



U.S. Consumer Product Safety Commission



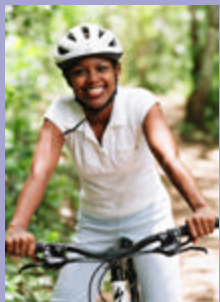
TESTIMONY OF THE HONORABLE NANCY A. NORD ACTING CHAIRMAN



**SUBMITTED TO
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMERCE, TRADE,
AND CONSUMER PROTECTION**



June 6, 2007



Saving Lives and Keeping Families Safe



*www.cpsc.gov
1-800-638-CPSC*

Good morning Mr. Chairman.

Thank you for the opportunity to come before the Subcommittee again this morning to discuss product safety issues of mutual concern. Specifically, I am pleased to provide information regarding several bills introduced this Congress to address several product safety issues, including child resistant gasoline can closures, pool and spa safety, product registration for durable juvenile products, and the civil penalty limit under the Consumer Product Safety Act (CPSA).

However, before addressing these specific issues, I would like to take this opportunity to update the subcommittee regarding the activities of the U.S. Consumer Product Safety Commission (CPSC) since my last appearance before you in May. In particular, I would like to briefly discuss my recent trip to China to discuss with Chinese officials the need to improve the safety of consumer products imported from that country.

You and the other members of the subcommittee have expressed understandable concern over the growing number of product recalls of imported products, including those from China. As I have relayed to you

previously, about two-thirds of all product recalls under our jurisdiction are of imported products, and about two-thirds of these recalls of imports have been of products manufactured in China.

In meetings with Chinese officials in Beijing during the week of May 21, I and several of my colleagues from the CPSC proposed to the Chinese a number of activities they might undertake, both independently and in cooperation with our agency, to address product safety issues in four key product areas: toys, electrical products, fireworks, and lighters. It is our hope that these discussions will lead to tangible and measurable results. While this is by no means the only thing we are doing to address these product-related safety issues, it is, we believe, a significant development, and I would be happy to provide you or your staff with a fuller briefing on this and our other agency efforts to address the increasingly important issue of imports.

Also, by way of reminder, Mr. Chairman, you will recall that, although the Commission has been without a quorum for over four months, we continue to be very active on a host of fronts. For example, our Office of Compliance and Field Operations is on pace this year to set another record

number of product recalls (possibly in excess of last year's all-time high of 466 recalls). We are doing twice the number of incident investigations from that done when our staff was much larger. On the regulatory front, we are presently engaged in 14 active product safety rulemaking procedures, again a record high for the agency. (While the Commission obviously cannot vote on these until our quorum is restored, staff work continues unabated.) And in the other key area of public information and education, we have never been busier as we attempt to raise awareness of not only product recalls but also broader issues, like pool and ATV safety.

Regarding the topic at hand, Mr. Chairman:

You asked that I address four specific bills introduced during the 110th Congress. Before I do so, I would like to make clear that the Commission has taken no formal position on these or any other legislation now pending before Congress.

I would also like to note, as you well know, that the last time the CPSC was authorized under the CPSA and the last time any of the other major statutes we administer were updated by Congress was 1990. All things

considered, I believe it is in the best interest of consumer product safety to look to possible modernization of these statutes, as well as looking at the resources of the agency, to address both general and specific product safety issues. I believe this broader approach is to be preferred over “regulation by legislation” on specific products and product categories. In the long run, ensuring that the CPSC continues to maintain adequate statutory and resource tools not only will help address existing product safety issues, but also will make sure we continue to understand and anticipate emerging product safety hazards as, for example, whether and to what extent incorporating nanomaterials into consumer products might affect consumer safety.

Having said that, the bills before the subcommittee for discussion today are relatively distinct from one another except for two commonalities. First, all the bills evidence a genuine desire to address real and difficult product safety issues. Second, should any, or all, of these bills be enacted into law, we will require additional resources to implement and enforce them. As you know, Mr. Chairman, the CPSC is relatively small, with just over 400 full-time employees (FTEs) and a budget of just over \$62 million in FY 2007. While other, larger agencies may be able to realign priorities and

resources to implement new legislation, we operate on a very small margin at the CPSC and any significant new commitment of people, time or money will result in fewer resources being available for some other area or activity. In other words, we will need to take resources away from existing projects to implement the projects addressed in these bills unless you can assure additional resources for these new activities.

HR 814

The Children's Gasoline Burn Prevention Act, H.R. 814, would require the CPSC to issue regulations mandating child-resistant closures on all portable gasoline containers. There currently exists a voluntary ASTM standard for child resistance of portable fuel containers for consumer use. That standard is referenced in the legislation. Additionally, CPSC staff has recommended a change to the standard that is currently being balloted.

