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

Todd A. Stevenson  
Secretary to the Commission  
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June 9, 2003

Ms. Angela Logomasini  
Director of Risk and Environmental Policy  
Competitive Enterprise Institute  
1001 Connecticut Ave., NW, Suite 1250  
Washington, DC 20036

Re: CEI Comments on Petition No. HP 01-3

Dear Ms. Logomasini:

The following is in response to your e-mail of March 28, 2003 and written comments attached thereto on the petition to ban playground equipment made with wood treated with chromated copper arsenate (CCA), petition no. HP 01-3. Your e-mail states that in addition to providing the attachment as comments on the petition, you also submitted them "as a petition to the CPSC to comply with the Data Quality Act." Based on the content of your comments, that appears to be a request to invoke the Administrative Correction Mechanism of the CPSC's Information Quality Guidelines issued under section 515 of P.L. 106-554, copy enclosed.

As stated at page 9 of the Guidelines, the Administrative Correction Mechanism is not available for information -- such as the staff briefing package on petition HP 01-3 -- disseminated by the CPSC through a comprehensive public comment process. As you are no doubt aware, given your personal participation, the staff briefing package on that petition was the subject of a two-day public meeting and a *Federal Register* notice soliciting written comment. 68 FR 7510 (February 14, 2003).

Your written comments have been entered into the docket for petition HP 01-3 as comment number CH01-2-60 and will be fully considered as the Commission assesses what action to take on the petition. Thank you for your interest in the complex issues surrounding this matter.

Sincerely,

Todd A. Stevenson

Enclosure

## U.S. CONSUMER PRODUCT SAFETY COMMISSION INFORMATION QUALITY GUIDELINES

The U.S. Office of Management and Budget (OMB) has issued government-wide information quality guidelines under Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Public Law 106-554). The OMB guidelines have been prepared to ensure and maximize the quality, utility, objectivity, and integrity of information disseminated by federal agencies. These guidelines direct all Federal agencies to implement their own implementing guidelines by October 1, 2002. OMB's guidelines were published in the Federal Register on September 28, 2001 (66 FR 49718) and updated on January 3, 2002 (67 FR 369). A corrected version of the guidelines was published in the Federal Register on February 22, 2002 (67 FR 8452). In response to the OMB directive, the U.S. Consumer Product Safety Commission (CPSC) issued its Draft Information Quality Guidelines for public comment on April 20, 2002 (67 FR 21222). These draft guidelines contained the scope of the guidelines, description of CPSC's information quality standards, and an administrative mechanism by which the public can seek correction of information disseminated by the CPSC.

This report presents the revised draft of CPSC's Information Quality Guidelines. This revision incorporates applicable comments received from the public and OMB, as well as other changes to fulfill OMB and CPSC requirements for efficiency and effectiveness.

CPSC works to save lives and keep families safe by reducing the risk of injuries and deaths associated with consumer products. CPSC does this by:

- Developing voluntary standards with industry;
- Obtaining the recall of products or arranging for their repair;
- Issuing and enforcing mandatory standards or banning consumer products if no feasible standard would adequately protect the public;
- Conducting research on potential product hazards; and
- Informing and educating consumers through the media, state and local governments, private organizations, and by responding to consumer inquiries.

In meeting its mission CPSC disseminates information in a number of ways, including:

- Press releases and video news releases
- Publications
- Product safety alerts
- Special technical reports
- Advisory opinions
- Regulatory guidance letters

This information is used by the media, the public as well as by other government agencies, to reduce the risk of product-related death and injuries. Businesses use the information to assure that products they manufacture or import comply with the requirements of applicable regulations and to discharge the various obligations that the laws the Commission administers impose on firms.

The CPSC Information Quality Guidelines substantially follow the provisions of the OMB guidelines referenced above. Under the OMB information guidelines three aspects of quality must be considered: utility, objectivity, and integrity. In addition, for influential data, higher standards of transparency and reproducibility must be met. CPSC's guidelines use the definitions of the key statutory terms such as "information," "disseminate," "utility," "objectivity," "integrity," "influential," "transparency," and "reproducibility" as defined in the OMB guidelines. For the purpose of these guidelines, most of the information disseminated by CPSC does not meet the standard of influential as defined by the OMB guidelines. Each of these aspects of quality is described below.

### **Utility**

Utility involves the usefulness and availability of the information for its intended use. Utility is achieved by continuously monitoring information and developing new information sources or by revising existing information collection methods, models, and information products where appropriate.

CPSC efforts to ensure the usefulness of information include:

- Internal analyses and review of information requirements and products
- Discussions with policy-makers and analysts at all levels of government
- Consultations with data providers and data users
- Preparation of "plain English" guides and summaries of information

CPSC efforts to ensure the availability of information include:

- Participation in industry-sponsored and government-sponsored meetings, conferences and workshops
- Exploring and implementing multiple vehicles with which to disseminate information
- Providing expanded Web site access to publicly available information

### **Objectivity**

Objectivity involves a focus on ensuring that information is accurate, reliable, and unbiased and that information products are presented in an accurate, clear, complete, and unbiased manner. Objectivity is achieved by using reliable data sources and sound analytical techniques, by having information products prepared by qualified people using proven methods, and by carefully reviewing the content of all information products.

