of the Consumer Product Safety Act (CPSA) that has served as a serious barrier to the release and timely disclosure of information that could warn the public about safety concerns relating to products.

Parents and caregivers alike have been very concerned with the repeated recalls of dangerous children's products and toys due to product defects or excessive amounts of lead in the paint, We commend you for specific provisions of the legislation that would address hazards relating to toys, including:

- Third-party certification of children's products to ensure that products comply with safety standards or Commission rules (we strongly support this measure, and encourage you to expand this requirement to all products, especially all-terrain vehicles and gasoline powered outdoor equipment);
- Tracking labels for children's products to enable easier identification of products subject to a recall; and
- A ban on children's products containing more than "trace amounts" of lead, which S. 2045 would define as limiting amounts in children's jewelry to 0.02 percent, and amounts in other children's products to 0.04 percent. The American Academy of Pediatrics has stated that there is no safe level for which a child can be exposed to lead, and recently has called for limiting amounts in products intended for use by children under 12 to 0.004 percent. We also agree that current limits are too high, and believe that Federal regulations should be changed to reduce the allowable limit for *all* consumer products to the lowest possible threshold.

Other important consumer protection provisions include:

- Requiring importers to pay a bond to ensure that they have the financial ability to conduct a recall, if necessary;
- Strengthening CPSC recall authority, and powers under Section 15 of the CPSA to better ensure that product recalls are appropriate in scope and effectiveness;
- Authorizing the CPSC to refer repeat offenders to U.S. Customs for possible termination of their import license;
- Authorizing enforcement of the CPSA by State Attorneys General;
- Whistleblower protection for employees of manufacturers;
- Clarifying that, after the date of enactment, product safety rules promulgated by the CPSC will not preempt state or local laws to any greater extent than already permitted under Section 26 of the CPSA. This provision also makes clear that the recent attempts by the Commission to cause the Mattress Flammability Rules to preempt state law will not do so in ways beyond what is allowed under Sections 26(a) and (c) of the CPSA.

Once again, we thank you for crafting this important bill, designed to put into place important protections for consumers against unsafe and dangerous products. We appreciate your efforts to restore both resources and authority to the CPSC to enable it to better serve the public interest. We look forward to working with you on this measure as it moves through the legislative process.

Sincerely,

JANELL MAYO DUNCAN,
Senior Counsel,
Washington, D.C.

DON MAYS,
enior Director of Product Safety,
Planning and Technical Administration, Yonkers, New York.

cc: Members of the Senate Commerce Subcommittee on Consumer Affairs

FRIENDS OF THE EARTH
Washington, DC, October 23, 2007

On behalf of Friends of the Earth, MOMS (Making Our Milk Safe), Sierra Club, Clean Water Action, Environmental Working Group, Firefighters Burn Institute, Trauma Foundation, San Francisco Firefighters Cancer Prevention Foundation, Institute for Agriculture and Trade Policy, Citizens' Environmental Coalition, Indiana Toxics Action, Kentucky Environmental Foundation, California Communities Against Toxics, Clean New York, Global Community Monitor, Vermont PIRG, CA Product Stewardship Council, Blue Voice

HON. DANIEL K. INOUYE,
U.S. Senate,
Hart Senate Office Building,
Washington, DC.

RE: SENATE BILL 2045: THE CONSUMER PRODUCT SAFETY COMMISSION REFORM ACT OF 2007

Dear Senator Inouye,

Thank you for your excellent work on Senate Bill 2045, the Consumer Product Safety Commission Reform Act of 2007, which is an important piece of legislation for reducing the very real threats of lead contamination in children.

However, we, the undersigned, are writing to request that Section 25 be deleted from the bill. This provision mandates the Consumer Product Safety Commission (CPSC) to issue a final rule for furniture flammability by June 1, 2008, which could result in exposing the American people and the environment to potentially dangerous toxic fire retardant chemicals. We strongly urge you to delete this section for reasons outlined in more detail below.

1. *Based upon historical experience in the State of California, we believe that flame retardant chemicals would be used to meet CPSC's proposed standards. Unfortunately, in hundreds of peer-reviewed scientific studies, a sample list of which we have provided with this letter, flame retardants used in furniture have been found to persist, accumulate and be potentially toxic.* Fire retardant chemicals are accumulating in humans, wildlife, and the environment at alarming rates. U.S. women have some of the highest levels of fire retardants in their breast milk in the world. The Polyurethane Foam Association, which produces the foam for the Nation's furniture manufacturers, estimates that 17 to 70 million additional pounds of these chemicals would be used annually to meet CPSC's current draft standard.

2. *Adequate toxicity testing has not been conducted on the serious health impacts of these flame retardant chemicals.* Health impacts include the potential for bioaccumulation and persistence, especially in children, as well as endocrine disruption, carcinogenicity, and reproductive and neurological toxicity. Recent U.S. EPA studies indicate areas of concern, as well as large data gaps for human health and environmental safety for all of the fire retardant chemicals currently used in furniture.

3. *Dozens of scientific studies are now underway examining the relationship between previously used PBDE fire retardant chemicals and birth defects, autism, hyperactivity, reduced fertility including lowered sperm counts, and other reproductive and neurological conditions.* This August, a study conducted by U.S. EPA scientists linked fire retardant chemicals to the current epidemic of hyperthyroid disease in domestic cats. Further studies will not be completed within the timeline of this legislation.

4. *Studies have not been conducted on the fate and transport of fire retardant chemicals used in furniture.* Alarmingly, some fire retardants such as PBDEs and PCBs have been found in extremely remote areas including the Arctic Circle, with the highest levels found in Killer Whales, The entire lifecycle of products containing fire retardant chemicals must be considered including occupational exposure during manufacture, chemical exposure during use, and end of life disposal problems when products are combusted, land-filled, composted, littered, or recycled.

5. *Even though California is the only state in the country with furniture flammability standards (California Technical Bulletin 117), leading to the use of millions of pounds of chemical fire retardants, California has failed to achieve greater fire safety than other states.* According to a study by the National Fire Protection Association, the rate of reduction of fire deaths in California over the last 20 years is statistically identical to other states that do not have furniture flammability standards. A general decrease in smoking, the increased use of sprinkler systems and smoke alarms, fire-safe cigarettes, and improved building codes have had a significant impact on increasing fire safety across the U.S.

6. *A dangerous fire retardant known as chlorinated tris, or TDCP, which was removed from children's sleepwear 30 years ago by CPSC, is the second most common fire retardant used in California furniture today.* Tris is both a mutagen and a probable human carcinogen. CPSC studies predict that 300 cases of cancer per million are likely due to current human exposure to this chemical in furniture. If tris were used more broadly across the Nation as a result of new fire retardant standards, CPSC projects an additional 1,200 cases of cancer annually.

7. *When furniture treated with fire retardant chemicals burns, dioxins and furans—some of the most carcinogenic chemicals known—are produced.* According to a recent study by the *Journal of Occupational and Environmental Medicine,* firefighters have significantly elevated rates of four types of cancer: multiple myeloma, non-Hodgkin's lymphoma, prostate, and testicular cancer. Experts believe that these cancers may be related to firefighters' exposure to the toxic by-products created when furniture treated with fire retardant chemicals burn. Primarily for this reason, The International Association of Firefighters, which represents hundreds of thousands of firefighters nationwide, supports efforts to phase-out the use of toxic and unsafe fire retardants.

8. *California is currently considering legislation in the Senate mandating the phase-out of the most toxic fire retardant chemicals (AB 706).* A new study finds private residences in California have three to ten times higher levels of fire retardant chemicals than homes elsewhere in the U.S. For this and other reasons, AB 706 has the strong support of national environmental and public health organizations, burn institutes, organized labor organizations, as well as the largest firefighter organizations in California.

9. *A Federal flammability standard set by CPSC may lead to a pre-emption of state laws to phase-out toxic fire retardants.* Eleven U.S. states have already banned pentaBDE and octaBDE, and two states have banned decaBDE. If CPSC establishes a national furniture standard which in practice leads to the use of chemicals which have been banned by any state, this will likely lead to litigation between states and the Federal Government.

10. *Early estimates from New York State suggest that fire-safe cigarettes will cause a 50 to 67 percent reduction in fire deaths. Public health officials acknowledge that this is a much safer and more effective means of reducing fire hazard.* Laws in 22 U.S. states and Canada currently require cigarettes to be constructed so that they will self-extinguish if left unattended. Other states are actively considering such regulations. Compared to adding chemicals to foam, which has not resulted in a measurable decline in fire deaths in California over 20 years, fire safe cigarettes will appreciably reduce fire hazard without dangerously adverse public health and environmental impacts.