H.R. 814 would require promulgation of the ASTM consensus standard, or "any successor standard issued by ASTM International" as a mandatory consumer product safety standard. The "any successor standard" language would appear to be a problematic

delegation of legislative authority to the private sector. As discussed below with respect to H.R. 1721, Public Law 101-608, dealing with a mandatory standard for automatic garage door openers, may provide a better model for consideration.

Furthermore, while H.R. 814 would waive many of the rulemaking findings required by our statutes, it does not waive or address time consuming rulemaking requirements applicable to the CPSC imposed by external statutes such as the Regulatory Flexibility Act (cost/benefit analysis), Small Business Regulatory Enforcement Fairness Act (impact on small business and other small entities) or the National Environmental Policy Act. I would offer assistance from my staff to address such technical issues with the bill.

HR 1721

The Pool and Spa Safety Act, H.R. 1721, seeks to increase the safety of swimming pools and spas. Swimming pool and spa safety is a major and long-term concern of the CPSC, and the agency has dedicated significant resources to this issue over the years. While we underscore that there is no substitute for diligent supervision, the CPSC recommends multiple

layers of protection to guard against child drownings. Constructing and maintaining barriers to prevent children from gaining access to pools is an essential first step that every pool owner must take. In addition to these barriers, the CPSC recommends additional layers of protections such as safety covers.

The CPSC is also very concerned about deaths resulting from entrapment and recently updated its publication entitled “Guidelines for Entrapment Hazards: Making Pools and Spas Safer.” In 2005 CPSC’s annual comprehensive national safety campaign focused on pool drain entrapment hazards. In 2006 the education campaign focused on the hazards associated with increasingly popular inflatable pools, and this year’s campaign, just launched over Memorial Day, warns that children’s drownings are a silent death that do not usually involve calls for help or the alerting sound of thrashing water.

H.R. 1721 would make mandatory the current (at the time of enactment) ASME/ANSI voluntary drain cover standard that was crafted to help prevent the tragedy of pool and spa entrapments. With regard to this provision, a technical change in the bill’s language would be helpful to keep the

standard current subsequent to becoming effective as a consumer product safety standard under Section 9 of the CPSA. I again call to your attention language in Public Law 101-608 which is a mandatory standard for automatic garage door openers passed by Congress in 1990. This law gives the Commission flexibility to adapt the mandatory standard in response to any revisions that may be made to the voluntary standard after the date that the law was enacted.

Additionally, H.R. 1721 establishes a pool safety grant program, to assist states that currently have laws or subsequently enact laws that meet certain minimum requirements outlined in the legislation. The CPSC has never provided grants and lacks the staff expertise and administrative infrastructure required to issue or oversee grants. I would recommend that the committee consider adding language to the bill that would direct an outside agency with such expertise and infrastructure to provide grant administration services, including audit services, on a reimbursable basis to the CPSC. The CPSC would retain authority to make the final determination of grant awards, and these costs could be paid from the appropriated funds for the grant program.

HR 1699

H.R. 1699, the Danny Keysar Child Product Safety Notification Act, directs the CPSC to require manufacturers of certain durable infant and toddler products to provide registration cards with each such product, to maintain that information, and to permanently place the manufacturer's name and other information on each such product.

By way of background, the CPSC was petitioned in 2001 by the Consumer Federation of America to require, among other things, that manufacturers (or distributors, retailers or importers) of products intended for children provide a registration card along with every product and to maintain that information for a minimum of twenty years or the useful life of the product, whichever was longer.

Subsequently, under the Consumer Product Safety Act (CPSA) the Commission's General Counsel docketed that part of the Federation's petition that addressed product registration cards and directed staff to prepare a briefing package for Commission consideration. The Commission requested public comment and held a public hearing to discuss the merits of the petition. A number of interested stakeholders

presented their views both in writing and at the public hearing, including the Consumer Federation of America, U.S. PIRG, Consumers Union, the Toy Industry Association, the Juvenile Products Manufacturers Association and the International Mass Retail Association.

After considering these comments and other relevant data (including that detailing the experiences of NHTSA respecting car safety seats), the Commission did not grant the petition. In its briefing package addressing the petition, the staff expressed reservations about the effectiveness of a registration card program. The staff noted that the cards are frequently ignored and not returned; that people move frequently with the result that, after three years, the ability to reach even those few people who return cards has gone down dramatically; and that registration cards would not be passed on to subsequent purchasers. The staff noted that recall effectiveness has been a challenging issue since the Commission's earliest days.