- Use of reliable data sources

CPSC is a data-driven agency and bases its decisions on the data it collects to assess the causes and scope of product-related injuries and deaths. Many of the information products disseminated by CPSC are created using information in death, injury and compliance action databases. These databases contain information used to perform standards effectiveness studies, special investigation studies, emerging hazard evaluation and other technical analyses. CPSC conducts ongoing internal quality assurance reviews of information in its

database systems. These reviews include checks for accuracy, completeness, and consistency to ensure high quality. Often these databases contain information from external sources. Data and procedures are reviewed to ensure that data from external sources are properly transferred into the database.

When analysis requires using samples from databases, CPSC employs statistically acceptable methods to design and select the samples. Data samples are designed and compiled by staff knowledgeable about the content, structure, and limitations of the administrative data files employed. In addition, those staff members maintain working relations with agency personnel who create, update, and maintain those files to ensure that their understanding of files is current and complete. When information products require administrative files linked to external data sources, CPSC employs sound procedures for extracting and linking data from external sources based on a thorough understanding of the relevant components of the data sources.

Occasionally CPSC conducts surveys of product use, customer satisfaction, and service quality. CPSC employs and documents accepted professional standards and practices for all survey activities, including sample frame development, sample design, questionnaire design and testing, data collection, analysis of sampling and coverage errors, imputation of missing data, weighting, and variance estimation. CPSC surveys follow guidelines and policies set forth in the Paperwork Reduction Act and other regulations related to the conduct of government surveys. CPSC is already required to demonstrate in their Paperwork Reduction Act submissions to OMB the 'practical utility' of a proposed collection of information the CPSC plans to disseminate. Additionally, for all proposed collections of information that will be disseminated to the public, CPSC should demonstrate in their PRA clearance submissions to OMB that the proposed collection of information will result in information that will be collected, maintained, and used in a way consistent with OMB and CPSC information quality guidelines.

CPSC information products may also include data produced or maintained by other U.S. government agencies or other private organizations. All such information is assessed by CPSC prior to its use. Third party information may be included in information that CPSC disseminates. Although third-party sources may not be directly subject to OMB's information quality guidelines, when used by CPSC to develop information products, this information must follow CPSC's information quality guidelines.

- Use of sound analytic techniques

CPSC analytical reports are prepared using a variety of analytical techniques including simple tabulations with descriptive summary statistics and multivariate statistical methods. For example, these reports can include integrating injury and incident information with laboratory testing and analysis, assessment of human exposure to various risks, and correlation of human behavior and risk. Analytical techniques are reviewed by qualified staff for their appropriateness to the data and the analysis being conducted and are clearly identified in reports.

CPSC also conducts economic studies, developing injury cost projections to estimate

potential benefits associated with CPSC actions. These projections are based on standard techniques and utilize the most relevant and up-to-date information available.

CPSC occasionally utilizes models to conduct engineering analyses and forecast product injury information. Most models utilized by CPSC have been developed by CPSC staff or by CPSC contractors under direction from CPSC. When CPSC uses a proprietary model from another organization, CPSC undertakes an analysis of the model to ensure its appropriateness before including the model results as part of a CPSC information product. CPSC models have detailed documentation describing the goals and objectives of the model, the data sources being used and the methodologies and assumptions employed. CPSC models are based on best judgments of current and future behavioral relationships and methods of projection. The models are periodically updated to reflect input from internal and external reviews and research findings on behavioral relationships. Any updates are documented.

- Preparation of information products

CPSC information products are based on internal data and analyses, surveys, models, and external information sources. Appropriate procedures are used in all steps of the information product preparation process. Documentation available with CPSC information products is designed to improve understanding of the information so that users may assess the suitability of the information for their needs. Reports are prepared by staff using a variety of sound analytical techniques ranging from simple tabulations and descriptive summary statistics to multivariate statistical methods and econometric models. Staff members preparing analytic reports and policy studies are knowledgeable in their use of relevant administrative data files, external data sources, and projections from simulation models.

- Review prior to dissemination

Information products are reviewed by technically qualified staff prior to dissemination to ensure their quality. Products that are considered to be more technically complex may also be reviewed by independent expert reviewers to provide additional perspective and expertise. The level of review an information product is subjected to prior to dissemination is determined by the characteristics of the product and CPSC-established review procedures. (See 15 U.S.C. 2055(b)(6) and CPSC Directive 1450.2.) Analytical techniques are clearly described and data sources are identified in reports. When analyses are based on projections from models, the assumptions used to produce the projections are identified, as well as the rationale for the assumptions used and the impact of using alternative assumptions. By statute, if the information disseminated by CPSC publicly identifies the manufacturer of a product, CPSC provides the manufacturer with the opportunity to comment on the accuracy of the information.

- Policy for correcting errors and revising previously disseminated information

CPSC's information may be revised after initial dissemination to reflect more complete information, corrections or other changes. CPSC information products identify information

that is preliminary and expected to be revised as well as revisions made to information previously disseminated.

