LOG OF MEETING

U.S. CONSUMER PRODUCT SAFETY COMMISSION
OFFICE OF COMMISSIONER THOMAS H. MOORE

SUBJECT: Meeting on Commissioner Moore's legislative proposals

DATE OF MEETING: August 8, 2007

PLACE: Room 725, CPSC headquarters

LOG ENTRY SOURCE: Michael Gougisha, Pamela Weller

DATE OF ENTRY: September 04, 2007

COMMISSION ATTENDEES: Michael Gougisha - Counselor to Commissioner Thomas H. Moore, Pamela Weller - Counselor to Commissioner Thomas H. Moore, David DiMatteo – Acting Chairman Nord's office

NON-COMMISSION ATTENDEES: Rachel Weintrab, CFA; Janell Duncan, Consumer Union; Sally Greenberg, Consumer Union; Mary M. McNamara, MCLH; Michael Wiegard, LESCM

SUMMARY OF MEETING: Janell Duncan, Rachel Weintraub and Sally Greenberg presented their respective organization's recommendations for CPSC's reauthorizations as outlined in the attached documents provided to Commissioner Moore's staff during the meeting.

The consumer groups' representatives said that they had found Commissioner Moore's statement and proposal to be extremely helpful and informative.

Rachel Weintraub indicated that they supported the 10% a year increase in the Commission's budget that Commissioner Moore had proposed. They also indicated they thought how that money was used would be very important. For example, Ms. Weintraub indicated there had been more delays in responding to FOIA requests in recent years.

The consumer groups' representatives also indicated that there needed to be a way to require mandatory recalls without having to go through a long drawn-out administrative process. They suggested that Congress look at the FDA, where they go after a product first to provide maximum protection for consumers and then provide the company with an opportunity to make their case that the product is safe.

The consumer representatives reiterated their support for eliminating the restrictions imposed on the Commission by section 6(b) of the CPSA and for the need for Congress to make it clear that there was no preemption in any of CPSC's statutes of private remedies against those who comply with

Commission standards or rules.

Commissioner Moore's staff summarized Commissioner Moore's legislative proposal submitted to Congress and answered questions specific to those legislative proposals. When questions were raised about Acting Chairman Nord's proposal, the questioners were directed to raise the questions with Commissioner Nord's office.

Commissioner Moore's staff emphasized that Commissioner Moore was very concerned with lead in children's products and that he felt that Congress could implement a ban more expeditiously than the Commission could through its regulatory process. Commissioner Moore's staff also encouraged the consumer groups to set some sort of priority listing of their own proposals.

Commissioner Moore's legislative proposals and his comments on Acting Chairman Nord's proposals are also attached.

Legislative Proposals of Commissioner Thomas H. Moore

1. The provisions of the Federal Hazardous Substances Act (FHSA) do not give the Commission authority to enforce the total elimination of lead or other toxic substances from children's products. I think the Commission should have that authority.

Our statute requires us to determine the accessibility of the lead (or other toxic substance) and that is the key measure under the FHSA of whether or not a product can be deemed to contain a banned hazardous substance. The Commission did issue a guideline document back in January of 1998, which went so far as to urge manufacturers "to eliminate lead in consumer products." The link to this guidance document follows, as well as the link to a similar guideline the Commission issued on hazardous liquid chemicals in children's products: http://www.cpsc.gov/businfo/frnotices/fr99/lead.html; http://www.cpsc.gov/businfo/frnotices/fr99/liquids.html. Given the provisions of the FHSA, the Commission does not have the authority to enforce those guidelines. Congress may want to reconsider the necessity for the accessibility requirement of section 2(q)(1) of the FHSA as it pertains to toxic substances in children's products.

2. Congress should consider making it clear whether a cost/benefit analysis should or should not be part of the rulemaking findings under PPPA.

There are areas where it would be helpful to have congressional clarification. For example, when Congress added cost/benefit language to most of our statutes, it did not add it to the Poison Prevention Packaging Act. I believe that was because Congress did not want to weigh the risk of poisoning children against the cost of preventing it, particularly in a statute that only deals with packaging requirements. The agency was given no authority to regulate drugs or chemical formulations or ban their use under this Act and I believe Congress took the limited nature of the statute into account when it declined to add cost/benefit language to the PPPA. Unfortunately, no legislative history exists to explain the distinction that was made between this Act and our other statutes. Consequently, the Office of Management and Budget is trying, through its Program Assessment Rating Tool (PART) process, to force the agency to use a cost/benefit analysis in our PPPA rulemakings. This is an area where Congress could speak authoritatively about whether the agency must do a cost/benefit analysis that is currently not required by the PPPA. Congress, not OMB, decides our rulemaking requirements.

3. Congress should determine the enforcement effect of the Commission relying upon a voluntary standard.

See my response to PRISM section 1(c) of Title I.

4. Congress should consider extending the CPSA's section 15 reporting requirements to the other statutes that we administer.

See my response to PRISM section 4(a) of Title I.

5. Congress should clarify whether our mandatory standards promulgated under the FHSA, FFA, or PPPA preempt a litigant's right of redress for personal harm caused by a product that complies with standards promulgated under those acts as Section 25(a) clarifies that right under the CPSA.

I have made my views known on the preemption language in our statutes in my statement on the Final Rule for Mattress Flammability (Open Flame). My statement is available on the CPSC web site at http://www.cpsc.gov/CPSCPUB/PREREL/prhtml06/06091.html. I believe this is an area that Congress must clarify. Certainly our mandatory standards should (and do) preempt most state and local standards and regulations seeking to address the same hazard scenario. But whether our standards should become the maximum protection available, which causes litigants to lose their right of redress for personal harm caused by a product that meets those standards, is a question only Congress can answer.

6. Congress should again require budget documents being submitted to OMB to be submitted to Congress under Section 2 7(k)(1) of the CPSA.

Congress used to get a copy of our budget submission to the Office of Management and Budget. 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 Congress should rethink the issue of whether it (and the public) should be able to review the agency's original budget request before it makes funding decisions about the agency.

7. Congress should consider giving the Commission the option to use 2-step rulemaking.

See my discussion of this in response to PRISM section 1 of Title II.

8. Congress should amend Section 37 of the CPSA to require, as a trigger for reporting, the filing of lawsuits (3 or more) involving the same product instead of the settling of such lawsuits. In addition, the 24 month period should be expanded or eliminated.

See my discussion of this in response to PRISM proposal Section 7(e) of Title II.

9. Congress should make distribution of products bearing a false certification mark of compliance with a standard from a nationally recognized testing laboratory a prohibited act under Section 19(a) of the CPSA.