In considering this legislation, the Committee should be aware that the agency is currently addressing recall effectiveness in a number of different ways. For example, we have done a limited, but on-going study of past

recalls which shows, among other things, that people are more likely to respond to recalls when the product is an expensive one and that the hazards most likely to get consumers' attention are fire and electrical hazards. Earlier this week we "went live" with our Consumer Opinion Forum, an on-line consumer survey mechanism. In April we initiated the "Drive to One Million" to encourage consumers and others to subscribe to receive notification of all CPSC recalls by e-mail. Later this summer, we will hold two consumer focus groups to discuss recall effectiveness, including how consumers respond to product registration cards. These are just some of the things we are doing in this area.

As stated above, H.R. 1699 would require product registration cards for durable infant or toddler products. While the Commission would, of course, work to implement the legislation and meet its deadlines if it were enacted into law, certain technical changes to the language of the bill would help to clarify Congressional intent and direction should the Committee decide to proceed with this legislation. For example, clarification of the definition of a durable infant or toddler product would be helpful in determining what products, if any, are intended to be covered beyond those specifically identified in the legislation.

Additionally, the language of Section 4(a) of the bill directs the CPSC to issue a rule under section 7 of the CPSA “pursuant to its authority under section 16(b). These references create a conflict; section 16(b) permits a two step rulemaking process whereas Section 7 requires a lengthier, three step process. Rulemaking under Section 7 requires a number of findings to assure that rules adequately address risks without undue burden on commerce. Given these statutory requirements and further external constraints such as the seventy-five (75) day comment period required on proposed regulations pursuant to the North American Free Trade Agreement, it is unlikely that the stated 270 day time frame for a final rule could be met. Again, I offer my staff's assistance to work with committee staff to address these concerns about the technical provisions of the bill.

HR 2474

The final bill that we are discussing today is H.R. 2474, which would significantly increase the current maximum civil penalty for violations under the CPSA from \$1,825,000 to \$20,000,000. Before enacting an increase of that magnitude, the Committee should seriously

consider both the need for such an increase and the impact it could have on the operations of the Commission. With respect to need, it is not clear that the current penalty cap needs to be increased to encourage more reporting. The overwhelming number of penalties that we impose are for violations of Section 15 (b) of the CPSA requiring reporting from product sellers, and in fact, the number of reports has been increasing in recent years.

I am also very concerned about the impact this change could have on the operations of the Commission. For example, the Committee should be aware that Section 15 (b) is written in very broad and somewhat imprecise terms and requires that companies make judgment calls about its applicability in specific cases. (This is to be contrasted with reporting statutes for other agencies where the reporting trigger is better defined.) When the staff disagrees with the judgment calls made by the company (or believes that the company has ignored its responsibility under the Act), we will seek penalties.

We are generally able to negotiate a settlement without litigation, but if the stakes are greatly increased under this legislation, I would expect that more litigation will result. Litigation adds time and

expense to the process and ultimately could impact our ability to achieve voluntary recalls.

If the scope of the reporting obligation is not limited or at least clarified, then a penalty cap of this magnitude could cause established manufacturers and retailers to greatly expand the amount and quality of information that they report to the agency under Section 15 to avoid a significant penalty. Rather than making efforts to winnow out the unimportant information from that which we should be reviewing, we anticipate that those companies will report most everything to the agency and could easily overwhelm the agency's resources for timely identification of potential hazards. Conversely, a sudden tenfold increase could have the effect of driving some bad actors underground. The perverse result of that could be to have more unsafe products in the stream of commerce without early alerts to the CPSC.

The issue of penalties is more complex than just the amount of the ceiling under the Consumer Product Safety Act. To begin with, it is unclear why the legislation amends only the CPSA and not the other

statutes we administer. These statutes (particularly the Federal Hazardous Substances Act and the Flammable Fabrics Act) also contain provisions for civil penalties, with amounts and ceilings that are generally parallel to those found in the CPSA. If there is a policy reason for raising the amounts in the CPSA but not elsewhere, it would be helpful to have that articulated. Another issue that has arisen is whether the Commission, in determining penalty amounts, may consider only those factors expressly enumerated in the statutes or whether other relevant factors can come into play. For example, the CPSA does not mention the number of past violations as a factor to consider in determining size of a civil penalty; however, our Compliance staff believes that this can be a very relevant factor in assessing penalties. We also have the authority to impose criminal penalties under our statutes, but the statutes take different approaches on whether offenses must be committed knowingly or willfully and whether prior violations are relevant. In addition, it would be most helpful to have authority to seek asset forfeitures in these cases, an authority we do not now have.

While I am sympathetic to the Committee's desire to assure compliance with the CPSA and other statutes we administer, I am most concerned that merely raising the penalty cap will have consequences to the operations of the agency that the Committee has not fully anticipated. I would be happy to make staff available to discuss these issues in more detail.

Thank you again, Mr. Chairman, for the opportunity to come before the committee to discuss these important safety issues and related legislation. I appreciate our continued dialogue and look forward to answering your questions.