### **Integrity**

Integrity, as used in the OMB quality guidelines, refers to the security of information from unauthorized access or revision to ensure that the information is not compromised through corruption or falsification. CPSC is highly protective of the confidentiality of information it holds through its policies and practices.

To ensure the integrity of its administrative information, CPSC will employ rigorous controls that have been identified as representing sound security practices. CPSC has in place programs and policies for securing its resources as required by the Government Information Security Reform Act (P.L. 106-398, title X, subtitle G). Those security procedures address all major components of information security and apply to all CPSC operating components. In addition, CPSC is subject to statutory requirements to protect the sensitive information it gathers and maintains on individuals. Those requirements are contained in the following documents:

- Privacy Act of 1974
- Freedom of Information Act
- Computer Security Act of 1987
- Office of Management and Budget (OMB) Circulars A-123, A-127, and A-130
- Government Information Security Reform Act
- Federal Managers' Financial Integrity Act (FMFIA) of 1982

### **Transparency and Reproducibility**

CPSC's Information Quality Guidelines substantially follow the definitions for "influential," "transparency," and "reproducibility" as defined in the OMB Guidelines referenced above. OMB's guidelines state that information disseminated by Federal agencies is considered "influential" if it does or will have a clear and substantial impact on important public policies or important private sector decisions. OMB's guidelines require that agencies disseminating influential information must have quality guidelines that include a high degree of transparency about data and methods to facilitate reproducibility of such information. "Reproducibility" as set forth in the OMB guidelines means that the information is capable of being substantially reproduced, subject to an acceptable degree of imprecision.

Most of the information disseminated by CPSC does not fall under OMB's definition of "influential." However, CPSC's staff and contractor technical reports related to engineering, health science, or hazard analysis issues potentially have impacts on important public policies and private sector decisions, such as changes in voluntary standards. Therefore, CPSC's information in these reports should be highly transparent and capable of being reproduced by qualified persons. CPSC strives for a high degree of transparency about information and methods in order to improve understanding and to facilitate reproducibility by qualified third parties. To achieve transparency and reproducibility, CPSC's Guidelines

require documentation of systems and models and appropriate explanatory material to accompany disseminated information (specific data sources and quantitative methods and assumptions used). Some estimates and projections included in CPSC's information products are not directly reproducible by the public because the underlying data sets used to produce them are confidential. Also, some estimates and projections may not be easily reproducible by third parties due to the complexity and detail of the methods and data. CPSC places great emphasis on its review process to ensure the quality of information disseminated.

CPSC also achieves transparency through wide dissemination of its information. Most reports and other data products are available both as printed and electronic documents. They are announced on the CPSC web site and most electronic versions can be accessed and downloaded directly from the web site.

To ensure reproducibility, CPSC creates archival files of data and model results that are used as input to CPSC information products.

### **Risk Assessment**

Some of the influential information that we disseminate is based on an analysis of the risks to the public of certain actions or exposures to hazardous substances. For purposes of this guidance, we are defining risk as the likelihood that injury or damage is or can be caused by a substance, technology, or activity. We use risk analysis (the integration of risk assessment with risk management and risk communication) as a tool to enhance the scientific basis for our regulatory decisions.

The OMB Guidelines provide special considerations that must be taken into account in certain risk assessments, those that provide the basis for the dissemination of influential information. The Guidelines state that "With regard to analysis of risks to human health, safety, and the environment maintained or disseminated by the agencies, agencies shall either adopt or adapt the quality principles applied by Congress to risk information used and disseminated pursuant to the Safe Drinking Water Act Amendments of 1996 (SDWA) (42 U.S.C. 300g-1(b)(3)(A) and (B))."

The SDWA risk assessment principles are as follows:

1. To the degree that the agency action is based on science, the agency shall use
  - a. the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices
  - b. data collected by accepted methods (if reliability of the method and the nature of the decision justify use of the data)
2. In the dissemination of public information about risks, the agency shall ensure that the presentation of information about risk effects is comprehensive, informative, and understandable.
3. In a document made available to the public in support of a regulation, the agency shall specify, to the extent practicable
  - a. Each population addressed by any estimate of applicable risk effects

- b. The expected risk or central estimate of risk for the specific populations affected
- c. Each appropriate upper-bound or lower-bound estimate of risk
- d. Each significant uncertainty identified in the process of the assessment of risk effects and the studies that would assist in resolving the uncertainty and
- e. Peer-reviewed studies known to the agency that support, are directly relevant to, or fail to support any estimate of risk effects and the methodology used to reconcile the inconsistencies in the scientific data.

Many of our actions are based on scientific experts' judgments using available data, are essentially qualitative, and are generally carried out for non-cancer-causing hazards. Such assessments provide useful answers in most instances that are sufficient for regulatory purposes, and much more elaborate, quantitative estimates extrapolating beyond the data are unnecessary. Although we might analyze the economic costs of the regulations and consider alternatives, regulations like these do not lend themselves to the types of full quantitative risk assessments contemplated by the Safe Drinking Water Act principles. As a result, we have adapted the general principles for risk assessments from the SDWA to fit these situations. The principles we intend to apply to risk assessments involving the dissemination of influential information affecting product approval actions or regulations that do not lend themselves to quantitative risk assessment are as follows:

1. The Agency will use —
  - a. the best available science and supporting studies conducted in accordance with sound and objective scientific practices, including peer reviewed studies and supporting studies where available
  - b. data collected by best-available method or accepted methods (if reliability of the method and the nature of the decision justify use of the data)
2. In the dissemination of public information about risks, the Agency will ensure that the presentation of information about risk effects is comprehensive, informative, and understandable.