Given the growing problem with counterfeit products, particularly electric products that appear to carry the mark of respected testing laboratories, Congress should consider making it a prohibited act to distribute products bearing false certifications. We have recalled a number of these products in recent years when they have been found to present a substantial product hazard under section 15. This would be an additional tool in the fight against counterfeit products and, an additional avenue for civil and criminal penalties against the makers/importers/distributors of these products.

10. Congress should consider the elimination of the 6(b) requirements and, specifically, compare the powers NHTSA has to make product complaints public and to publish initial defect determinations in the Federal Register.

See my discussion of 6(b) in response to the PRISM proposal in Section 7(a) of Title II.

11. Congress should consider eliminating the civil penalty cap and clarify whether other factors may be considered by the Commission in addition to those that exist in our statutes.

See my discussion of this in response to PRISM section 2(b) of Title I.

12. Congress should require manufacturers to put identifying information on products (e.g. date marks) so that products that need to be recalled can be readily distinguished from safe versions of the same product.

See my discussion of this in my response to PRISM section 1(b) of Title I.

13. Congress should give the Commission the ability to order manufacturers, importers, retailers and distributors to take whatever action the Commission determines is in the public interest if the Commission determines that a corrective action plan chosen by a company is not adequate.

See my discussion of this in response to PRISM section 3(a) of Title I.

14. Congress should reexamine our export policy and consider giving the Commission broader powers to prevent the exportation of products that have been recalled in the United States.

Our agency, through our governing statutes, cannot claim much moral superiority over the Chinese, or any other foreign country, when it comes to our own export policy. As long as a product has not been offered for sale in the United States, but is only made for export, our statute gives us practically no authority over it. The only products that cannot be exported from the U.S. are products that violate either a U.S. mandatory standard or ban, or are deemed a misbranded hazardous substance, AND

have been introduced into U.S. commerce. In the 1980's a notice provision was added so that foreign receiving countries now do have to be notified if a product made solely for export, that does not comply with one of our mandatory standards or is a banned hazardous substance, is being exported to them. But it is then up to the receiving country to deal with the product on their end (assuming they have the ability and resources to take action). Products that our agency has recalled under our section 15 authority can be exported to other countries without any notification to the receiving country. Our export policy is based on a desire to see U.S. manufacturers be able to compete in foreign countries in terms of price and marketability, not safety. Our statute makes it clear (as does the legislative history) that it is not CPSC's concern whether products made in the U.S. for export meet the mandatory or voluntary standards of other countries; we do not inquire what those standards are nor do we require our manufacturers to do so. To the extent U.S. manufacturers follow foreign standards it is for their own self-serving interest, to avoid recalls in countries that pay attention to their imports. There is also a practical aspect to this policy: Our agency does not have, and never has had, the resources that would be required to know every country's mandatory, let alone voluntary, product standards and ensure that our manufacturers' exports comply with them. Internationally, it is truly a buyer beware marketplace.

Given this background, it is somewhat hypocritical of us to berate any other country for not requiring their manufacturers to abide by the myriad U.S. mandatory and voluntary product safety standards (and those in all the other countries they trade with). Other countries expect, as we do, that the receiving countries' regulators (or the marketplace) will find any problems. The problems we are seeing in the U.S. with imported products have been increasing as the volume of imports increases. Our agency's attempts (and attempts by other U.S. government agencies) to go to the source before the problem products arrive on our shores are necessary and admirable, but the system we have set up (back in the days when we were exporting a lot more products, compared to imports, than we do now) weakens our negotiating position.

What is working in our favor at the moment is that a wide assortment of fairly serious recalls from CPSC and other agencies have gripped the public's attention and have also gotten China's. I think this country has to work with China at the highest levels (and not just agency by agency) to address this problem. Along with it, we may want to take another look at our own export policy. A "do as I say, not as I do" policy is hard to sell.

Unfortunately, at the moment our best defense against imported products that violate our mandatory standards is to try to stop them at the docks. For that both CPSC and Customs need more people and the resources to support them. I note that in a recent *Time Magazine* article it stated that the Food and Drug Administration has 1,317 field investigators and inspects just 0.7% of all imports under it jurisdiction. CPSC has perhaps a total of 15 people to visit those same ports of entry out of a total field investigative staff of less than 90. I think that says everything Congress needs to

know about why products under our jurisdiction that violate mandatory safety standards find their way into the marketplace.

15. Congress should make it a prohibited act under section 19(a) of the CPSA for companies to misrepresent the scope of products covered by a recall or to misrepresent any material fact in a recall investigation that delays or otherwise hinders the agency's ability to initiate a recall.

A company that misrepresents the scope of the products affected by a recall should be subject to a penalty. In fact, a company that knowingly misrepresents any material fact in a recall investigation that delays or otherwise hinders the agency's ability to promptly initiate an effective recall should be subject to penalties by the Commission.

16. Congress should give CPSC the authority to designate importers who routinely ignore our mandatory standards as repeat offenders and to refer those names to Customs for license termination under Customs' procedures.

Whether we have leverage with the Chinese government or not, we surely have leverage with the U.S. companies that have their products made in China and with the U.S.-based importers. Importers who repeatedly bring in violative products should have their import licenses pulled, permanently.

Comments of Commissioner Thomas H. Moore to the Prism Proposal

Moore comments in blue

...WORKING PAPER ...WORKING PAPER

PRODUCT RECALL, INFORMATION AND SAFETY MODERNIZATION ("PRISM") ACT

Note: CPSC = Consumer Product Safety Commission; CPSA = Consumer Product Safety Act; FHSA = Federal Hazardous Substances Act; FFA = Flammable Fabrics Act.

Title I. Improved Enforcement Tools

Section 1. Additional Prohibited Acts

(a) Make it unlawful (under Section 19 of CPSA) to knowingly sell to a consumer a recalled product after the date of public announcement of the recall;

Rationale: Creates incentive to halt sales of recalled products quickly.

I agree with the basic premise, but I have two questions. First, there appears to be a "knowing" requirement to make selling a recalled product a prohibited act, in addition to the "knowing" requirement before a civil or criminal penalty can be assessed. No other provisions in section 19 require knowledge. I am not sure if this is intentional or merely a recognition of the "knowing" requirement in the penalty provisions.

Second, sections 19, 20 and 21 make "any person" liable for civil and criminal penalties for committing a prohibited act. I can certainly understand wanting to make sure retailers and importers who continue to sell recalled products are covered, but how far down the chain would this provision apply: thrift stores; flea markets; yard sales? When our staff has visited thrift stores in the past, for recall round-up activities, they nearly always find a recalled product or two. Our enforcement capabilities are already limited, so if this provision does contemplate reaching beyond retailers and importers to the domestic resale market, there could be major resource implications for our Compliance staff.

