



U.S. CONSUMER PRODUCT SAFETY COMMISSION
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October 24, 2007

The Honorable Daniel K. Inouye, Chairman
Senate Committee on Commerce
The Honorable Mark Pryor, Chairman
Subcommittee on Consumer Affairs, Insurance, and Automotive Safety
508 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairmen Inouye and Pryor:

I write in my capacity as Acting Chairman and Commissioner of the U.S. Consumer Product Safety Commission (CPSC) to express my views on the pending bill, S. 2045, which I understand is scheduled to be marked-up by the full Committee as early as next week.

First, I want to express my appreciation for your demonstrating so much interest in the CPSC over the past several months and for your willingness to reauthorize the agency and to update our statutory authorities for the first time in 17 years. As you know, the consumer product landscape under our jurisdiction has changed significantly during that time, particularly with regard to the growth of imported products, and our statutes must be updated to give us the tools we need to address this new landscape. I am especially grateful that you have adopted as part of your bill several of the provisions I submitted to you for consideration in July, including such proposals as extending the certification requirement to all CPSC statutes and making it unlawful to sell a recalled product.

While your legislation does contain some needed reforms of our statutes and gives us several of the new enforcement tools that I have requested, there are a number of provisions of S. 2045 that are unnecessary and that could have the unintended consequence of hampering, rather than furthering, consumer product safety.

We recently met at length with your staff to discuss many of the issues that I and other senior agency officials have identified with the bill. (At their request, I am also forwarding to you under separate cover suggested statutory language to modify several of the provisions of your legislation.) Among the issues we identified:

Resources. As you know, ours is a small agency, with only about 400 full-time equivalent employees. These employees are responsible for fulfilling our existing statutory mandates, which include monitoring and gathering data on over 15,000 different product types, acting upon hundreds of thousands of product safety reports, recalling unsafe products, educating the public about a variety of product-related safety issues, and promulgating new product safety rules and participating on many voluntary standards committees.

On top of these and other missions and activities of the Commission, S. 2045 would impose a number of substantial new missions on the CPSC, including the dramatic and unprecedented new mission of hearing and acting upon employee whistleblower complaints. In addition, the bill would require the CPSC to roughly triple the number of substantive rulemakings we have underway. Taken together, were the agency to immediately implement all of the new mandates contained in S. 2045, it is my and the CPSC staff's assessment that many of our existing public safety activities would have to be severely curtailed or would cease entirely in order to attempt to fulfill all of the bill's proposed statutory directives.

To prevent crippling our existing agency activities and functions, CPSC staff has estimated that S. 2045 would require at least 125 additional full-time employees and a minimum of \$18 million to implement, in the first year alone. Even assuming enactment of the higher of our proposed Senate and House appropriations levels for fiscal year 2008, which would be a \$7.2 million increase for FY '08, and even assuming that additional employees could be hired immediately after enactment of that level (which would be virtually impossible), we would still be faced with a dramatic shortfall in our ability to do all the things that the legislation would call on us to do.

Indeed, to meet many of the very short deadlines contained in the bill, it is the assessment of our Office of Hazard Identification and Reduction that virtually all other rulemakings now underway would have to be suspended in order to free personnel and other resources to implement the bill. The impact on our Office of Compliance and Field Operations is estimated to be likewise negative and very significant. The result is clear: enactment of S. 2045 would harm product safety and put the American people at greater risk.

Product Certification. As you know, I requested as part of my legislative submission that the requirement that all products subject to a mandatory certification rule found in the Consumer Product Safety Act (CPSA) be extended to all of the statutes we administer, notably including the Federal Hazardous Substances Act (FHSA), under which we regulate toys and other children's products. We have also requested that we be given the option, through regulation, of whether and to what extent third party, independent testing and certification should be required or whether self-certification is an appropriate option. A one-size-fits-all statutory mandate in this regard is not necessary.

In addition, the accreditation system for laboratories administered by the American National Standards Institute (ANSI) is, by all accounts, effective, and there is therefore no compelling reason to overlay this functioning process with a host of new CPSC "protocols and standards" to credential testing labs. Both agency resources and expertise are at issue here. (We are supplying statutory language that we believe will achieve what we have requested in this regard without adding this new laboratory oversight role to the CPSC's list of missions.)

Information Disclosure. In addition, we appreciate your inclusion in the bill of our suggested provision that we be allowed to share otherwise protected information with other government agencies, including foreign governments, as long as adequate assurances are in place to ensure that information is handled in the same way as we must handle it. As we have discussed at length, and as I have stated in testimony before the Committee, I believe it would be very unwise to eliminate the protection for information reported to us under section 15b. This process encourages firms to report to us when they have or believe they might have a product safety problem. However, the mechanics of, and the exceptions to, this general procedural protection certainly warrant review and modification, both to expedite the review process and to ensure that the protection is not used inappropriately by reporting companies. (Again, we have suggested language that would accomplish this without disposing of the basic procedural protection the law now grants.)

Relied Upon Standards. I appreciate your consideration of my suggestion and suggested statutory language that Congress enact minor modifications to our statutes to clarify and revive our existing statutory authority to effectively enforce consensus standards upon which the Commission has formally relied. I think greater use of this provision could prove to be a very useful tool in specific cases where the private sector implements a good solution to a product safety risk. The CPSC could then “rely upon” that standard and, in an expedited fashion, ensure that products entering the stream of commerce adhere to that standard before they reach the market, rather than after, which is our only recourse now available for products that violate such standards. Mine is an eminently pro-consumer, pro-safety proposal and one which I urge you to include in S. 2045.