CPSC rarely performs quantitative risk assessments. However, in situations requiring a quantitative risk assessment, we generally follow basic risk assessment principles in the NAS paradigm of 1983. Thus, we also subscribe to the statement from NAS when it revisited the risk assessment process in 1994 (*Science and Judgment in Risk Assessment*, NAS 1994): "Risk assessment is not a single process, but a systematic approach to organizing and analyzing scientific knowledge and information." In each of the areas we regulate, we apply risk assessment practices to the specific task that are widely accepted among relevant domestic and international public health agencies.

For quantitative risk assessments in support of the dissemination of influential information, CPSC intends to apply the following principles, following the SDWA risk assessment principles:

1. The agency will use —
  - a. the best available science and supporting studies conducted in accordance with sound and objective scientific practices;



- b. data collected by accepted methods (if reliability of the method and the nature of the decision justifies use of the data)
2. In the dissemination of public information about health risks, the agency shall ensure that the presentation of information is comprehensive, informative, and understandable, within the context of its intended purpose.
3. In a risk assessment document made available to the public, the agency shall specify, to the extent practicable —
  - a. Each population addressed by any estimate of applicable effects;
  - b. The expected or central estimate of risk for the specific populations affected;
  - c. Each appropriate upper-bound and/or lower-bound risk estimate;
  - d. Data gaps and other significant uncertainties identified in the process of the risk assessment and the studies that would assist in reducing the data gaps and other uncertainties; and
  - e. Additional studies not used to produce the risk estimate that support or fail to support the findings of the assessment, the rationale of why they were not used, and the methodology used to reconcile the inconsistencies in the scientific data.

### **Information Not Subject to CPSC's Information Quality Guidelines**

CPSC's Guidelines do not apply to:

- Procedural, operational, policy, and internal manuals prepared for the management and operations of the agency that are not primarily intended for public dissemination.
- Information disseminated by CPSC employees that is not put forth as a CPSC product (e.g., materials presented by an individual at a professional meeting).
- Other materials specifically exempted in the OMB guidelines

CPSC has historically utilized standards, policies, and other operational guidance to ensure the quality of all its activities and has confidence in the quality of information disseminated by CPSC prior to October 1, 2002. However, we regard information originally disseminated before October 1, 2002, as being subject to these information Quality Guidelines only if it remains readily available to the public, (e.g., it is posted on the CPSC Web site) and it continues to play a significant, active role in CPSC programs or decisions.

### **Administrative Correction Mechanisms**

CPSC has established procedures for any person to request correction to information disseminated by CPSC when the information does not comply with CPSC's or OMB's information quality guidelines. A person who believes that information disseminated by CPSC does not adhere to CPSC's or OMB's information quality guidelines and who would like to request correction of specific information should write to the Office of the Secretary, U.S. Consumer Product Safety Commission, Washington, D.C. 20207, or send an e-mail to [cpsc-os@cpsc.gov](mailto:cpsc-os@cpsc.gov) or use the form at <http://www.cpsc.gov/feedback.html>. The Request should be captioned "Information Quality Guidelines" and should provide the following information:

- Information identifying the requestor;

- A specific description of the information to be corrected;
- Potential adverse impacts from the information identified for correction; and
- A specific reason why and how the information should be corrected.

Based on a review of the information provided, CPSC will take the following actions:

- Perform an acceptance review to confirm that the necessary information regarding the correction has been provided.
- Submit the request for review to a management official who is knowledgeable about the subject matter related to the request. The designated management official may consult with other federal agencies or CPSC staff in responding to the request for correction, as appropriate.
- Determine whether a correction is warranted and, if so, what action will be taken.
- Respond to request for correction of information within 60 calendar days of receipt of the request. If the request requires more than 60 calendar days to resolve, then CPSC will inform the requestor that more time is required, state the reason why, and include an estimated decision date.

If the requestor is not satisfied with CPSC's final response to the request, the requestor may submit an appeal to the Office of the Executive Director, U.S. Consumer Product Safety Commission, Washington, D.C. 20207. The requestor must use the following process to appeal a decision:

- Submit an appeal within 30 calendar days of receipt of CPSC's notification of denial or notification of the corrective action. (Only the original requestor may appeal the decision.)
- Identify the original request for correction, and specify the CPSC response that they are appealing.
- Describe the basis for the appeal and how the response failed to resolve the request for correction.

The appeal will be evaluated by an agency official, typically at the Executive Director level. The appeal review will be limited to the basis of the appeal. The requestor will be notified of the agency's decision regarding the appeal within 60 calendar days. If the request requires more than 60 calendar days, then CPSC will tell the requestor that more time is required, state a reason why, and include an estimated decision date.