See my additional comments on this issue with regard to retailers in the next section.

(b) Make it unlawful for a recalling firm to fail to provide notice to any retailer or

distributor to whom it has previously distributed the recalled product at least 24 hours before notification to the general public or purchasers of the product (Section 19 of CPSA and relevant sections of other statutes);

Rationale: Assures recalling firm's distributors/retailers have advance notice so that they can comply with "stop sale" requirement.

I agree with this provision. Retailers have been complaining for years about the short notice given to them prior to a recall. However, I wonder if 24 hours is enough time. For a huge chain of stores, being able to react in that short timeframe may be difficult. Congress might want to consider making it at least a 48-hour advance notice. Recent well-publicized recalls have shone the spotlight on the difficulty of reaching the many retailers (from the mom-and pop-stores to the larger ones) that may carry a product. We are nearly always negotiating a recall with a manufacturer or an importer, not the retailer. Manufacturers usually object to our letting their retailers know about a pending recall until it is finalized, so the retailers have little or no advance notice that they need to sweep their shelves of a recalled product. Some of the retailers will only hear about it from the news reports as it is not always the case that a manufacturer will know where all of his products end up. Requiring a manufacturer or an importer to provide advance notice will go a long way to solving the problem, although ensuring that all retailers, of whatever size and however they may have ultimately received the product, know of a recall may not be possible. The proposal to make selling a recalled product after the date of the public announcement of the recall a prohibited act should also spur retailers to pay attention to our recall notices. Most of them should be able to access the Internet and could sign up to receive recall notices through the CPSC web site for the types of products they carry. Policing such a requirement at the retail level would still be haphazard, as the agency does not have the investigative force to do more than spot checks. But perhaps a few fines would bring most retailers into line. The larger stores could certainly be held accountable under such a system, but it is unclear how the mom and pop stores or stores that sell overstock and discontinued products would fare. I will be interested to hear the retailers' perspective on both of these issues.

Identifying the exact product to be recalled can also be a problem. Manufacturers are not required, in most cases, to put date codes or other distinguishing marks on their products every time they change them. Thus they often cannot tell the Commission at what point in a product's production it presented a risk, and at what point the problem was fixed (particularly if they fixed the problem before the Commission became aware of it). Because old product can stay on store shelves for quite a while and be intermingled with newer versions of the same product, this presents problems for retailers and the Commission staff in identifying which products in stores are subject to the recall. I believe the law should put the burden squarely on the manufacturer/importer/distributor to make sure the products are marked (production date codes, for example) so that problem products can be readily distinguished by everyone (including the consumer who has the product in his home). If Commission staff is unable to clearly distinguish between products that should be covered by a recall and those that should not, then that should result in the recall of <u>all</u> similar products made by that manufacturer. The Commission should not have to guess (or test) every possible permutation of a particular product to determine if it has been remedied (although we certainly should test the alleged 'fix' to make sure that the hazard has indeed

been eliminated). A company that misrepresents the scope of the products affected by a recall should be subject to a penalty. In fact, a company that knowingly misrepresents any material fact in a recall investigation that delays, or otherwise hinders the agency's ability to promptly initiate an effective recall, should be subject to penalties by the Commission.

(c) Clarify that it is a prohibited act to manufacture *etc.* a product which violates a voluntary standard upon which the CPSC has relied under Section 9(b) of the CPSA or other statute administered by the Commission;

Rationale: Makes clear that once the Commission has formally relied upon a voluntary standard, its stature is equal to a mandatory standard for enforcement purposes. Makes requirement uniform across all CPSC statutes.

This is a policy change that Congress will need to decide because it significantly alters the interplay between voluntary and mandatory standards and would require a change to the premise that underlies the statutory reliance provisions. Our statutes provide that the Commission is required to terminate rulemaking on a mandatory standard if a voluntary standard exists that eliminates or satisfactorily reduces the unreasonable risk of injury presented by the product and there is likely to be substantial compliance with the voluntary standard. Under current law, the only consequence of the Commission formally relying upon a voluntary standard under the CPSA (as opposed to simply terminating the rulemaking) is that a reporting requirement is triggered under section 15(b)(1). Presently, if a product fails to meet a voluntary standard (whether that standard has been formally relied upon or not), it does not necessarily mean the product presents an unreasonable risk of injury or is a substantial product hazard under section 15. Many products that fail to meet some provision of a relevant voluntary standard are never recalled because no hazard is presented that warrants one. Conversely a product that meets a voluntary standard is not deemed, for that reason alone, to be free of safety concerns, although there are those in industry that want a presumption that products meeting voluntary standards are deemed to be safe. The PRISM proposal would make the failure to comply with a formally relied upon voluntary standard a prohibited act making it "equal to a mandatory standard for enforcement purposes." Thus, if a product fails to comply with a relied upon voluntary standard, no section 15 analysis would be required to determine if it presented a substantial product hazard, the product would automatically be deemed to constitute an unreasonable risk of injury and be violative.

In its history, the Commission has only formally relied upon two voluntary standards and, to my knowledge, there is no problem with those products(unvented gas-fired space heaters and gasoline-powered chain saws) being introduced into commerce in contravention of the standards. The proposal that violations of relied upon voluntary standards be made a prohibited act appears to be a solution to a nonexistent problem. It, in fact, seeks to lay the groundwork for a policy change that could have far-reaching consequences in the interplay between voluntary and mandatory standards. The changes would give credibility to attempts to reinterpret the reliance provisions of the CPSA (and by extension to our other statutes as well) to allow the Commission to adopt voluntary standards as mandatory standards, with full enforcement powers, and possibly preemption

protection, without having to make the usual findings required for rulemaking and to use 'reliance' to mean something quite different than what it was originally intended to mean. I object to these changes, and their larger agenda that anticipates a policy change by the Commission, because they are contrary to congressional intent, past agency interpretation and the clear language of the statute. Congress may very well want to make such a policy change, which would also require additional wording changes in the statute, but it should do it with a clear understanding of what is involved.[1]

The reasons given for seeking to rely on a voluntary standard and enforce it as if it were a mandatory one are to reduce the time it takes to promulgate a mandatory standard and to have the full range of enforcement powers available for failure to comply with relied upon voluntary standards, especially the ability to stop violative imports at their port of entry. If the Commission could simply rely on a voluntary standard, without having to make the cost/benefit and other findings required by our statutes, it could be a much shorter process, or so the argument goes. It is true, it *could* be shorter, but unless the CPSC staff has been closely involved in the development of the voluntary standard, is completely satisfied with its provisions, and has been monitoring industry's conformance with it over a period of time, much of the underlying work that is required in promulgating a mandatory standard should still be done in order for the Commission to feel confident in relying upon the voluntary standard (the only set of circumstances under which the agency should consider relying upon it). And, of course, the premise underlying the current reliance language would have to be changed from one of keeping the federal government out of the way of effective voluntary standards to one of the federal government co-opting them and turning them, without the normal regulatory process, into mandatory standards (a significant change to the present reliance language).