We urge you to strike Section 25 and to allow California, Washington, Maine, New York and other states to take the lead on efforts to limit the use of the most dangerous fire retardants.

We applaud your efforts to improve fire safety, but it must not come at the expense of increasing human and environmental exposure to potentially toxic chemicals for which there is inadequate health and safety information.

Thank you,

BRENT BLACKWELDER, PH.D.
President
Friends of the Earth

ED HOPKINS
Director of Environmental Quality
Sierra Club

PATTY NEIFER
Executive Director
Firefighters Burn Institute

MARIE ZELLAR
Midwest Regional Director
Clean Water Action

ANDREW MCGUIRE
Executive Director
Trauma Foundation

TONY STEFANI
Chairman of the Board
San Francisco Firefighters Cancer Prevention Foundation

MARY BRUNE
Executive Director
MOMS (Making Our Milk Safe)

CAROL MISSELDINE
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California Product Stewardship Council

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Vermont PIRG

HARDY JONES
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PREPARED STATEMENT OF THE AMERICAN ACADEMY OF PEDIATRICS

The American Academy of Pediatrics (AAP), a nonprofit professional organization of 60,000 primary care pediatricians, pediatric medical sub-specialists, and pediatric surgical specialists dedicated to the health, safety, and well-being of infants, children, adolescents, and young adults, appreciates this opportunity to submit testimony for the record of the October 4 hearing on S. 2045, the CPSC Reform Act of 2007.

The American Academy of Pediatrics commends the sponsors of S. 2045 for this effort to pay long-overdue attention to the Consumer Product Safety Commission (CPSC), its authorities, and the marketplace in which it operates. The AAP supports initiatives to increase the CPSC's staff and funding, give it more tools to police the consumer marketplace, and require manufacturers and sellers of consumer products to pursue safety more zealously.

The AAP would like to offer testimony directed to the portions of S. 2045 dealing with children's products and regulation of lead. In particular, the AAP applauds S. 2045 for reducing the lead standard for paint to 90 parts per million (ppm). The AAP recommends that S. 2045 be improved as follows:

- Lead should be banned in children's products above the level of 40 ppm. Further, no compelling rationale exists for differentiating toy jewelry from other types of children's products.
- Children's product should be defined as those intended for use by or with children age 12 and under.
- Legislation or regulations should limit the overall lead content of an item, rather than only limiting lead content of its components. A single product may contain numerous components that could cumulatively contain a dangerous level of lead.

Lead is Ubiquitous in Our Environment

Lead is a soft, heavy and malleable metal that occurs naturally in trace amounts throughout the environment. Due to its abundance and easy workability, it has been used for thousands of years in plumbing, production of glass and crystal, and manufacture of ammunition.[1] Its toxicity was recognized by the Romans[2] and documented during the twentieth century, as its increasingly widespread use led to unprecedented levels of occupational and environmental lead poisoning.[3] By 1970, science had demonstrated conclusively that lead could cause both acute poisoning as well as a wide range of long-term human health consequences.[3] [4] Since then, hundreds of studies have shown that the body has no use for lead, and that a "normal" blood lead level is zero.

Because of its widespread use, lead has been concentrated in the environment where it poses a serious threat to children's health. Furthermore, because it cannot be identified easily, even when present in high amounts in paint, dust, or dirt, children can be exposed in their homes and schools and at play without our knowledge. It is an "invisible" poison.

Low Levels of Lead Can Cause Serious Effects

Damage done by small amounts of lead may be hard to measure and even harder to understand. Most children who accumulate lead in their body do not have any physical symptoms, but low lead levels cause a wide array of negative effects, including cognitive, motor, behavioral, and physical harm.[5]

There is no "safe" level of lead exposure. The developing embryo, fetus, and child grow and change rapidly. If, during this period of change, the fetus or child is exposed to a poison of some kind, development can be impacted negatively. These "critical windows of exposure" are specific periods of development during which the embryo or fetus is undergoing some process (such as the development of arms and legs between days 22 and 36 of pregnancy, when thalidomide damages their devel-

opment.[6] [7]) There are many other examples of this effect, including tobacco smoke and behavioral effects, and alcohol and fetal alcohol syndrome. The critical period associated with harm from lead poisoning is brain and nervous system development, which begins in early pregnancy and continues until at least age 3 years.[8]

The vulnerability of children to lead poisoning during development of their brain and nervous system has been amply demonstrated, and the literature is very consistent. On average, children whose blood lead levels (BLLs) rise from 10 to 20 mcg/dL lose two to three IQ points. More recent studies have shown an even greater impact on IQ of BLLs under 10 mcg/dL. Key studies reported a loss of 4 to 7 IQ points in children whose lead levels rose from 1 mcg/dL to 10 mcg/dL.[9] [10] These studies suggest that "low" levels of exposure—meaning BLLs less than 10 mcg/dL—cause proportionately greater harm than higher levels. The effects of lead on health do not stop once the child reaches age 6 years. A recent study found that in a group of 7-year old children exposed to lead before the age of 3 years, IQ was more closely related to blood lead at age 7 years than past blood lead at age 5 or peak blood lead at approximately age 2 years.[11]

Another important lasting effect of lead exposure is on behavior, with higher rates of behavioral problems reported in teens and adults exposed to lead during childhood. Children with elevated lead are more likely to have problems with attention deficit, reading disabilities, and to fail to graduate from high school.[12] Investigators have identified associations between lead exposure and increased aggression, commission of crime and antisocial or delinquent behaviors.[13-16] Studies have suggested that several nations which began reducing lead exposure aggressively in the 1970s experienced corresponding decreases in crime rates two to three decades later.[16] Other effects include abnormal balance, poor eye-hand coordination, longer reaction times, and sleep disturbances.[12] [17] [18]

The loss of a few IQ points or a small increase in the proportion of children with behavioral problems in the population of U.S. children has marked impacts on educational needs and future potential.[19] Since lead exposure is a population-wide risk, even relatively low levels of exposure can affect large numbers of children. This means that more children need special education, there are fewer gifted children, and over time, the average IQ of the entire population falls.[19]

Lead Poses a Serious Health Hazard to Children At Every Level of Exposure and Every Stage of Development

Lead is easily absorbed by ingestion or inhalation. The most common route of exposure of children is through ingestion, usually by putting hands and other objects in their mouth. Both hand-to-mouth exploration and playing on floors are typical behaviors for children, especially younger children. Studies using videos to record oral behaviors of young children report hand or object in mouth activities *20 or more times per hour*.[20] [21] If the dirt on their hands or the dust on the floor contains lead, every one of those activities delivers a dose of lead.

Another significant difference between children and adults is in the rate of their metabolisms. Children have significantly faster metabolisms, which means that they breathe faster and ingest proportionately more food and water.[22] This difference means that in similar environments, children are exposed to a greater extent to contaminants than adults. Since children absorb 5 to 50 percent of any lead they ingest (compared to adults, who absorb 10–15 percent),[23] they are at high risk of lead poisoning every time they are exposed.

Once lead enters the body it remains there for years. Lead is similar to calcium from the elemental perspective. This means that our bodies "see" lead as calcium, absorb it into blood and then store it in bone. These stores of lead can be released years later, when bone changes occur or demands on calcium stores are made.[24] Another consequence of storing lead in bone is that exposures separated by months or years have an additive effect on the body's burden of lead and can exert effects over decades. Acquisition of lead in the body even in small amounts (*i.e.,* amounts that result in BLLs less than 10 mcg/dL) contribute to this accumulation of lead. This means that commonly encountered blood lead concentrations have lasting negative effects.

Another consequence of this accumulation of lead in bone is the exposure of the fetus to lead by the mothers. Women exposed to lead during childhood may have significant stores of lead in their bones. If they do not consume adequate calcium during pregnancy, their bones release calcium as the fetus grows. As the calcium is released, lead is released as well, This lead can be transferred to the fetus—exposing the fetus' developing brain and nervous system at a critical time. Fetal exposure from this route has been demonstrated to cause measurable decreases in IQ.[25]

Sources of Children's Exposure to Lead

The most common source of lead exposure today is lead paint, found in older housing stock. As paint wears off, it contaminates the dust that clings to surfaces, toys and the fingers of children. Other sources of lead exposure include contaminated soil, traditional or folk medicines, and certain types of dishes. In recent years, however, parents have found a new source of anxiety regarding lead exposure: children's toys and other products, particularly those imported from China.