The correction and appeal process that will address data quality challenges does not apply to information disseminated by the CPSC through a comprehensive public comment process, e.g., Federal Register notices of proposed rulemakings, regulatory analyses, requests for comments on information collections subject to the Paperwork Reduction Act, environmental impact statements, and other documents for which CPSC solicits public comments. Persons questioning the quality of information disseminated in those documents, or documents referenced or relied upon in those documents, must submit comments as directed in the Federal Register or other notices requesting public comment on the given document. CPSC will use its existing processes for responding to public comments in addressing the request for correction, and will describe the actions it has taken

with regard to the request in the Federal Register notice of the final agency rule, regulatory analysis, or other final action. In cases where the agency disseminates a study, analysis, or other information prior to the final agency action or information product, requests for correction will be considered prior to the final agency action or information product in those cases where the agency has determined that an earlier response would not unduly delay issuance of the agency action or information product and the complainant has shown a reasonable likelihood of suffering actual harm from the agency's dissemination if the agency does not resolve the complaint prior to the final agency action or information product.

The correction process is designed to address the genuine and valid needs of affected persons without disrupting agency operations. The requestor should be aware that they bear the burden of proof with respect to both the need for correction and the type of correction requested. In determining whether to correct information, CPSC may reject claims made in bad faith or without justification. The CPSC is required to undertake only the degree of correction that it concludes is appropriate for the nature and timeliness of the information involved.

## References

1. Office of Management Budget Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies. Final Guidelines. Effective January 3, 2002.  
<http://www.whitehouse.gov/omb/fedreg/reproducible.html>
2. 2003 Budget and Performance Plan (Operating Plan),  
<http://www.cpsc.gov/cpsc/pub/pubs/reports/2003opplan.pdf>
3. Clearance Procedures for Providing Information to the Public, U.S. Consumer Product Safety Commission, Directive 1450.2, September 5, 2001,  
<http://www/cpsc.gov/library/1450.2.pdf>
4. Public Disclosure of Information, 15 U.S.C. Sec. 2055,  
<http://www4.law.cornell.edu/uscode/15/2055.html>
5. Science and Judgement in Risk, National Research Council, National Academy Press, 1994, <http://www.nap.edu/books/030904894X/html/index.html>

**Stevenson, Todd A.**

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**From:** Angela Logomasini [alogomasini@cei.org]

**Sent:** Friday, March 28, 2003 6:23 PM

**To:** Stevenson, Todd A.

**Subject:** CCA Petition and Data Quality Petition

Todd,

Attached are CEI's written comments on the petition to ban playground equipment made with chromated copper arsenate. They are substantially different than my presentation comments.

I am also submitting them as a petition to the CPSC to comply with the Data Quality Act.

Thanks.

Angela Logomasini  
Director of Risk and Environmental Policy  
Competitive Enterprise Institute

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Written Comments of Angela Logomasini  
Director of Risk and Environmental Policy, Competitive Enterprise Institute  
To the Consumer Product Safety Commission  
Regarding the use of Chromated Copper Arsenate in Playground Equipment  
March 28, 2003

The following comments serve two purposes. First they serve as written comments on the petition to ban playground equipment made with wood treated with preservative chromated copper arsenate (CCA). Second, they petition the Consumer Product Safety Commission (CPSC) to comply with federal data quality mandates.

On March 17, 2003, the CPSC heard public comments on this issue. The commission questioned many of the presenters on why the CPSC needed to act given that the EPA is banning CCA. They also inquired as to why the current registrants would consider canceling a product that they maintained was safe. Yet neither of these issues is relevant to the responsibilities of this commission and its decision, as detailed below.

### **Responsibilities to Taxpayers, Consumers, and Small Businesses**

The commission's responsibility is to serve the taxpayers who support our federal institutions. It involves providing accurate and scientifically valid information and not impeding consumer choice unless it is absolutely necessary to prevent a clear and substantial risk. That means the commission's bias should be in favor of consumer freedom. It also demands that the commission avoid actions that can mislead the public; create unwarranted fears; and prompt activities that could impose needless burdens on taxpayers, consumers, and small businesses. In this regard, two actions by this commission are relevant.

First is the commission's action in regard to its study on the topic. The CPSC study appears to significantly overestimate risks and unless corrected, it will create needless burdens for the public, even without any further CPSC actions. In addition, the commission has not met its responsibilities to provide a transparent process and peer review as mandated by the data quality law.

Second, the commission is responsible for the impacts of its decision, whether it involves deferring, accepting, or denying the petition. Acceptance and even deferral of this decision will confuse the public about real risks. This commission was asked to rule on the safety of CCA. Despite the theoretical risks presented by the staff-produced study, there isn't any concrete evidence that CCA-treated wood has ever caused significant problems when used according to label directions. In addition, the theoretical risks suggested by the staff are highly overstated,

and do not justify proceeding with a rulemaking that denies consumer choice and misleads the public. The commission needs to send a clear message to the public by denying this petition.

In contrast to CPSC, EPA is not responding to claims about CCA safety; it is responding to a cancellation request. Some have suggested that the registrants desire to cancel their registration is a market response, as if CCA was not competitive and better options were already winning in the marketplace. This claim should not be used to justify deferral to EPA or to ignore serious problems with CPSC science because the claim is false. If this claim were true, there would be no need to deny other possible registrations of CCA.