Over the years, Congress has viewed the relationship between voluntary standards and federal mandatory standards in the consumer product area in varying lights. The Commission was founded on the belief that industry-formulated voluntary standards were consensus-driven *minimum* standards that sometimes did more to protect industry than consumers.[2] Over time, after some changes were made to the voluntary standards-setting procedures and CPSC staff began to have active participation in those organizations, Congress became concerned that the Commission was stifling or supplanting acceptable voluntary standards with mandatory ones, and the emphasis shifted from favoring mandatory regulation to requiring the agency to defer to voluntary standards when those standards adequately addressed the risk of injury and the standards were substantially complied with by industry.

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[1] Some domestic manufacturers in industries facing increasing competition from abroad have begun to advocate a reinterpretation of the reliance language to persuade the Commission to elevate their industry's voluntary standard to a mandatory one, as a way to create enforcement roadblocks for foreign competitors who are gaining market share and in an attempt to obtain immunity from state court civil actions through the preemption provisions of our statutes. Absent clear safety issues, foreign competition is not a concern of CPSC, but is in the purview of other government entities.

[2] "Safety itself has been a secondary consideration in the usual process of developing voluntary standards. The need for a consensus commonly waters down a proposed standard until it is little more than an affirmative of the status quo." *Final Report of The National Commission on Product Safety*, Presented to the President and Congress, June 1970, page 62.

It was in the context of Congress wanting CPSC to get out of industry's way when it was doing a good job through the voluntary standards process that the reliance language was added to the Consumer Product Safety Act. The whole thrust of the statute is to allow voluntary regulation (without any rulemaking or mandatory enforcement resources being expended) to fill as much of the regulatory landscape as possible. When we terminate a rulemaking in reliance (formally or otherwise) on a voluntary standard, the mandatory rulemaking ends as do any agency enforcement powers (other than the ability to make a substantial product hazard determination under section 15). The Commission understood this context at the time and has interpreted the provisions accordingly ever since. The Commission has only used the formal reliance mechanism twice—both times looking back at past Commission actions and determining that they met the requirements for reliance--one involved the revocation of a mandatory regulation for which the industry had adopted a more stringent voluntary standard and one was the termination of a rulemaking in which industry had adopted a solution developed in cooperation with Commission staff.[3] [4]

There are two reasons why the Commission has so rarely formally terminated a rulemaking in reliance on a voluntary standard to obtain the increased reporting authority under section 15(b)(1). First, that reporting requirement only applies to voluntary standards relied upon under the CPSA. Since the CPSA also requires the agency to promulgate regulations under the more targeted provisions of the FHSA, FFA or PPPA whenever appropriate, the result is that most of our regulations are issued under one of these three statutes where there is no advantage to the Commission (in the form of a reporting requirement) to choose formal reliance over merely terminating the rulemaking proceeding and allowing the voluntary standard to fill the void. The second reason is that the premise set up by the statutory language rarely occurs. If a voluntary standard exists that both adequately addresses an identified risk and it is being substantially complied with by manufacturers and importers, the agency would be unlikely to even start a rulemaking process. There is no need for agency intervention in the face of an effective voluntary standard. Only if the standard does not meet one of the two prongs of the test (adequately addressing the risk or likely to be substantially complied with) could the Commission step

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[3] In voting to revoke the Mandatory Standard for Unvented Gas-Fired Space Heaters, Commissioner Stuart M. Statler listed among his reasons for supporting the revocation of the mandatory standard in favor of the **voluntary** standard the following: "The Commission retains powers under Section 15 of the CPSA **to remove from the market** any unvented LP or natural gas-fired heaters not equipped with an ODS device or equivalent means to curtail the asphyxiation risk." He stated further "If [States and localities] believe the voluntary standard is not a sufficient safeguard, States and cities may now regulate the use of unvented gas space heaters **as they best see fit** without having their hands tied by the existence of a Federal rule." [Emphases in the original.] Statement of Stuart M. Statler dated August 16, 1984. Clearly Commissioner Statler viewed the revocation of a mandatory standard in reliance on a voluntary standard as terminating federal enforcement powers (except to the extent section 15 might apply, as it would to any unregulated product) and ending any federal preemption that had attached to the mandatory standard.

[4] It is also worth noting that until the adoption of the 1991 amendments, which added the reporting requirement with respect to relied upon voluntary standards to section 15 of the CPSA, the Commission felt no obligation to make any particular distinction when it was terminating a rulemaking as to whether it was "relying" on a voluntary standard because, until those amendments, no statutory consequences were attached to reliance beyond the termination of the rulemaking. Not until 1992 did the Commission go back and review past actions and identify the two Commission actions in which it was determined that their revocation and termination had been done in reliance on a voluntary standard. The Commission did this in order to give notice to the affected industries that the new reporting requirement would apply to them.

in, and then it would be to turn the voluntary standard into a mandatory standard through its normal regulatory process.

It might be useful to extend the reporting provision for relied upon voluntary standards to the other Acts we administer. For example, until the Commission began a rulemaking proceeding to address the more than 25,000 annual injuries to infants falling down stairs in baby walkers, no solutions were proffered by industry to this serious problem. Industry maintained the only solution was better parental supervision. But once the agency began rulemaking in this area, industry, working closely with Commission staff, began to work on a solution. CPSC held the rulemaking in abeyance until a satisfactory voluntary standard was issued and until staff was satisfied that there was substantial conformance with the standard. Had the baby walker rulemaking been initiated under the CPSA rather than the FHSA, the Commission might have considered formally relying upon the voluntary standard. This would have triggered the reporting requirement under section 15 of the CPSA and would have resulted in that voluntary standard being referenced in the *Code of Federal Regulations* as one upon which CPSC has relied. While it is unknown whether the reporting provision and the *CFR* reference would have prevented any of the recalls of noncomplying baby walkers that occurred after the acceptance of the voluntary standard by the Commission, it is possible that they could have made a difference.[5] [6]