These concerns are justified. Since July 2006, the CPSC has issued at least 11 recalls affecting more than 6.7 million units of children's toy jewelry due to excessive lead content. Since 1998, CPSC has issued at least 29 recalls involving 157,962,000 pieces of toy jewelry due to high lead levels. Other products recalled during that time due to lead contamination include game pieces, candles, sidewalk chalk, and art kits. Consumers are acutely aware of recent recalls of popular toys found to contain lead paint, including Thomas the Tank Engine, Mattel's Barbie, and Fisher-Price's Dora the Explorer toys. The risk of harm to children from these toys is real: in 2006, a 4-year-old Minnesota boy died after ingesting a small Reebok shoe charm that was later found to be 99.1 percent lead.[26] The charm he ingested dissolved in his stomach, releasing the lead into his bloodstream.

Lead Must Be Removed from Toys and Other Children's Products

The American Academy of Pediatrics has consistently urged the Consumer Product Safety Commission (CPSC), the Environmental Protection Agency (EPA), and other agencies to take aggressive, proactive steps to minimize children's exposure to lead. The addition of lead to jewelry or toys is not in any way central or even necessary to the function or purpose of the product. For example, manufacturers add lead to jewelry to give it more weight or heft, rather than using a more expensive but safer metal. None of these factors represent a compelling rationale for including a poisonous substance in a product specifically designed for use by children.

The range of products covered by a ban on lead content must also be considered carefully. "Children's product" must be defined broadly enough to cover the full range of items capable of causing a serious hazards—not just toys or "toy" jewelry but also durable products such as furniture (cribs, strollers, high chairs, etc.) and products meant for the care of children (bath seats, gates, etc.). One of the first pediatric deaths attributed to lead paint was a child who chewed on the railing of his crib—in 1913.[4]

Finally, legislation should cover products meant or designed for use by or with children at least up through the age of 12. Children are susceptible to neurological damage from lead exposure throughout the development of their brain and nervous system. Their long "shelf life," or the period of time over which they can be exposed to and accumulate lead in their bodies, means that every exposure should be eliminated or minimized to prevent future harms. Finally, toys meant for older children often find their way into the hands of younger siblings and other small children, posing a hazard to these children outside the object's target audience.

Federal Lead Standards

Federal agencies use a variety of standards for unacceptable lead content. This issue is complicated by the fact that lead uptake varies depending upon the route of exposure (ingestion, inhalation, skin contact, etc.) In considering existing guidelines, it is critical to bear in mind that many were set before research demonstrated the harmful effects of lead at low levels. There is no known safe level of lead exposure; as a result, exposure to lead below these levels should not be considered "safe."

- In 1978, the Consumer Product Safety Commission banned the manufacture of paint containing more than 0.06 percent lead by weight on interior and exterior residential surfaces, toys, and furniture.
- Based on that standard for lead paint, the CPSC's current voluntary standard prohibits toy jewelry to contain more than 0.06 percent lead by weight. The standard further requires manufacturers to test for the "accessibility" of lead, although surface accessibility may be irrelevant if an item is small enough to be ingested.
- The EPA requires water provided by public utilities to contain no more than 15 parts per billion of lead. The 1986 Safe Drinking Water Act Amendments banned the use of lead in public drinking water distribution systems and limited the lead content of brass used for plumbing to 8 percent.
- The EPA set guidelines for lead contamination of dust, limiting levels called "safe" to below 40 mcg/ft^2 for floors.[27] It is important to note that this is not a health-based standard; an estimated 20 percent of children exposed to floor dust lead levels at 40 mcg/ft^2 will have a blood lead level above 10 mcg/dL.[28]

- In response to reports of lead contamination in candies likely to be consumed frequently by small children, the Food and Drug Administration (FDA) set a maximum lead level of 0.1 ppm. FDA has set different levels for other products; for example, dairy product solids may contain lead at no more than 0.5 ppm.[29]
- The FDA recommends a limit on children's lead intake in food to no more than 6 mcg/day. It is important to note that this is not a health-based standard; this limit is roughly equivalent to the amount of lead that would be expected to lower IQ by 1 point.
- FDA regulates lead content in cosmetics; for example, the colorant manganese violet may contain lead at no more than 20 ppm.[30]
- Airborne lead is regulated by EPA as a "criteria pollutant" under the Clean Air Act. The National Ambient Air Quality Standard for lead is 1.5 mcg/m^3, maximum arithmetic mean averaged over a calendar quarter.
- Both the National Institute for Occupational Safety and Health and the Occupational Safety and Health Administration set permissible limits for lead exposure in the workplace, but these guidelines are designed for adults and not appropriate for children.

Recommendations

To protect the health of our Nation's children, the CPSC must be given the tools it needs to fulfill its mission. In particular, nonessential uses of lead, especially in products to which children may be exposed, must be prohibited. The American Academy of Pediatrics recommends the following:

- The CPSC should require all products intended for use by or in connection with children to contain no more than trace amounts of lead.
- The Academy recommends defining a "trace" amount of lead as no more than 40 ppm, which is the upper range of lead in uncontaminated soil.[31] This standard would recognize that contamination with minute amounts of lead in the environment may occur but can be minimized through good manufacturing practices.
- "Children's product" should be defined in such a way as to ensure it will cover the wide range of products used by or for children. This standard should cover toys intended for use by or with children under the age of 12 years.
- The limit on lead content must apply to *all* components of the item or jewelry or other small parts that could be swallowed, not just the surface covering.
- Legislation or regulations should limit the overall lead content of an item, rather than only limiting lead content of its components. A single product may contain numerous components that could cumulatively contain a dangerous level of lead.
- The CPSC must be funded adequately. The President requested a budget of $63.2 million for CPSC in Fiscal Year 2008, which would require the agency to cut an additional 19 employees. This budget is insufficient to even allow the agency to continue current programs, much less expand its efforts. At its founding, the CPSC budget was $39 million. If the budget had kept pace with inflation, it would be $138.2 million today, more than double its requested allocation.
- An appropriately qualified CPSC chair must be nominated and approved in a timely fashion. The CPSC has been without a voting quorum of Commissioners since January 2007, meaning it cannot take many regulatory, enforcement and other actions. The President's recent nominee to chair the Commission withdrew from consideration after a public outcry regarding his qualifications.
- The authority of the agency to issue mandatory recalls and provide full information to consumers must be strengthened.

Finally, it is important to note that, while limiting lead is an important aspect of guaranteeing the safety of children's products, numerous other aspects of this issue should also be considered. Other key children's product safety issues including choking hazards, flammability, dangerous magnets, and safe product design.

Conclusion

There is no known "safe" level of lead for children.[32] [33] No study has determined a blood lead level that does not impair child cognition. Since any measurable lead level causes lasting harm, prevention of exposure is the only treatment.[34] Lead exposure is an important, unnecessary, and preventable poisoning.

The American Academy of Pediatrics appreciates this opportunity to submit testimony for the record of this hearing on S. 2045, the CPSC Reform Act of 2007. If

the AAP may be of further assistance, please contact Cindy Pellegrini in our Washington, D.C. office.

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PREPARED STATEMENT OF CHARLES JEFFREY DUKE, GENERAL COUNSEL, ZIPPO MANUFACTURING COMPANY

Chairman Pryor, Ranking Member Sununu, and other distinguished Subcommittee Members. My name is Charles Jeffrey Duke, General Counsel of Zippo Manufacturing Corporation. I want to thank you for giving me the opportunity to submit my views on the Consumer Product Safety Reform Act, S. 2045.

In general, Zippo supports the reauthorization of the U.S. Consumer Product Safety Commission with substantially increased authorization and staff levels. I believe that S. 2045 embraces a healthy increase of both of these resources and I support those objectives. Zippo supports a number of the needed reforms in S. 2045; for example, providing the authority to expand the Commission to five Commissioners; streamlining the submission of documents and reports to Congress; streamlining rulemaking procedures; and providing a system for more accurate identification of manufacturers by importers, retailers and distributors.

Zippo also supports expanding the list of certain prohibited acts—such as prohibiting the resale of recalled products; increasing penalties for repeat offenders; and increased penalties for misrepresenting information in investigations; and more efficient sharing of information with Federal, State, local and foreign law enforcement agencies.