In a free society, when superior products are introduced, others may become obsolete via consumer choice; there is no need for government bans. Yet when Home Depot attempted to market the alternative products, they could not sell them and had to restock with CCA-treated wood. The alternatives have failed in the marketplace; they are unable to capture a significant portion as long as CCA remains an option. Clearly, a vigorous market for CCA remains; it is hardly obsolete. Hence, the EPA ban is not the result of a market response — it is the exact opposite. It denies market demand by denying consumers the right to buy a product that they clearly want, and it denies potential registrants the right to sell that product.

### **Responsibility to Comply with Data Quality Law**

Even if the CPSC defers or denies this decision, its legal and moral obligations to the public do not end there. Under the Data Quality Act, the commission is required to show that any information it disseminates meets standards maximizing “quality, objectivity, utility, and integrity.”<sup>1</sup> These mandates were put into place because policymakers recognized that by simply distributing information, government agencies can have profound impacts on public and private sector decisions. The CPSC’s recent study on CCA is highly likely to produce such impacts, and accordingly, the commission must ensure that it complies with the data quality law. The law also demands that government agencies distribute only the best available, peer-reviewed science in a transparent manner. At this point, it appears that the commission has not met these standards and hence it needs to take steps to comply with the law by improving its science and making its data and peer review more transparent.

### **CPSC is Responsible to Meeting the Highest Scientific Standards: Distribution of “Influential Information.”**

OMB requires that information that qualifies as “influential” meet the highest data quality standards. OMB defines “influential information” as that which an agency “can reasonably determine that dissemination of the information will have or does have substantial impact on important public policy or private sector decisions.”<sup>2</sup> CPSC’s guidelines concur, stating: “Most of the information disseminated by CPSC does not fall under OMB’s definition of ‘influential.’”

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<sup>1</sup> 44 U.S.C. 3502.

<sup>2</sup> Office of Management and Budget, Executive Office of the President, “Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies,” 67 *Federal Register*, no. 2 (January 1, 2002): 369–378. (Corrected version published in 67 *Federal Register*, no. 36 (February 22, 2002): 8451–8460, see: <http://www.whitehouse.gov/omb/fedreg/reproducible.html>.)

However, CPSC's staff and contractor technical reports related to engineering, health science, or hazard analysis issues potentially have impacts on important public policies and private sector decisions, such as changes in voluntary standards."<sup>3</sup> It would stand to reason that this risk assessment on pressure-treated wood clearly qualifies as "influential" because it involves both health science and a hazard analysis, and it has potentially significant impacts on public policies and private sector decisions.

In particular, the CPSC's study may prove particularly influential in ongoing litigation regarding the safety of CCA-treated wood. If CPSC's study overestimates risks, it may produce a direct and substantial harm on businesses involved in litigation. If it underestimates risks, it places plaintiffs at a disadvantage.

The study also poses other potentially perilous impacts on private-sector decisions. In particular, it may encourage consumers, day care centers, and cities to tear down playgrounds, decks and other structures based on specious claims. The costs to consumers and small business could prove quite substantial. This concern is warranted by past experience with this issue. Similar state-level studies in Florida on CCA-treated structures sparked a statewide scare that led people to begin tearing out such equipment.<sup>4</sup> A subsequent study by a group of Florida physicians eventually concluded that CCA treated wood did not in fact pose a significant risk<sup>5</sup> and the state government eventually rejected legislation banning CCA. However, the costs of the initial scare remain, and the information distributed will likely continue to mislead and confuse the public.

If CPSC's study does have this effect, perhaps wealthy communities will be able to rebuild these structures, but what of the poorer communities? Raising the costs of safe playgrounds may well mean that we will have fewer of them (particularly if localities are prompted to remove playgrounds). Will kids in poor, inner-city neighborhoods be safer without safe play areas? CPSC must consider that the absence of affordable safe playgrounds will create real risks that certainly outweigh theoretical risks of CCA-treated wood.

CPSC's study (in addition to its failure to deny this petition) is likely to have a substantial effect on future regulatory decisions in other agencies. In February 2002, EPA stated its intent to ban all residential uses of CCA-treated wood. Even though the agency announced on March 17 at the CPSC hearings that it would soon issue its final decision in the *Federal Register* on this topic, its deliberations on CCA are not over. There is a high probability that the CPSC study will impact future EPA decisions regarding non-residential uses as well as ongoing consideration as to whether to list CCA as a hazardous waste. CPSC's study is already having impacts at the federal level. Senator Nelson of Florida cited the study in a press release in which he announced

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<sup>3</sup> Consumer Product Safety Commission, "U.S. Consumer Product Safety Commission Information Quality Guidelines," <http://www.cpsc.gov/LIBRARY/infoguidelines.html>.

<sup>4</sup> For example, see Stephanie Erickson, "Florida Study Finds Pressure-Treated Wood Can Lead to Arsenic Poisoning," November 9, 2001; and Julie Hauserman, "Alachua County Closes Playgrounds with Arsenic," *St. Petersburg Times*, September 27, 2001.