Ultimately it is for Congress to decide whether it wants to again change the interplay between voluntary and mandatory standards. Since Congress last addressed this issue, many industries have often fought long and hard to devise a voluntary standard in order to avoid a mandatory one. It would be instructive to know their reasons for not wanting a mandatory regulation. Is it simply the desire to keep the illusion of control over their product? I say "illusion" because the Commission should not accept a voluntary standard solution that provides less safety for the consumer than it could achieve through rulemaking, whether it formally relies upon the voluntary standard or not. Or is industry reluctant to give CPSC greater enforcement powers over their products? Whatever the reasons, we should move carefully in this area. The ability to too easily transform voluntary standards into mandatory ones could remove any incentive manufacturers have to develop voluntary standards to avoid federal regulation (there would likely be no effective voluntary baby walker standard today had there not been the real threat of mandatory regulation). Given the success the Commission has had over the years in getting various industries to adopt effective voluntary standards in order to avoid federal regulation, we would not want to lose the leverage we currently have in that regard. And given the shrinking resources of the Commission, we often need the resources of industry to develop a workable standard—resources they have been much more willing to commit when working on a voluntary standard than when they are facing the promulgation of a mandatory rule. Resources would also be an issue if any significant number of voluntary standards suddenly had to be enforced as mandatory standards. Every new mandatory regulation creates expectations in consumers and industry alike that the Commission is

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[5] The baby walker voluntary standard has been instrumental in the dramatic decrease in injuries to children of almost 90 percent from 1992 to 2005.

[6] Even if no other changes are made to the reliance provisions by Congress, I think the Commission should consider elevating the prominence of the relied upon standards in the text of the *CFR*, particularly if more voluntary standards are added to the current list of two. As it stands now, those standards are effectively buried in the CFR.

going to be able to keep noncomplying products out of the marketplace. As our budgetary resources and our personnel decline, and the number of imported products grows, this is less and less of a realistic expectation.

While I do not believe the current statutory language can be used to give formal reliance on a voluntary standard any consequence beyond the imposition of the reporting obligations in section 15, I think Congress should address whether other consequences should flow from formal Commission reliance on a voluntary standard in lieu of a mandatory one and clearly state its views on the matter. Congress should also consider giving the Commission the ability to do two-step rulemaking (instead of three-step) when the Commission, in its discretion, feels a shorter process may be appropriate. One case might be where the Commission believes an adequate voluntary standard exists (based on active staff participation in the development of the standard) that addresses a real risk of injury but which, for some reason, is not being adequately complied with and where the Commission's enforcement powers could make a significant difference in that compliance. I say "significant" because one could always make the argument that we have more enforcement tools in the mandatory setting than in the voluntary one.

Congress also needs to consider the effect the preemption of state regulations, standards, and state civil court actions (in light of the new interpretation by the current Commission in that area) could have if reliance on consensus-developed voluntary standards were extended beyond the CPSA and too casually used in lieu of full-blown federal rulemaking proceedings. I do not believe we want consensus-driven voluntary standards routinely becoming the ceiling instead of the floor in protecting consumers from product hazards that may present an unreasonable risk of injury or death. That would run contrary to the purpose for which the Commission was established (see footnote 2, above).

(d) Make it unlawful to fail to furnish a certificate of compliance with a mandatory standard under any statute administered by CPSC or any voluntary standard relied upon by the Commission or to issue a false certificate of compliance (CPSA Section 19 and relevant sections of other statutes);

Rationale: Applies CPSA certificate requirement uniformly across all CPSC statues, and treats voluntary standards formally relied upon by the Commission as equivalent to mandatory product safety standards for certification purposes.

I agree to the extent it extends the certification provision to mandatory standards under our other statutes. As to extending it to relied upon voluntary standards, that would depend upon what decision Congress makes with regard to expanding the reach and the meaning of such standards. See my answer to the previous proposal.

(e) Make it unlawful to fail to provide information in timely response to a subpoena from the Commission (CPSA Section 19 and relevant sections of other statutes);

I agree, although I would like to see the language when it is drafted with regard to what

constitutes a "timely" response.

Rationale: Provides explicit enforcement mechanism for failure to respond to a Commission subpoena in timely fashion.

I agree.

(f) Prohibit stockpiling under all statutes administered by the Commission to the same extent as under the CPSA (Section 9(g)).

Rationale: Conforms other CPSC statutes to anti-stockpiling provisions of CPSA

I agree.

Section 2. Civil and Criminal Penalties and Other Remedies

(a) Add asset forfeiture as a potential additional criminal remedy under any statute administered by the Commission (Section 21 of CPSA and relevant sections of other statutes);

Rationale: Allows CPSC to act to assure that any gain from criminally violative activity is not retained by perpetrator.

I agree.

(b) Give the CPSC the authority to impose penalties of up to $2 million administratively (without need for Department of Justice referral and initiation of federal court action) under CPSA, FHSA and FFA (penalty would still be subject to judicial review);

Rationale: Streamlines civil penalty process by allowing CPSC to proceed administratively rather than via judicial action in many cases.

I am undecided on this proposal. Given that this requires an administrative proceeding that could take quite a bit of time and agency resources (one of the reasons we so rarely have administrative proceedings in the recall area) and then would be subject to judicial review, I'm not sure this would streamline the process. I also worry about the $2 million cap becoming a barrier to Justice Department referrals, further limiting the use of any increased penalty authority.

(c) Increase the cap on civil penalties under the CPSA, FHSA, and FFA to $10 million, to be phased in over 4 years. (Section 20 of CPSA; Section 5 of FHSA; Section 5 of FFA);

Rationale: Gradual phase-in reduces likelihood of unmanageable surge in unnecessary reports from firms or that some firms may stop submitting necessary reports. Uniformity across all statutes makes enforcement tools consistent for all products under Commission jurisdiction.

I have gone on record several times as supporting the complete elimination of any civil penalty cap. The civil penalty provision already lays out factors to be considered in determining the amount of any penalty: "the nature of the product defect, the severity of the risk of injury, the occurrence or absence of injury, the number of defective products distributed and the appropriateness of such penalty in relation to the size of the business of

the person charged." Having a monetary cap on top of those factors (particularly such a small cap) serves no useful purpose other than to make it easier for companies to include the risk of potential consumer harm in their cost of doing business.