There are, however, other provisions in the bill that would impose unreasonable burdens on small and medium sized enterprises (SMEs) like Zippo. The elimination of section 6(b) of the Consumer Product Safety Act could expose Zippo and other SMEs to breaches of confidential and proprietary information. Zippo also is very concerned about Section 21 of the bill that would authorize lawsuits by state attorneys general. This has the potential of exposing Zippo and other SME's to expensive and unnecessary litigation in a myriad of legal systems. SMEs are much less able to expend resources on litigation than multinationals are. Every dollar spent on litigation comes at the expense of spending to protect intellectual property, developing new and innovative products and continuing to employ Americans in good paying jobs with comprehensive employee benefits.

Zippo is also concerned about Section 18 of the bill that would have the effect of narrowing Federal preemption. This tends to create confusion in the marketplace due to the absence of a clear national standard. In this era of globalization, when SMEs are being required to compete in dozens if not hundreds of countries, as Zippo does, just to survive, a clear national safety standard enforced federally, as compared to numerous state variations created by state enforcement, to provide the consistency both manufacturers and consumers need. Zippo would like to work with the Committee to improve this legislation making the provisions more fair and equitable for consumers and SMEs alike.

I would like to point to one specific provision of the bill—section 25—that establishes a model for helping Zippo and other lighter companies, along with many other industries, to make a substantial contribution to safety. Section 25 requires the Commission to issue a final rule by no later than June 1, 2008 on a proposed rule on "Ignition of Upholstered Furniture by Small Open Flame and/or Smoldering Cigarettes" This proposed rule has been pending before the Commission for over 10 years without a successful outcome. It is time for the Commission to act on this proposed rule and the Congress is justified in encouraging the Commission to ensure action.

Zippo urges the Committee to adopt language similar to Section 25 to create a mandatory rule for the existing voluntary standard for cigarette lighters, ASTM F–400. For years, the Commission has been considering a pending rulemaking (*Federal Register*/Vol. 70, No. 68/Monday, April 11, 2005/Proposed Rules) to create a mandatory safety standard for cigarette lighters, yet it appears that the Commission is not prepared to act on this rulemaking, which is stuck at the ANPR stage. In the interim, one to two persons die each year due to faulty lighters entering the U.S. market.

The history of this rulemaking is revealing of the Commission's inability to take action. In November 2001, the Lighter Association, Inc. petitioned the Commission to adopt a voluntary standard—ASTM F–400—as a mandatory standard under the Consumer Product Safety Act (CPSA). This voluntary standard meets the require-

ments to address the risk of death, and injury associated with the mechanical malfunction of lighters. Zippo believes that a mandatory rule is necessary to address an unreasonable risk of injury created by the widespread non-conformance of the voluntary standard by imported lighters.

Nearly 3 years ago on November 30, 2004, the Commission voted to grant the petition and published an advanced notice of proposed rulemaking (ANPR) in the *Federal Register* on April 11, 2005. According to the CPSC staff, available market data indicates that imported and domestic lighter production totals approximately 1 billion units annually. Imports account for more than 75 percent of the U.S. market for lighters. China accounts for 58 percent of lighter imports—or 435 million lighters imported into our country every year. Chinese compliance with the voluntary standard on tests conducted by the CPSC is less than 30 percent thus assuming these samples are indicative of the market, at least 304 million of all lighters imported into the United States from China annually are not in compliance with the voluntary lighter standards with which American manufacturers comply. A voluntary standard loses its value to the consuming public if millions of products are potentially non-conforming.

According to the National Fire Incident Reporting System (NFIRS) for the period 1999–2002, there were an estimated 290 residential structure fires that appear to have been caused by malfunctioning lighters. According to CPSC data from the National Electronic Injury Surveillance System (NEISS) from 1997–2005, there were an estimated 4,145 emergency department treated injuries resulting from malfunctioning lighters; mostly burns to the face, hands, and fingers. From 1997–2005, 362 incident reports related to lighter failures were received; 65 percent of these lighter failures resulted in fires, leading to 4 deaths and some serious injuries. The information in these reports showed that malfunctioning lighters mostly resulted in fire and explosion hazards. This updated incident data includes four deaths and additional serious injuries.

In testimony before the Commission on September 14, 2004, Rohit Khanna, the Project Leader for the lighter rulemaking, testified that there were an estimated 2.2 deaths per billion lighters sold from malfunctioning lighters and an estimated 1.1 injuries per million lighters sold from malfunctioning lighters. With the billion lighters sold each year, this equates to about 2 deaths each year and about 1,000 injuries each year.

Once the ANPR was voted out, the CPSC staff conducted a study to estimate the level of conformance of lighters to ASTM F–400 and revealed that inexpensive and disposable lighters had conformance rates at or below 40 percent (approximately 91 percent of all lighters in the market are disposable and 9 percent are refillable). Among countries, lighters from China had the lowest conformance rate at less than 30 percent. This is consistent with testing conducted by BIC Corporation in 2002 which revealed a conformance rate of less than 10 percent for disposable lighters from China and testing conducted by the Lighter Association in 2004 which revealed a conformance rate of less than 20 percent for disposable lighters from China. Zippo's conformance with the ASTM F–400 voluntary standard is 100 percent.

It is clear from this data that China and other countries that export disposable lighters to the United States are simply ignoring ASTM F–400. One of the problems is the fact that an industry standard is voluntary and the Chinese have stated that if it is voluntary, they do not think they have to comply with it. A mandatory standard would provide the Commission staff with the tools to enforce the provisions of the standard and compel a high rate of conformance.

There are at least three reasons for a mandatory standard:

- A mandatory standard would reduce fires, injuries and death;
- If we want consistently high consumer safety standards it seems reasonable to require importers to adhere to the same high standards American producers already adhere to, particularly when they have an extraordinarily large share of the market and their products are more or less indiscernible to the consumer from lighters produced by American companies; and
- The EU and Canada have both adopted F–400 (ISO 9994) as a mandatory standard. If the Commission does not adopt F–400, the U.S. will become a dumping ground for lighters that cannot be imported into the EU or Canada.

Adoption of this standard as mandatory by the Commission would enhance consumer safety and greatly decrease the possibility of exposure to unsafe imported lighters. Zippo urges the Committee to adopt the Consumer Product Safety Commission Reform Act, S. 2045, with appropriate amendments.

I thank the Committee again for considering my views.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK PRYOR TO HON. THOMAS H. MOORE

Civil Penalties

Question 1. One of the complaints about an increased level of civil penalties is that many entities would hire more attorneys to become more litigious, and thus less cooperative, with the CPSC. What is your response to this position?

Answer. We have already had companies hire some of the most expensive attorneys in Washington to fight us under our current civil penalty cap. No company wanted to be the first one to draw a million dollar fine. Once that psychological barrier was broken, companies went back to their normal way of dealing with us (or ignoring us, as the case may be). I do not foresee an increase in the cap, even a substantial one, as having any significant, lasting impact on companies' willingness to fight us, once they and our staff adjust to the new regime. I would hope that, if anything, a penalty structure that shows that Congress means business when it comes to protecting consumers will make companies more cooperative, not less. I think some of the bigger companies currently view us as more of a nuisance than a real check on their corporate behavior. That needs to change.

Question 2. Do you believe this will enable the agency to make distinctions in the assessment of penalties?

Answer. Yes, most definitely. It will also give us the room to start assessing penalties for violations of multiple subsections of section 19 and not fall back, as we have almost exclusively, on failure to report as the only violation that we pursue. We would be able to review cases from top to bottom and start enforcing the other prohibitions in our statutes that we presently have little reason to pursue because they would not increase the penalty amount that we could assess. Now, given the low overall penalty amount, if we were to assess a penalty for multiple violations of section 19, it would have the effect of lessening the amount of the penalty for the reporting violation.

Question 3. Some have expressed a concern that these penalties could be assessed with little more discretion than the current sentiment of the Commission. This bill requires the CPSC to establish a rulemaking establishing criteria for their imposition. How would you foresee this criteria being set?

Answer. We already have an open rulemaking proceeding, spurred by industry, to formally add criteria to those currently listed in our statute. I took issue with some of the new criteria that were being proposed. A copy of the statement that I issued on the draft proposals can be found at *http://www.cpsc.gov/pr/statements.html,* under "Civil Penalty Factors." We could use that proceeding, which is still open, to flesh out any additional criteria Congress may wish to add to the statute.

Question 4. Do you believe this should alleviate some concerns?