<sup>5</sup> Florida Physicians' Arsenic Workgroup, June 14, 2002, available online at: <http://www.preservedwood.com/safety/0730cca-docs1.html>;

his decision to “renew” his efforts to ban CCA-treated wood. He is introducing federal legislation to that effect.<sup>6</sup>

Numerous individuals and businesses stand to lose from such additional regulations. Consider what the costs would be if CPSC actions build pressure for EPA to list CCA-treated wood as a hazardous waste.<sup>7</sup> Cost of disposal will rise for everyone from consumers to cities to small businesses. CPSC should not underestimate this possibility and the associated welfare losses as prices for disposal rise. For example, families may keep decks longer — even when the decks begin to deteriorate and become safety hazards — if both the costs of disposing the wood and building a new deck grow too high.

CPSC needs to consider the full implications of its actions. That includes consideration of the “risk-risk” implications of every action it takes. Everything in life carries risks and if we demand perfect safety, we can end up trading off small risks for big ones.

### **CPSC Not In Compliance with Standards for the release of Influential Information**

Under OMB guidelines, agencies must meet certain standards for “influential information.” In particular, OMB states: “If an agency is responsible for disseminating influential scientific, financial, or statistical information, agency guidelines shall include a high degree of transparency about data and methods to facilitate the reproducibility of such information by qualified third parties.”<sup>8</sup> CPSC data quality guidelines agree, stating that such influential information from risk assessments and other scientific reports “should be highly transparent and capable of being reproduced by qualified persons. CPSC strives for a high degree of transparency about information and methods in order to improve understanding and to facilitate reproducibility by qualified third parties.”<sup>9</sup>

Yet the CPSC has failed to provide such transparency because it has failed to release the underlying data in its study as well as the peer review. At the hearing, the commission indicated that it might be willing to release at least the peer review, but it remains unavailable. CEI contacted the CPSC’s legal counsel who informed us that the commission has not decided whether it would release this information and the counsel indicated that the commission could wait until after the public comment. However, the Data Quality Act does not appear to give agencies that option. The law is designed to provide openness so that the public can have access to information before decisions are made or impacts result. Holding up data until after a decision is made or even until the end of a comment period seems to contradict legislative intent.<sup>10</sup>

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<sup>6</sup> “Senator Renews Effort to Ban Arsenic-treated Wood,” Press Release, February 10, 2003, <http://billnelson.senate.gov/billsviews/issuesmain.cfm#>.

<sup>7</sup> Mary Ellen Klas, “Treated Wood Emerges as Environmental Hazard (arsenic pollution in Florida),” *Florida Trend*, October 1, 2001, Volume 44; Issue 6.

<sup>8</sup> Office of Management and Budget, “Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies.”

<sup>9</sup> Consumer Product Safety Commission, “U.S. Consumer Product Safety Commission Information Quality Guidelines.”

<sup>10</sup> Telephone communication between Angela Logomasini (CEI) and William DuRoss (Legal Counsel, Consumer Product Safety Commission), March 26, 2003.



OMB and CPSC data quality guidelines also address process for peer review of influential studies. OMB states:

'If data and analytic results have been subjected to formal, independent, external peer review, the information may generally be presumed to be of acceptable objectivity.' However, this presumption is rebuttable based on a persuasive showing by the petitioner in a particular instance. If agency-sponsored peer review is employed to help satisfy the objectivity standard, the review process employed shall meet the general criteria for competent and credible peer review recommended by OMB-OIRA to the President's Management Council (9/20/01) ([http://www.whitehouse.gov/omb/inforeg/oira\\_review-process.html](http://www.whitehouse.gov/omb/inforeg/oira_review-process.html)), namely, 'that (a) peer reviewers be selected primarily on the basis of necessary technical expertise, (b) peer reviewers be expected to disclose to agencies prior technical/policy positions they may have taken on the issues at hand, (c) peer reviewers be expected to disclose to agencies their sources of personal and institutional funding (private or public sector), and (d) peer reviews be conducted in an open and rigorous manner.'<sup>11</sup>

CPSC's peer review does not appear to comply with these standards. CPSC's briefing materials provide scant information on the peer reviewers backgrounds, nor is there evidence of disclosure of the reviewers prior policy positions on the issues, nor is there evidence of disclosure of funding sources, and finally the peer review was not conducted in an open and rigorous manner. In fact, the peer review was conducted in private, and little information is on the substance of the peer review.

OMB standards do allow some data to remain protected if it qualifies for an exemption under the Freedom of Information Act, such as a national security or confidential business information exemptions. Yet it is unclear that any such exemption exists in this case. If there is an exemption, the CPSC has not provided any proof or explanation to that effect.

Moreover, if an exemption exists, the agency must comply with additional data quality mandates. In particular, OMB notes that "in situations where public access to data and methods will not occur due to other compelling interests, agencies shall apply especially rigorous robustness checks to analytic results and document what checks were undertaken." Hence, the agency is required to conduct and document such robustness checks if it claims that it cannot release the data and peer review. CEI found no mention of "robustness" studies and additional external, independent reviews in the CPSC briefing materials. If the commission can demonstrate that it has a FOIA exemption, it needs to perform these studies and provide documentation to the public.