Because the Commission strives for negotiated civil penalty settlements whenever possible, the existence of a cap means that, even in the most egregious cases, the cap amount is where the agency has to start its negotiations. Unless we are willing to take the case to court, we are always going to be settling the case for less than the civil penalty cap and since the cap itself is so low, going to court will usually be the difference of only a few hundred thousand dollars. We often find ourselves accepting penalties below what we think is appropriate because the cost of getting the relatively small incremental amount through a lengthy court proceeding is not worth the time and resources. Our negotiating room is thus extremely limited and obvious to every company we deal with. We also have little room to make meaningful distinctions in assessing civil penalty amounts among the types of violations and the sizes of the companies involved. Industry complains that they cannot discern a rationale for our civil penalty decisions. If the cap was not putting unnatural constraints on the way the statutory factors should work to determine penalties, the basis for our decisions would be more cogent and thus more obvious. Removal of the cap, or raising it significantly, would put the agency in a stronger negotiating position, allow us to make more reasoned distinctions among violators and the penalties assessed against them and would make business more hesitant to ignore their safety responsibilities to consumers.

If we are going to still have a cap, I see no particular reason to phase it in. We have complained for years that we really do not get the reports that we should be getting under section 15. If we suddenly got a surge of reports, I would say "bravo." The whole point of the staff's retailer reporting model is to try to get the number of reports up because we know we are not seeing all the incident reports we should be seeing.

On the whole, this proposal is better than no change, but, given how long we have labored under this low cap, and since we finally have the opportunity and the interest in Congress to do something about it, I would hope we would make the strongest change possible.

(d) Clarify that the list of 5 statutory factors to be considered by the CPSC in determining a civil penalty amount under the CPSA, FHSA or FFA is not exclusive [Section 20(b),(c) of CPSA; Section 5(c)(3),(4) of FHSA; Section 5(e)(2),(3) of FFA].

Rationale: Makes clear that while Commission must consider factors enumerated in the statute, it may in its discretion address other factors as appropriate to the particular matter under consideration.

I agree that this provision needs to be clarified, but I take no position as to what the original intent of Congress was with regard to the exclusivity of those provisions. Last year, the Commission considered whether certain other factors that are not listed in the statute should be considered in assessing civil penalties. The Commission has gone out for public comment on these additional factors. A copy of my statement discussing the proposed factors can be found at http://www.cpsc.gov/pr/statements.html. Congress may want to review the factors currently in the statute to see if additional factors are warranted (such as

the number of violations by the same company) and to clarify whether the Commission has the discretion to supplement the statutory list.

In addition to this proposal I would like to see the Congress clarify the reference in the second sentence of section 20(a)(1) of the CPSA with regard to the clause "any related series of violations." It would seem to me that if a company violates multiple provisions of section 19, for example, sells a product that violates a mandatory standard, has falsely filed a certificate with the Commission stating that the product meets the standard, and fails to file a section 15 report about the failure to comply with the standard, that the Commission should be able to seek a separate penalty amount for each such offense and that they not all be swept up under one civil penalty cap amount. There are differing opinions as to what that second sentence means—some will argue that the maximum penalty will be the same no matter how many violations occur with regard to the same product--and I believe this may be why we so rarely go after any other penalty than one for failure to file a section 15 report. If there were no civil penalty cap, this would not be an issue.

I also do not know why, if a person "knowingly and willfully" violates section 19, they also have to receive notice of noncompliance from the Commission before they are subject to a potential criminal penalty. Congress may want to reexamine the need for this requirement.

Section 3. Recalls

(a) Clarify that the CPSC must approve the consumer remedy (refund, repair or replacement) proposed by a firm in a mandatory recall under Section 15 of the CPSA or section 15 of the FHSA;

Rationale: Makes clear that Commission is the final arbiter of the remedy in rare instances of mandatory recalls (recalls that are mandated after failed negotiation, an administrative law hearing, Commission review and subject to judicial review).

I agree. In May of 2000, I voted to endorse draft legislation that would have given the Commission the ability to order manufacturers, distributors or retailers to take whatever other action the Commission determines is in the public interest, if the Commission determines that the remedy chosen by the company in a mandatory recall is not in the public interest. A copy of the draft legislation and the press release that accompanied the vote on the legislation (as well as the statement in opposition by Commissioner Mary Sheila Gall) can be found at the following link http://www.cpsc.gov/library/foia/ballot/ballot00/ballot00.html. This legislation also eliminated the civil penalty cap and the requirement of notice of noncompliance in the criminal penalty provisions.

Companies have used the fact that they can elect the remedy if the agency pursued administrative action, as a basis for arguing with Commission staff that their proffered voluntary recall action plan is as much as they will do. Staff is thus constrained by the statutory consequences of failing to negotiate a voluntary recall even when staff believes that the remedy is inadequate. Because time is of the essence in removing a hazardous product from the marketplace, having to go through an administrative process (in addition

to the cost such a process entails), has led to less than robust recalls on occasion. It is true that the agency can get an injunction to stop future distribution of the product during the pendency of the administrative proceeding, but that does not get the product out of the hands of consumers who already own it.

Under the Consumer Product Safety Act, if we fail to negotiate a cooperative recall with a company, we can take the matter to an administrative proceeding before an administrative law judge. If at the end of that proceeding, the Commission determines that a recall of a product is required in the public interest, the Commission may "order the manufacturer or any distributor or retailer of such product to take whichever of the following actions the person to whom the order is directed elects ...." The election is among the options of repair, replacement or refund. The statute goes on to say, "An order under this subsection may also require the person to whom it applies to submit a plan, satisfactory to the Commission, for taking action under whichever of the preceding paragraphs of this subsection under which such person has elected to act." [Emphasis added.] Thus, by statute, the Commission cannot require a certain remedy but I believe it can insist that whatever remedy is chosen be satisfactory to achieve an effective recall. Nevertheless, making it clear that the Commission is 'the final arbiter' on the choice of a recall remedy would be helpful in the voluntary recall negotiation stage, even though the Commission has rarely taken the steps necessary to go to the mandatory recall stage.

(b) Authorize CPSC to order further notification of consumers and additional corrective action if consumers are not adequately protected by the original corrective action.

Rationale: Provides clear authority to the Commission to take additional action if remedy as initially implemented proves insufficient to adequately protect consumers.

I believe we already have this authority and we have insisted in several cases in the past that companies take additional action if their original recall remedy is not effective. However, I support any change that would strengthen our ability to act in this area.

Section 4. Information and Reporting

(a) Require reports under section 15 whenever a manufacturer, distributor or retailer obtains information which reasonably supports the conclusion that a product fails to comply with (i) a mandatory standard or ban adopted by the Commission under any statute it administers; or (ii) a voluntary standard relied upon by the Commission under any statute it administers;

Rationale: Adds reporting requirements for violations of mandatory standards under all statutes, as well as voluntary standards upon which the Commission may rely.