Answer. I have always thought these concerns were a bit of a red herring. Industry will not be completely satisfied until it has a "price list" showing what we will assess for a particular violation with a precise list of mitigating circumstances. Then they can really factor in the cost of compliance versus the benefit of not complying. The violations we see are as unique as the company, the product, the hazard, and the people who made the judgments that led us to seek a penalty. Precision is not possible. But I do welcome Congress's input on any additional factors it wants us to consider.

Criminal Penalties

Question 1a. In your testimony you describe the requirement of notice as an impediment to the Justice Department pursuing criminal sanctions. Would you mind describing how many, if any, actions have been pursued by the Justice Department and the nature of those actions?

Answer. As best I can determine, there have been only three criminal cases that stemmed from violations of the Consumer Product Safety Act since the agency's inception. The first criminal penalty under this statute was not assessed until 1997, when two men pleaded guilty to criminal charges stemming from their distribution of volatile alkyl nitrites. Both men had continued to sell the products after the Commission had first notified them that the product they were selling was banned under the CPSA. One man was sentenced to 5 years' probation, with home detention for 6 months and the other was sentenced to 2 years' probation, 150 hours of community service and fined $2,500.

In 2000, a man was sentenced on charges arising from his removal of the child safety mechanisms from child-resistant disposable cigarette lighters. While this violated the CPSA, the criminal charges that were brought against him were for ob-

struction of justice and making false statements to CPSC. This is a tactic that the Department of Justice's Office of Consumer Litigation must sometimes resort to in order to obtain criminal convictions for violations of the CPSA. He was ultimately sentenced on the false statement charge and sentenced to 2 years in prison.

In January of 2002, a man pled guilty to charges stemming from his importation of counterfeit and substandard electrical products. Once again the Justice Department proceeded on the basis of false statement made by the defendant to a CPSC investigator as well as false statements made on Customs importation forms. He was sentenced to 14 months in prison, with 3 years of supervised release and fined $30,000.

Copies of the relevant press releases can also be found at:

http://www.cpsc.gov/cpscpub/prerel/prhtml97/97167.html

http://www.cpsc.gov/cpscpub/prerel/prhtml00/00101.html

and

http://www.cpsc.gov/cpscpub/prerel/prhtml02/02091.html.

Question 1b. Does the agency initiate these actions?

Answer. The Department of Justice pursues them at our request.

Question 2. In your opinion, are criminal penalties reserved for the most egregious "bad actors"?

Answer. Yes. Certainly the requirement that we have to tell someone they've violated our statute and then catch them at the same violation again, tends to make it that way for violations of the CPSA. The criminal violations that we pursue under the Federal Hazardous Substances Act tend to be situations where we have recalled a product and the company subsequently resells the recalled product to another company or where we have seen repeated violations of the same mandatory requirement by the same company. Since our statutes currently only provide for misdemeanor charges—criminal fines and no more than 1 year in jail—the really bad actors currently do not face much in the way of punishment unless we can find non-CPSC statutory violations, as in two of the three cases above.

Question 3. You note in your written testimony that the Justice Department has recommended a two-tiered system. How would you foresee the Agency utilizing a new two-tiered system?

Answer. I think we would consult informally with the Justice Department prior to their seeking an indictment and decide in conjunction with them how to proceed given the evidence and the gravity of the violations. Because we do not prosecute these cases, we would necessarily depend on Justice's expertise in similar types of cases.

Question 4. Some have expressed this would have negative effects on attracting board members and company executives. How would you respond?

Answer. I would hope that prospective Board Members and company executives would not factor into their employment decision the probability as to whether they might knowingly or willfully break the law and what the penalties for such a violation might be. But to the extent they do, we are all better off if the penalties in our statutes are strong enough to make such people seek other employment.

Preemption

Question 1. You have noted that the Mattress Flammability Standard offered new preemptive interpretation. Would you describe your concerns with this interpretation?

Answer. On January 13, 2005, the proposed rule for the Flammability (Open Flame) of Mattresses and Mattress/Foundation Sets was published. The language in the preamble on preemption tracked the language that had been used in rulemakings under the FFA since the issuance of the Executive Order in 1996, merely stating the statutory provision without attempting to interpret it.

A year later, in January of 2006, the Commission released the draft final mattress rule to the public. Specifically omitted from the public document was the preemption section of the preamble. All that appeared in the public document is the title of the section "N. Executive Order 12988 (Preemption)" and the words "[TO BE INSERTED]." This was the first public notice from the Commission that there could be a change in the preemption language. New proposed preemption language (without any input from my office) was circulated to the Commissioners' offices, but was not released to the public. On February 1, 2006, I asked my colleagues to release the proposed preemption language so that the public would have an opportunity to comment on it. They agreed and it was put on our website, but not prominently, as I had requested. To the extent they were aware of it, the public had 2 weeks to comment on this language before the Commission vote. I had also requested that

the General Counsel's memo on the language be made public, as it was the underpinning for this new interpretation. This was not agreed to, so the rationale for the new interpretation was not available to the public, other than what they could glean from the proposed preemption language itself.

I believe that the majority's interpretation that the preemption section of the Flammable Fabrics Act preempted not only non-identical state regulations (a proposition with which I have no problem) but that it also preempted many state civil court actions by people seeking to redress injuries stemming from fires involving complying mattresses, was unfounded. I saw no evidence that this was what Congress had intended and saw absolutely no reason to attempt to make this strained argument after 10 years of silence by the Commission on this point. My statement on the preemption issue can be found at *http://www.cpsc.gov/pr/statements.html* under "Mattresses."

It has been said that the preamble is not part of the regulation and will not appear in the *Code of Federal Regulations* and thus has no force or effect. A court may or may not decide to give weight to an agency's interpretation of such a prevision. I liken a preamble of a regulation to the legislative history of a statute. It explains, often in great detail, why the Commission took the action it did in any particular instance. The Commissioners pay as much attention to the drafting of the preamble as they do to the language of the regulation itself. The preamble is the foundation upon which the regulation rests and a bad foundation can undermine the validity of the regulation. The preamble is referenced by stakeholders. I often go back to look at earlier Commission precedents as expressed in the preamble of a regulation to find the basis for a Commission action. Clearly if the majority did not feel the preamble carried any weight they would not have used it to put interpretive gloss on the preemption provisions of the FFA. What would have been the point?

Question 2. Do you believe the language is S. 2045 adequately reaffirms the codified preemption language in the CPSA?

Answer. It does not affirmatively state what the Congress's intention is with regard to the preemptive effect of our statutes on state civil court actions, except in the case of the CPSA, where Congress's intent has always been clear. While the language does prevent further interpretation of the current preemption provisions by the Commission and the Executive Branch, I am puzzled why it does not simply state what the preemptive effect of standards or rules under the FFA, the FHSA and the PPPA are with regard to state court actions. If the intent is to leave it up to the courts to try to figure out what the congressional intent is, it does appear to do that. Currently there are situations where a children's product is regulated under the FHSA, for example, but the adult version of the product is regulated under the CPSA. There should be no difference in the preemptive effect of the regulations affecting those two products, yet that could be the case if courts attempt to extend a preemption interpretation, similar to that given the FFA in the mattress rulemaking, to our other statutes.

Question 3. How would you respond to entities worried that this bill would erase all assumption of preemption under product safety rules and standards?

Answer. I do not think it does that, but to be honest, I am not entirely sure what the Clarification subsection does.

Question 4. Do you believe the current preemption gives companies some assurance of a national protocol?

Answer. Yes with regard to state regulatory actions. What it does not do is make it clear whether or not a Federal standard is the ceiling for redress of personal injury cases (and therefore potentially preventing people who are injured by products that meet that standard from being able to sue for damages for their personal injuries) or whether a Federal standard is a minimum safety requirement, or a floor, thus allowing such lawsuits.

Disclosure

Question 1. Commissioner Moore, some claim that keeping information secret from the public encourages fuller disclosure by companies. Some also contend that this legislation would discourage this disclosure. How would you respond to these contentions?

Answer. I know some argue that being able to provide information to CPSC and having it kept secret from the public somehow encourages "fuller disclosure" by companies than there would be otherwise. Some point to our Retailer Reporting Model, now being followed by four companies, as an example of where there is a "fuller disclosure" of information which might discontinue if the 6(b) protections, as they currently exist, were modified. However, I do not accept these arguments because the fact is the reporting model was developed to *assist the retailers in complying with*

their lawful obligation to report to us and thereby avoid the repercussions that follow a failure to report.