### **Best Available, Peer Reviewed Science & the CPSC Study**

Finally, the data quality law demands that agencies employ the standard set in the Safe Drinking Water Act amendments of 1996, which demands the use of "best available, peer reviewed science." Specifically, OMB states: "With regard to analysis of risks to human health,

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<sup>11</sup> Office of Management and Budget, "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies."

safety and the environment maintained or disseminated by the agencies, agencies shall either adopt or adapt the quality principles applied by Congress to risk information used and disseminated pursuant to the Safe Drinking Water Act Amendments of 1996 (42 U.S.C. 300g-1(b)(3)(A) & (B)).”

In its data quality guidelines, the CPSC stated that it would comply with this portion for quantitative risks assessments by applying “the best available science and supporting studies conducted in accordance with sound and objective scientific practices.”<sup>12</sup> There is good reason to believe that the commission has not met its standard.

Employing the best science and using the best methods for applying that research would reasonably include appropriate application of studies. Studies used for risk assessments should apply to the issue at hand, and CPSC staff should be expected to consider limitations and recommendations made in those studies regarding proper use of the data. Among the peer-reviewed studies applied by the commission are the research reports published by the National Research Council (NRC).<sup>13</sup> The NRC studies do qualify as peer reviewed science. However, the CPSC inappropriately applied the NRC findings, which likely results in serious overestimation of risk for pressure-treated wood.

A key problem with CPSC’s application of the NRC reports is its assumption that short-term exposure to arsenic from wood early in life is equivalent to the long-term exposures studied by the NRC. The NRC data relied on data from Taiwanese populations exposed to relatively high levels of arsenic for decades in their drinking water. The relevance of these studies to short-term exposures to trace levels of arsenic early in life here in the United States is highly questionable.<sup>14</sup> The two types of exposures do not likely pose the same risks. The NRC notes that an important risk is caused by the duration of exposure and the fact that exposure continued at old age. Exposure during old age may be a key factor to arsenic exposure and cancer risk.

In addition, the NRC cautioned EPA in its report that there were serious problems with the data that produced great uncertainties,<sup>15</sup> which it noted that EPA should address before using the data in an actual risk assessment. The NRC ran models on this data in its 1999 report, but warned: “this analysis should not be interpreted as a formal risk assessment for arsenic in drinking water or as a recommendation on how the risk assessment should be performed. Rather it is presented only to illustrate points raised earlier in the chapter.”<sup>16</sup> In the interest of reviewing all the relevant scientific studies on the topic, the CPSC staff should have also considered the EPA’s Science Advisory Board’s review of the EPA risk assessment and the 1999 NRC report. It reiterated the importance of not using the NRC report as a risk assessment and how uncertainties in the data warranted caution because they could lead EPA to significantly overstate risks. The SAB expressed concern that EPA had in fact done just that, noting, “The

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<sup>12</sup> Consumer Product Safety Commission, “U.S. Consumer Product Safety Commission Information Quality Guidelines.”

<sup>13</sup> National Research Council, *Arsenic in Drinking Water* (Washington, D.C.: National Academy Press, 1999); and National Research Council, *Arsenic in Drinking Water 2001 Update* (Washington, D.C.: National Academy Press 2001).

<sup>14</sup> For more details, see the written March 28 comments to the CPSC submitted by Dr. Kenneth Brown, who served on the NRC panel in 1999.

<sup>15</sup> National Research Council, *Arsenic in Drinking Water*, p. 294.

<sup>16</sup> National Research Council, *Arsenic in Drinking Water*, p. 264.

agency may have taken the modeling activity of the NRC as prescriptive despite NRC comments about possible limitations.”<sup>17</sup>

“Accordance with sound and objective scientific practices” should demand that the CPSC address data limitations noted by the NRC and the SAB. In addition, it should require that the CPSC apply NRC recommendations on the proper use of the data and its findings. Yet, the CPSC seems to have done the opposite, assuming all the worst possible effects based on the NRC report without regard to NRC warning against such application. In fact, CPSC decided to choose a potency factor for arsenic that it notes is 6 to 56 times more potent than an already conservative standard that EPA used to set its drinking water standard. Why CPSC picked such a high potency factor deserves further evaluation or at least a much more convincing explanation. CPSC seems to be operating with the most conservative assumptions about risk even when the NRC noted that the data potentially had already greatly overestimated risks.

### **Conclusion**

CPSC has both moral and legal responsibilities to the public. In addition to ensuring that it has complied with the data quality law, CPSC needs to consider the considerable impacts that its decision and study could have on consumers, small businesses, and taxpayers. Accordingly, these comments petition the agency to produce science that is more grounded in reality and that meet appropriate scientific standards. After all, in our free society, the commission's bias should be to favor consumer choice, not spread unfounded fears and limit access to safe and beneficial products.

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<sup>17</sup> EPA Science Advisory Board, Arsenic Proposed Drinking Water Regulation: A Science Advisory Board Review of Certain Elements of the Proposal, EPA-SAB-DWC-01-001, December 2000, p. 26, available at: <http://www.epa.gov/sab/pdf/dwc0101.pdf>.