I agree with extending the reporting requirements of section 15 to our other statutes.

(b) Require any retailer or distributor of any consumer product to provide, to the extent practicable, the name and address of any company who supplied the product to such retailer or distributor (would amend Section 16 of CPSA);

Rationale: Such information should be in the hands of the retailer or distributor. Access to it would allow CPSC to reach other possible routes for product to get to consumers.

I agree, although I would add "importer" to the list.

(c) Require any manufacturer, importer or distributor of a consumer product to provide, to the extent practicable, the name and address of any entity to which it sold or otherwise made available such product for resale (CPSA Section 16).

Rationale: Such information should be in the hands of the manufacturer, importer or distributor. Access to it would allow CPSC to identify other possible routes for the product to get to consumers.

I agree. While this, and the proposal just above it, appear to be covered in section 19(a)(3), the Congress might want to consider a separate reference to them in 19(a) to make it clear that failure to abide by these requirements are prohibited acts and to spur companies to obtain and retain such information.

Section 5. Bonding of Violative Imports

(a) Permit the Commission or Customs to require the posting of a bond sufficient to pay for the destruction of a shipment of consumer products where the expense may be substantial or there are concerns that a firm may disappear or abandon the shipment.

Rationale: Assures that if CPSC must address disposal of violative products, funds to do so are available from the importer. As an example of the need, disposal of violative fireworks can involve significant costs.

I agree.

Section 6. Foreign Internet Sales

(a) If a consumer product is sold or offered for sale to consumers on the internet by an entity located outside the United States, that entity shall be deemed the manufacturer/importer and shall maintain the original or a copy of the records relating to such sales within the United States.

Rationale: Allows CPSC to reach extraterritorial internet sellers and assures that records necessary to track such sales are available in the United States.

I do not know what enforcement tools we would have to reach foreign internet sellers, and given that, I am not sure what use we would make of the sales records, apart from taking it upon ourselves to notify purchasers if we discovered a problem with a product. I appreciate, as Acting Chairman Nord put it, that this is more of a place marker, than an actual solution. I think most foreign products still end up coming through a U.S. distributor as opposed to being sent directly to the consumer, due to the product having to clear Customs and tariffs having to be paid. This is an area that will bear continued watch

and thought. How much of an actual problem it is at the moment I do not know.

Section 7. Information Disclosure Reform

(a) Reduce the notice period of CPSA section 6(b) from 30 days to 15 days and allow for electronic notice to a firm by the CPSC;

Rationale: Reduced timeframe facilitates timely recalls and recognizes 21st Century modes of electronic communication.

The entire rationale for section 6(b) of the CPSA needs to be revisited. Congress should decide what kind of information it wants consumers to have about potentially hazardous products and when that information should become available. The Committee may want to look at certain of the powers that have been granted to the National Highway Traffic Safety Administration (NHTSA) and consider how extending similar powers to the CPSC could enhance our consumer protection abilities. For example, anyone can go onto the NHTSA web site, type in the make, model and year of an automobile and read consumer complaints about the car. The complaints are not censored, nor are they verified, and they do not necessarily result in a recall. They are a compendium of comments by owners of cars who were concerned enough about some feature of their car to file a complaint. It is a car buyer's bonanza. Compare that to CPSC where complaints are kept secret (except from the manufacturer) and consumers only know about a problem with a product from CPSC when the agency has issued a recall, and then they only know what the agency and the company have agreed to make public. I cannot think of any good reason why there should be a difference with what a consumer could be aware of when he is thinking of buying a particular car (or who is having a problem with one he already owns) and, for example, what a prospective or current All- Terrain Vehicle (ATV) owner could know about ATVs?

NHTSA also has the ability to publish <u>initial</u> defect determinations about a vehicle in the *Federal Register* for everyone to see. I think a lot of the foot-dragging and reluctance to provide the agency with information would disappear if companies knew that their lack of cooperation in a recall could result in the public knowing that the agency staff has made a determination that their product presents a hazard.

The information from such an open process would not only benefit the consumer, it would benefit the Commission, for it could not help but generate input from other consumers who had had similar problems with a product, but who did not, for whatever reason, report it to the CPSC. We are always looking for ways to spot potential problems at the earliest possible moment. It is often not easy to recognize when a product incident goes from being what might simply be an aberration involving an unusual interaction between a consumer and one product, to its being a systemic problem with a product line that requires action by the Commission. The more that we learn from consumers about their product experiences, and are able to share with the public, the more likely we are to stop a problem before it causes serious harm. The Commission is forced to operate on a 'need to know' basis and, oddly enough, the consumer is not on the 'need to know' list until after a recall is finalized.

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. All I can say is that 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, but given the often very difficult time we have obtaining information from some companies now, I doubt seriously that 6(b) plays much of a role in encouraging disclosure. The provision does come into play at a later stage in the process, after the company has agreed to a recall and when it is trying to paint the brightest picture of its product's failure. The elimination of 6(b) is not going to result in the agency disseminating false information about a product or a company. No purpose would be served by that and it would only further confuse consumers. Consumers want timely, accurate warnings about products that may cause harm to their families; information that is not filtered through some corporate public relations firm.

Speaking of public relations, I also think our recall notices may not be designed in a way that garners them the attention they deserve. They have been formalized and homogenized over the years to the point where they look like corporate press releases about quarterly profits, rather than serious safety warnings that people need to heed. I think we need to look at these releases in a different way. To the extent staff feels they are constrained in making the releases more attention-getting because of 6(b), then that is one more reason to change 6(b).

(b) Expand the exemptions from CPSA section 6(b) to include (i) violations of any CPSC mandatory standard, ban or relied-upon voluntary standard (not just CPSA-promulgated standards); and (ii) prohibited acts under any statute administered by the Commission;

Rationale: Extends application of section 6(b) exemption to relied-upon voluntary standards and clarifies that section 6(b) exemption runs to prohibited acts under any CPSC statute.

If some version of 6(b) is retained (and subject to whatever decision the Congress makes as to relied upon voluntary standards), I agree that we should extend the exemptions to the other statutes.

(c) Amend Section 29(e) of the CPSA to allow the CPSC to share information with any other federal agency for law enforcement purposes and to share any product safety-related information with any federal, state, local or foreign government who has established the ability to protect such information from premature public disclosure and who agrees to protect such information;

Rationale: Clarifies that CPSC can share any information with government enforcement partners, not just "reports." Adding foreign governments recognizes global marketplace.

I agree in principal, but I would like to see the exact language of the proposed statutory change.