Under circumstances provided in the statute, companies are required, by law, to report certain information to the Commission and to respond truthfully and completely to our information requests. Companies can keep certain information out of the public eye by appropriately identifying information such as trade secrets, which they want kept confidential and the Commission can use the law enforcement exception to the Freedom of Information Act, if it feels withholding certain information is necessary. What more assurance companies need for them to provide the information they are required to provide, I do not know.

Public safety is our concern, not protecting companies from public scrutiny, and when there is a chance that there is a product in the stream of commerce that could hurt or injure someone we must have the ability to compel companies to tell us about that product and we must have the ability to quickly inform the public so that the product does not cause harm. Quick and accurate dissemination of information about potentially harmful products is essential to protecting the public from the risk of harm posed by those products. Given the often very difficult time we have obtaining information from some companies now, I doubt seriously that the current provisions of 6(b) play much of a role in encouraging disclosure. Consumers want timely, accurate warnings about products that may cause harm to their families. We should be able to provide that information to them in an accurate and expeditious manner.

Question 2. How should the Commission react if companies don't provide information required by law?

Answer. The failure to furnish information required by our statutes is prohibited by law and can subject the offender to possible civil and criminal penalties. The Commission should have the necessary tools and resources and be willing to aggressively enforce the laws adopted for the protection of the American consumers. S. 2045 provides increased resources and a substantial increase in our civil penalty cap. With these additional tools, the Commission could be in a much stronger position to compel compliance with its statutes and companies will be *less inclined* to test the will of a stronger Commission by withholding lawfully required information.

Question 3. How do you believe we can ensure the best collaboration between the CPSC and industry in relation to this issue?

Answer. The law requires reporting certain information to the Commission. The Commission is the regulator and has a job to perform with respect to the American public and the regulated community. One of the best ways to provide for the safest products for the marketplace is through a cooperative approach with industry. When working with industry can help us achieve our product safety goals, we should certainly be willing to work very closely with them, and we have. But, competition in the marketplace does not and will not inevitably take the form of a rivalry to produce the safest products. To successfully continue the mission of the agency, the Commission must have the resources and the flexibility to respond quickly and effectively to critical situations where the lives and health of the American public are at risk, whether the affected company or industry is cooperating with us or not.

The best way for Congress to ensure collaboration between the CPSC and industry with respect to information that might lead to the determination that a product presents a hazard is to give the Commission the tools it needs to enforce its statutes. The Commission must then be willing to clearly communicate its expectations of industry for compliance while at the same time clearly communicating that there is a system in place for the responsible treatment of information provided.

Attorneys General

Question 1. Commissioner Moore, in your submitted testimony you state that the enforcement by Attorneys General could be a tremendous benefit given the agency's limited resources for litigation. What kind of resources does the agency have for litigation purposes?

Answer. We have a pool of resources which include our existing compliance staff (including 10 attorneys in the legal branch) and several members from our General Counsel staff (2–3 attorneys), and about $170,000 in contract funds to draw upon. The pool of money is not a litigation pool but a pool for technical support, of which litigation is one part. We don't budget separately for litigation and technical support.

We generally have conducted a limited amount of litigation so the funds and staff are made available for other support activities. If litigation develops as a priority, then the Commission must reassign the necessary resources away from other ongoing activities.

Question 2. What, if any, relationship has the CPSC had with Attorneys General?

Answer. The most common ways in which the CPSC relates with State Attorneys General is through our Office of Compliance and our Office of the General Counsel. Interactions with State Attorney General Offices often involve addressing inquiries related to assistance in prosecuting state criminal cases, jurisdictional questions, and information exchange.

Commons sorts of inquiries include:

- Requests for assistance in state prosecution of criminal cases involving alleged arson, child abuse, poisoning, etc., where a consumer product might be involved, including requests to provide CPSC employees as witnesses.
- Inquiries on the regulatory authorities of the Commission versus the police powers of states, particularly with respect to state laws requiring licensing and insurance for use of low speed electric bicycles versus the Commission's regulations concerning the design/performance specifications for these products.
- Inquiries concerning sharing of CPSC accident and investigation reports with states under authority of section 29(e) of the CPSA and the interplay between that authority and the requirements of the Freedom of Information Act.

The Commission has also, on occasion, been petitioned by a State Attorney General's Office to begin a rulemaking and State Attorney General's Offices often comment on pending rulemaking proceedings. In the past, these Offices have also joined us in distributing safety information, alerted us to hazards which have led to recalls, shared information on a State's safety testing of potentially hazardous products, jointly announced recalls with us and cooperated with us in issuing consumer products safety warnings.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK PRYOR TO TRAVIS PLUNKETT AND EDMUND MIERZWINSKI

Fast Track Authority

Question 1. Chairman Nord supports giving the CPSC "fast track" authority to make voluntary consensus standards into mandatory standards. Since voluntary standards tend to reflect the lowest common denominator safety standard, do you support this proposal?

Answer. We have concerns about this proposal because we fear that manufacturers may "game the system" for a variety of reasons: manufacturers and others representing a specific industry may push through an intentionally weak voluntary standard that they would want CPSC to "rely upon" to preempt stronger CPSC action that CPSC may be considering in a rulemaking proceeding; to preempt a stronger state law; and/or to serve their economic interest by thwarting foreign competition.

Question 2. What would the effect of adopting an industry standard be on more restrictive state standards?

Answer. Section 26 of the Consumer Product Safety Act (15 U.S.C. 2075), "Effect on State Remedies" provides that when a consumer product safety standard is in effect and applies to a risk of injury associated with a consumer product, a State does not have the authority "to establish or continue to effect any provision of a safety standard or regulation . . . which are designed to deal with the same risk of injury associated with such consumer product, unless such requirements are identical to the requirements of the Federal standard." The provision further provides, however, that a State may establish or continue in effect a safety requirement that "provides a higher degree of protection from such risk of injury" after the State files a waiver with the Commission. After notice and comment, and a finding by the CPSC that the State regulation provides a significantly higher degree of safety than the Federal regulation and the State regulation does not unduly burden interstate commerce, CPSC may grant the State a waiver for a stronger regulation.

Thus, the likely impact of CPSC's reliance upon a weak voluntary standard would be the preemption of a stronger, more consumer protective state law. We know of no incidence of a State filing for a waiver under section 26 of the CPSA.

Corrective Action Plans

Question 1. Currently, corrective action plans (recall procedures) are determined by a manufacturer. This bill would give the CPSC authority to approve a corrective action plan it believes to be in the public interest. What concerns should we have about the current structure for corrective action plans?

Answer. Virtually all recalls CPSC administers are voluntary recalls. As such, CPSC negotiates the terms of the recalls with the recalling entity, most likely the

manufacturer. Currently, recalling entities have vast leverage when negotiating a recall because they have the ability to sue CPSC over the disclosure of information and because they can elect the corrective action.

The recent example of the Simplicity Crib recall is a case in point. CPSC and Simplicity announced the recall of certain models of simplicity cribs on September 21, 2007, after publicly acknowledging 3 deaths. The recall was conducted because "drop-side failures result from both the hardware and crib design, which allow consumers to unintentionally install the drop-side upside down. When the drop-side detaches, it creates a gap in which infants can become entrapped." [1] However, at that time, while the recall warned of a severe entrapment hazard, no corrective action was in place. Unfortunately, the press release indicated that a repair kit was available, when it was not. An October 25, 2007 statement from the Commission indicated that the repair kit "was now available." [2] Further, we believe that a repair kit is inadequate and a refund to consumers should have been available immediately.

This Subcommittee should be concerned that industry has too much leverage and discretion in selecting and offering corrective action plans which may not exist or may be entirely inadequate to protect consumers from harms caused by the recalled product.

Question 2. How should we address these concerns?

Answer. We believe that the most effective way to address these concerns is to significantly alter the imbalance caused by section 6(b) of the CPSA and to give CPSC the authority to approve corrective action plans before they are implemented. We believe that S. 2045 goes a long way to ameliorating these concerns by the changes made to the CPSA by the inclusion of sections 7 and 13 within S. 2045. By eliminating a manufacturer or other entity's ability to sue the agency over the disclosure of information, this bill vastly decreases the leverage a recalling entity has over the Commission. Further, by providing that the Commission must approve a corrective action plan and can deem an approved action plan ineffective, S. 2045 includes an important additional step that will seek to ensure that corrective action plans are adequate and protective of consumers.