Lead in Children’s Products. I and the CPSC certainly share your desire to remove lead from children’s products, keeping in mind that by far the greatest source of lead in children continues to be old house paint. The question is how this should be accomplished and whether and how it should take account of the practical issues of accessibility, trace levels of lead found in many products (and, indeed, in the general environment) and many other factors which appear not to be contemplated by the proposed language of S. 2045, the possible consequences of which are not understood.

I am forwarding to you and your staff a proposal that I believe will achieve the desired result but with some provisions that contemplate actual implementation issues that are certain to arise. With regard to lead paint on toys, your staff has stated it is your intent to adopt the European standard as part of your legislation. While I have no quarrel with this in principle, in our view S. 2045 as presently drafted will not secure this result. As an alternative, I would urge your further consideration of statutory language that I have forwarded to your staffs.

State Attorneys General *Parens Patriae*. The provision in S. 2045 that would grant state attorneys general a cause of action in federal court to effectively enforce the statutes that we administer would invite nothing short of product safety chaos. Currently, the CPSC routinely works with state attorneys general and other state and local government officials through our State Partners Program. Indeed, we have a close working relationship with many states, which

accrues to the benefit of both the CPSC and our state partners, and ultimately to the benefit of the American people.

To essentially create 50 new, independent federal product safety enforcement agencies, each empowered with unilateral authority to pursue enforcement of our statutes, will undoubtedly lead to the inconsistent application of federal law. This situation could evolve to the point where states may effectively develop their own unique product safety systems and standards, with the residents of one state essentially being put at a higher or lower level of product safety risk, depending on which state they happen to live in. Were this to occur, it would undermine one of the core reasons for the initial creation of the CPSC by the Congress, which was to establish uniform, national product safety standards, for the benefit of both consumers and manufacturers, which must otherwise comply with a patchwork of many different state standards. While I am always willing to consider ways to strengthen our relationships with our state and local partners, these provisions of S. 2045 are clearly not the way to accomplish this.

Whistleblower Protection. This sweeping new provision, as mentioned, represents a colossal and wholly unfamiliar new mission for the CPSC. While I will not opine on the underlying policy of creating this new right and cause of action, I can tell you that the CPSC has neither the resources nor the expertise to administer such a complaint and appeal system. Were we to attempt to implement such a system, again, it would dramatically drain the limited resources of the Commission, to the direct detriment of public safety.

Penalty Cap Increase. As you know, the House of Representatives recently passed, on a bipartisan basis, an increase in our statutory penalty cap from the present \$1.825 million to \$10 million, an amount I proposed to Congress in July. I would respectfully urge that the bill you report out of Committee next week have the same amount. While some have argued for penalty caps as high as the \$100 million contained in your bill, I do not believe that there is a need for this level of penalty cap and that such a relatively high cap may have the undesired consequence of firms, as a precautionary measure, flooding the agency with virtually every consumer complaint and incident of any kind, regardless of any actual product safety issue, making it more likely that true safety issues will go unrecognized in the process.

Criminal Penalties. This provision would expose company officials to potential criminal liability, including prison for up to one year, for mere knowledge of an act at issue, but without the requirement that the act was done in willful violation of the law. This is a very significant departure from current law, and I believe could expose otherwise law abiding individuals to large fines and incarceration for what they may have honestly believed at the time was simply making and selling a legal consumer product. While I agree that the statutory requirement in CPSA of "prior notice" (in addition to knowing and willful conduct) may not be necessary, this proposed expansion of potential criminal sanctions is not in my estimation necessary to deter unlawful conduct under our statutes and may have very serious and unintended consequences.

CPSC Personnel Issues. There are several provisions in the bill that deal with internal management and personnel issues of the CPSC. These are unnecessary, inappropriate, intrusive, have no counterpart, and would cause further resource demands and limitations that do not

benefit product safety. I would therefore strongly urge that these provisions be removed from the bill.

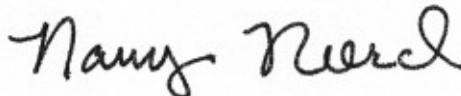
Bonding Requirements. As we stated to your staff, we would urge that you consult with U.S. Customs and Border Protection (and possibly the Office of United States Trade Representative) on any such provision. However, as we suggested in our legislative package, we do believe that a bonding requirement should be imposed sufficient to cover the cost of destroying violative products that are abandoned at ports of entry. CPSC staff sees no need for a new bonding requirement beyond that.

Counterfeits. We have suggested language to ensure that, while we would like clear authority to address products bearing a counterfeit product safety mark or other certification, we do not believe the agency is equipped or that it is an appropriate mission for the CPSC to enforce intellectual property rights *per se*.

Upholstered Furniture Rulemaking. Finally, we have suggested clarifying in S. 2045 that another option (as is always the case with rulemaking) with respect to this rulemaking activity is termination of the rulemaking.

Senators Inouye and Pryor, I have appreciated working with you and your staffs over the last several months. The Senate Commerce Committee has traditionally embodied the best traditions of the Senate: bipartisanship and sound policy discussions and sound legislating. I hope and trust this will be the case during consideration of legislation to reauthorize the CPSC, and I look forward to contributing as much as I can to that process. The American people deserve nothing less.

Sincerely,

A handwritten signature in black ink that reads "Nancy Nord". The signature is written in a cursive, flowing style.

Nancy A. Nord

Cc: The Honorable Ted Stevens
The Honorable John Sununu