Disclosure

Question 1. The current disclosure regime under 6(b) of the Consumer Product Safety Act provides almost unlimited safeguards for industry. Many of the consumer groups I have met with have expressed concern about this structure. Would you mind elaborating about your concerns for this structure?

Answer. We have one primary concern about 6(b): critically important safety information is not being disclosed by CPSC to the American public. This lack of disclosure results in many more people being seriously injured or even killed by known and preventable hazards.

For many years, Consumer Federation of America, U.S. PIRG and other consumer groups have urged Congress to eliminate section 6(b) of the CPSA. This section of the Act restricts CPSC's ability to communicate safety information to the public. This secrecy provision is unique to the CPSC and it prevents the timely release of information about serious hazards relating to children's and other consumer products. Under this provision, the CPSC is required to give a company an opportunity to comment on a proposed disclosure of information. If the company has concerns about the wording or the substance of the disclosure, they can object. CPSC must accommodate the company's concerns or inform them that they plan to disclose the information over their objections. The company can then sue the Commission seeking to enjoin them from disclosing the information. Thus, this provision creates a time-consuming process between CPSC and the affected company, often serving to delay or deny the release of important consumer safety information.

Two recent examples highlight the anti-consumer impact of this provision. First, on October 22, 2007, CPSC staff announced its results of a special evaluation of consumer lead kits. CPSC staff tested samples of commonly available test kits on a variety of products containing different levels of lead. CPSC found that, "many of the tests performed using the kits did not detect lead when it was there (false negatives); some indicated lead was present when it was not (false positives). Of 104 total test results, more than half (56) were false negatives, and two were false

[1] CPSC Press Release, "About 1 Million Simplicity Cribs Recalled Due To Failures Resulting in Infant Deaths," September 21, 2007, available on the web at *http://www.cpsc.gov/cpscpub/prerel/prhtml07/07307.html.*

[2] CPSC Press Release, "Repair Kits Ready To Be Sent To Parents and Caregivers With Recalled Simplicity Cribs," October 25, 2007, available on the web at *http://www.cpsc.gov/cpscpub/prerel/prhtml08/08043.html.*

positives. None of the kits consistently detected lead in products if the lead was covered with a non-leaded coating. Based on the study, consumers should not use lead test kits to evaluate consumer products for potential lead hazards."[3]

However, this study *fails to mention which lead kits the CPSC actually tested*—a critically important piece of information for consumers seeking to evaluate which kits to use or avoid and an example of the absurd limits placed on the agency by Section 6(b). In addition, the study fails to disclose the threshold lead level that was used as the reference point for determining false negative test results. This is critical information for others to assess the technical basis upon which the CPSC drew their conclusions.

Contrast that process to that of *Consumer Reports* testing of lead kits. In the magazine's December 2007 edition, it has information about results from its recent testing of five home lead-testing kits and concluded that three of the five kits were useful though limited screening tools for consumers concerned about lead levels in the products in their homes. Importantly, the magazine disclosed the names of all five kits. Such information is vital for parents and families to have. The CPSC does a disservice to consumers when it fails to make this important information available to the public.

Second, and even more troubling, is the CPSC's knowledge of numerous, serious and well documented harms caused by Stand 'n Seal, a spray-on waterproofing sealant for tile grout. According to an October 8, 2007 article in *The New York Times,* after a new ingredient was added to Stand 'n Seal in the spring of 2005, "calls from customers, emergency rooms and doctors started to pour into poison control centers and, initially in smaller numbers, to the Consumer Product Safety Commission's own hot line."[4] One child stopping to talk to his father who was using the sealer, suffered damage to 80 percent of the surface area of his lungs.[5] With complaints mounting, the manufacturer's chief executive told staff answering the company's consumer hotline not to tell customers that others had reported similar complaints because doing so "may cause unnecessary public concern."[6] "Nearly 3 months passed between the time [the manufacturer] first received a report of an illness and the official recall by the Consumer Product Safety Commission, a period during which dozens were sickened."[7]

The CPSC officially recalled the product on August 31, 2005. In the press release, CPSC acknowledged, "88 reports from consumers who have had adverse reactions after using the aerosol product, including 28 confirmed reports of overexposure resulting in respiratory symptoms for which medical attention was sought for coughing, irritation, difficulty breathing, dizziness and disorientation. Thirteen individuals required medical treatment, including overnight hospitalization."[8] The Commission did not disclose critical safety information to the public and used 6(b) as a shield to maintain the secrecy of these severe health effects. However, even after the official recall, a hazardous product remained on the shelves because the replaced product contained the same hazardous chemicals and many people were severely injured.

We conceptualize our concerns with 6(b) in three ways: (1) Section 6(b) creates a dynamic between CPSC and the industries it regulates that requires the Commission to request permission from them to disclose critical product safety information to the public; (2) This process takes a long time and ultimately delays or denies such disclosure; and (3) Manufacturers and others have the ability to sue CPSC over information disclosure, which grants these entities vast leverage over CPSC.

Question 2. Do you believe this bill strikes a balance to address those concerns yet protects the economic concerns?

Answer. We view section 7 of S. 2045 as a reasonable compromise. This section retains section 6(b) and thus provides manufacturers and others the ability to verify the accuracy of such information. The timeline for 6(b) is cut in half and the industry's ability to sue the agency is eliminated. In addition, such information disclosures are already protected by the Freedom of Information Act (FOIA) which protects trade secrets and other proprietary information from public disclosure. S. 2045,

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[3] CPSC Press Release, "CPSC Staff Study: Home Lead Test Kits Unreliable," October 22, 2007, available on the web at *http://www.cpsc.gov/cpscpub/prerel/prhtml08/08038.html*.

[4] Lipton, Eric, "Dangerous Sealer Stayed on Shelves After Recall," *New York Times,* October 8, 2007.

[5] *Ibid*.

[6] *Ibid*.

[7] *Ibid*.

[8] CPSC Press Release, "CPSC, Tile Perfect Inc. Announce Recall of Stand 'n Seal Grout Sealer Due to Respiratory Problems," August 10, 2005, available on the web at *http://www.cpsc.gov/CPSCPUB/PREREL/prhtml05/05253.html.*

as amended and passed by the Senate Commerce Committee, also includes an internal review process that allows an entity not desiring disclosure to appeal to the CPSC's General Counsel and then to the full Commission. We believe, however, that these time frames should be shortened significantly to allow for more immediate review and potential disclosure.

Question 3. How would you envision an appropriate disclosure regime?

Answer. Consumer groups have advocated for years that section 6(b) should be eliminated entirely. We view this provision as the ultimate secrecy provision that thwarts the public disclosure of important information. Further, we believe that existing protections within FOIA protect manufacturer's economic interests. However, we have conceded that we would support retaining section 6(b) if the timeframes were shortened considerably and if the ability of manufacturers and others to sue CPSC were eliminated. In addition to these elements, we support a significant exception allowing for the disclosure of information to protect the public health, as well as requirement that the CPSC create a searchable adverse event database. This database should contain consumer complaints and industry reports of safety concerns relating to toys and other children's products, as well as other consumer products.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK PRYOR TO ALAN KORN, J.D.

Civil and Criminal Penalties

Question 1. Commissioner Moore stated in his testimony that the Department of Justice supports a two-tiered criminal penalty system, as outlined in the CPSC Reform Act, and since the Department of Justice is responsible for criminally prosecuting the Commission's criminal cases, Commissioner Moore is in support of this harmonization. What are your thoughts on the changes to criminal penalties proposed in S. 2045 and how do you anticipate that this would affect manufacturers' actions?

Answer. Safe Kids did not provide an opinion on this provision in the bill. We do not feel we have the necessary expertise on criminal sanctions to be helpful.

Question 2. Some companies have suggested that an increase in penalties will create a more litigious atmosphere between manufacturers and the CPSC. The companies claim that as a result voluntary disclosures will be harmed and more CPSC resources will need to be dedicated to enforcement activities. Do you believe that increasing penalties will be detrimental to public safety?

Answer. No, to the contrary. Ultimately, the increased civil penalties, we believe, will not be detrimental to public safety. Safe Kids USA believes that increasing the civil penalties will provide an excellent economic deterrent to bad behavior (or in the alternative, the increased civil penalties will provide an economic incentive for companies to do the right thing by not engaging in the prohibited acts listed in Section 19 of the Consumer Product Safety Act).

In some cases, and in particular when larger companies are involved, the current $1.8 million cap may not be enough of an economic deterrent to prevent the company from engaging in an unlawful act. For example, a company that has $50 million worth of product in the marketplace may be willing to incur the civil penalty instead of reporting a defect or injury as required under Section 15 in hopes of avoiding a recall (failing to report any information required by Section 15(b) is a prohibited act under Section 19 and is subject to a civil penalty). Safe Kids has long advocated for an increase in the civil cap to an amount that better represents a deterrent. We support the provision in the CPSC Reform Act of 2007 that would increase civil fines (for all statutes under the CPSC's jurisdiction) up to $250,000 per violation with a cap at $100 million.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK PRYOR TO JOSEPH M. MCGUIRE

Attorneys General

Question 1. Mr. McGuire, I recently received a letter from your association's president regarding this Act. I very much appreciate this input. However, I do have a question regarding some positions of the positions expressed. In Mr. Timmons comments, he expressed that greater AG enforcement would require manufacturers to expend resources on litigation instead of advancing product safety. However, he soon after states that increased penalties would force companies to become more litigious rather than cooperate for public safety. These positions seem counter to one

another when one advocates a concentration more on consumer safety than litigation while the other proposes a response of litigation rather than focusing on consumer safety. How would you respond to this supposition?

Answer. AHAM and the NAM CPSC Coalition support reauthorization and many provisions in S. 2045. Unfortunately, several major provisions in your legislation divert attention and resources from product safety and toward litigation. The Attorneys General provision eviscerates the uniformity and application of Federal law and undermines CPSC procedures. It will result in unnecessary litigation based on individual Attorneys General interpretation of law and require CPSC intervention and litigation. We support instead a system in which the Attorneys General participate in cooperation with and after the approval of the CPSC when a final determination has been made of violation of a law. Then, the CPSC may seek or agree to use the resources and geographical reach of the states.

Similarly, increasing the penalties by hundred fold to a maximum of $100 million means that many penalty cases now will be of such high value that companies will be incentivized to litigate them. Under the present system, penalties, coming after the true penalties of the costs, burdens, and loss of good will and bad publicity of a recall, virtually always are settled voluntarily and constitute not only a financial detriment but a new round of bad publicity. Once the stakes are raised as high as S. 2045 makes them, firms will find it in their interest to litigate these penalties.

Question 2. Your testimony recognizes that there is a crisis of confidence in the safety of consumer products in the United States marketplace. The testimony also recognizes that this perception has an adverse effect on U.S. manufacturers. Yet, you oppose attorney general enforcement of consumer product safety laws, which would help alleviate the strain on Commission resources and provide consumers with more confidence in the products they purchase. It seems to me that the American consumer wants more "Cops on the beat." Why deny the consumers of this added protection?

Answer. As stated in answer to the previous question, we do support "more cops on the beat" through extended use of Attorneys General in cooperation with, under the guidance of and with the approval of the CPSC. Creating 50 new mini, CPSCs, however, is a bad policy decision and will significantly adversely impact U.S. manufacturers and retailers and divert attention from protecting consumers.

Criminal Penalties

Question. If the Commission is not inclined to aggressively prosecute criminal violations of its statutes through the Department of Justice, why would this provision present a problem for any manufacturer, importer, or retailer, except in the most flagrant and egregious cases of violations of Federal consumer product safety laws under Commission jurisdiction?

Answer. We do not oppose increased criminal penalties for egregious behavior. Your legislation, however, unfortunately lowers the *scienter* requirement by eliminating the need for the government to show for criminal penalties a willful act that occurred after notification by the Commission. Instead, the much less heightened "knowing" requirement applies which is essentially the same as for civil penalties. This raises serious constitutional issues and potentially threatens to add within the scope of criminal sanctions a wide variety of U.S. management and board members who will have very little actual knowledge and absolutely no criminal intent. It is a misuse, misapplication and unnecessary extension of the criminal laws which will not enhance, for example, the need for companies to use safety circles and other premarket and post-market mechanisms to evaluate safety-related complaints.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK PRYOR TO AL THOMPSON

Resource Priority-Recall Effectiveness

Question 1. Mr. Thompson, in your submitted testimony you speak of the need to speed up recall timelines and create better dissemination of recall information to the public. Would you mind addressing why this is a priority for your organization and its members?

Answer. Reducing the timeline for the CPSC to implement a recall is important to retailers because the safety of consumers is our highest priority. Once a company and the CPSC have gathered sufficient evidence to demonstrate that a recall is necessary, we believe the public should be made aware as quickly as possible. While retailers remove products from store shelves when potential problems have been identified, the CPSC actually issues a recall. If a retailer's testing program detects

a problem with a product and notifies the CPSC that a recall is necessary, it should not take weeks or even months for a recall announcement to be made by the CPSC.

Question 2. Do you have any ideas on how we might achieve this goal in the bill?

Answer. S. 2045 will already go a long way to resolve this problem because it significantly increases resources for the CPSC. In addition the legislation could be enhanced by requiring CPSC to review its recall procedures and processes for corrective action plans and report back to Congress within 6 months of the date of enactment.

Third Party Labs

Question 1. Mr. Thompson, you have also mentioned the need for the credentialing of labs by the CPSC or an independent third party. You continue, however, that you are hesitant to support the mandate to use independent labs. Would you mind discussing the current lab structure of some of your members' labs?

Answer. A significant number of RILA companies use independent third-party labs as part of their product safety programs. One retailer has invested the resources to establish three worldwide testing facilities, which issue more than 20,000 test reports per year. These testing facilities include a state-of-the-art lab based in the United States that employees 27 permanent staff members, many of whom hold advanced professional degrees. We believe these facilities should be able to remain part of that company's product safety efforts, and we welcome the modification in the manager's amendment to create a process to approve proprietary laboratories. This is particularly important because increased testing efforts have stretched the capacity of independent laboratories.

Question 2. How can the American public feel confident in the trust of a non-independent lab?

Answer. The goal of retailers who invest in proprietary labs is to provide more assurance of product safety, not to circumvent safety requirements. We believe the manager's amendment creates sufficient requirements to demonstrate that a proprietary lab will provide an equal or greater level of consumer safety as an independent lab. RILA members have increased their due diligence and safety protocols to assure product safety and the American public should feel confident about the products they purchase in stores.

Criminal Penalties

Question 1. Mr. Thompson, you have mentioned that the proposed criminal penalties would create a less collaborative effort between your members and the CPSC. However the current law already mandates some criminal penalties. How does the current law affect business planning and the collaborative effort with the CPSC?

Question 2. Why would the proposed law be any different?

Question 3. To my knowledge, only one case has been prosecuted under the criminal statute. This case was a severe case by an extremely bad actor. Does this historical precedent of the CPSC only taking action in the most extreme cases provide the comfort under current law?

Question 4. Why would the industry think this criteria would change under the proposed law?

Answers 1–4. RILA is concerned with the dramatically increased civil penalties and the reduction in due process for criminal penalties in the bill. On criminal penalties, current law requires that a person has knowingly and willfully violated provisions of the Consumer Product Safety Act, after having received notice of such violation from the CPSC. S. 2045 would eliminate the willful standard and the requirement of prior notice, which would expose retailers to criminal prosecution even though they may not have been aware they were selling a defective product. It is not uncommon that a retailer is not part of the information chain between the manufacturer and the CPSC regarding an unsafe product, and the retailer may not learn of the problem until a product is officially recalled. Current law would protect the retailer in this example because the product was not knowingly and willfully sold. At a minimum, the *scienter* standard in current law of a knowing and willful violation should remain, as well as a requirement that a public notice be made for a recalled product.

Correction Action Plans

Question 1. Currently, corrective action plans (recall procedures) are determined by a manufacturer. This bill would give the CPSC authority to approve a corrective action plan it believes to be in the public interest. Would you mind describing to me the process for how corrective plans are currently determined?

Question 2. How do we know the public interest is placed before a company's bottom line?

Answers 1–2. Consumer confidence in products is paramount, and RILA members work with their suppliers to assure that products are safe. When a recall is announced, RILA's members promptly remove the product from the shelf and activate a block on cash registers to prevent the product from inadvertently being sold.

Brand reputation is critical to a retailer's success and serving the public interest is a component of brand reputation. Retailers take many steps to ensure that the products sold are safe for public use, including detailed contract specifications with suppliers, product testing, factory audits, and register blocks to prevent a recalled product from being sold.

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