(d) Clarify that section 6(b) does not prohibit the disclosure of information to foreign governments concerning products manufactured within their own national territory by companies not subject to U.S. jurisdiction;

Rationale: Recognizes global marketplace and addresses situations where direct U.S. jurisdiction over foreign manufacturer may not lie.

I agree, assuming we still have a 6(b) provision and assuming that the preceding proposal does not already cover that issue. I would also want to make it clear that this pertains only to information that the agency elects to disclose, so that we are not put in the position, for example, of having to disclose information to the government of a foreign manufacturer at a sensitive point in a recall negotiation with the importer of the product.

(e) Provide that reports to the Commission under section 15 shall be given the same consideration as reports under section 37.

Rationale: Increases incentive to provide prompt and full information to CPSC. Makes section 15 provisions consistent with existing section 37 provisions.

I do not know what this proposal attempts to do or what it amends.

I would like to see section 37 amended to enable the Commission to get more information from lawsuits filed against manufacturers. Congress should amend section 37 of the CPSA to require reporting when three or more individual lawsuits involving the same product are filed (or when one class action lawsuit is filed) instead of when they are settled. Given how long cases can be strung out, it is fairly easy for manufacturers to avoid the current reporting requirement and, indeed, we get few reports from it. The 24-month period should be expanded or eliminated as it serves no useful purpose, other than to cause companies to be creative about their delaying tactics.

Title II. Regulatory Reform

Section 1. Streamline Overall Regulatory Process

Eliminate the requirement (but not the option) of issuing an advance notice of proposed rulemaking (ANPR) prior to the issuance of a notice of proposed rulemaking (NPR) relating to standards or bans under any statute administered by the Commission.

Rationale: Enables Commission to issue and update mandatory standards more efficiently where warranted. Commission could still, in its discretion, issue ANPR with regard to either potential mandatory or relied-upon voluntary standard.

I agree. Congress should give the Commission the discretion to use two-step rulemaking in all of its statutes, instead of three-step rulemakings. Another example where the Commission might decide to streamline the process and use the two-step process (in addition to the example given earlier under the discussion of voluntary standards) is when

the Commission is making amendments to current regulations that do not change the overall thrust of the regulation.

Section 2. Efficient Enforcement Authority

Grant CPSC authority to promulgate regulations for the efficient enforcement of any statute it administers (just as the CPSC now has under Section 10 of the FHSA).

> Rationale: Clarifies that Commission can issue enforcement regulations in addition to consumer product safety standards under any of its statutes where warranted to carry out mission.

I agree.

Section 3. Eliminate Unnecessary Regulatory Requirement

Correct disparity in rulemaking process between Sections 2 and 3 of FHSA by eliminating the requirement that the CPSC follow the procedures of the Federal Food, Drug and Cosmetic Act.

> Rationale: Eliminates confusion between rulemaking under Food, Drug and Cosmetic Act and informal rulemaking procedures otherwise called for in these sections.

I agree.

Section 4. Strike Section 30(d) of CPSA

Eliminate the requirement to make findings, with public notice, before regulating under the CPSA vs. other statutes.

> Rationale: By eliminating two step proceeding, allows for more expedited issuance of CPSA rather than FHSA, FFA, or PPPA standard where warranted.

I do not agree with this change. The rule that is required to be issued under section 30(d) issues at the same time as the proposed rule, so it is not a two-step proceeding in the sense that it causes cumulative delay. The comment period on the rule to explain why the Commission has chosen to regulate under the CPSA runs right along with the time for comments of the proposed rule itself. Until such time as all of our statutes are combined into one comprehensive safety statute and until such time as choosing one statute over another for procedural or other advantages disappears, I think it is important for the Commission to continue to explain why it has chosen to proceed under the CPSA as opposed to one of the other statutes. See, for example, the Proposed Rule to Regulate Under the Consumer Product Safety Act Risks of Injury Associated With Multi-Purpose

Lighters That Can Be Operated by Children, September 30, 1998 issue of the *Federal Register*, Volume 63, Number 189, pages 52393-52397 http://www.cpsc.gov/businfo/frnotices/fr98/riskmult.html. This contains a thorough and informative explanation of why this hazard was regulated under the CPSA as opposed to the FHSA or the PPPA.

Section 5. Treaty Conformity

Eliminate the 60 day deadline for publishing final rules. Executive Order 12889 requires minimum 75 day comment period. (Section 9(d) of CPSA).

> Rationale: Conforms rulemaking process to notice requirements under North American Free Trade Agreement.

I agree.

Section 6. Expand Certification Requirements

Extend existing certification requirement under CPSA (Section 14) to all statutes administered by the Commission.

> Rationale: Avoids confusion among disparate certification and labeling provisions of CPSA, FHSA, FFA, and PPPA.

I agree.

Section 7. Relied-upon Voluntary Standards

Clarify that informal APA rulemaking requirements are to be followed under the "notice and comment" provisions of Section 9(b) of the CPSA (after other, existing prerequisites to Section 9(b) are met, e.g., that there be an extant mandatory rulemaking underway, etc).

> Rationale: Makes clear that full notice and comment rulemaking using Administrative Procedure Act process is the mechanism for the Commission to make "relied-upon" determinations.

As I indicated above, Congress must decide whether it wants to change the current balance between voluntary and mandatory standards. If it does decide that it wants to adopt a system that makes it easier for the Commission to convert existing voluntary standards into mandatory ones, then the two-step rulemaking process would be appropriate.

Section 8. Rulemaking Authority

Authorize the Commission to adopt rules implementing any of the provisions of this Act ("PRISM").

Rationale: Explicitly enables the Commission to implement the other provisions of PRISM.

The Commission should have the ability to adopt rules to implement whatever changes Congress makes to our statutes.

Title III. Technical Revisions

Section 1. CPSC Jurisdiction

(a) Clarify the jurisdiction of the National Highway Traffic Safety Administration vs. the CPSC over "dual use" motor vehicle equipment (*e.g.*, infant carriers and children's car seats that can be removed and used away from the vehicle) (Section 3 of CPSA; Section 2 of FHSA);

Rationale: Eliminates confusion over which agency can take action depending on whether issue involves in-car or out-of-car problems.

I agree.

(b) Add "medical devices" to list of products not within CPSC jurisdiction under FHSA (Section 2(f)(2)).

Rationale: Eliminates inconsistency with CPSA and places "medical device" jurisdiction with the Food and Drug Administration.

I do not see any reason for this change. The FDA does not regulate the same type of hazards that we regulate under the FHSA. I am reluctant to give up any jurisdiction without a good reason.

Section 2. Other Technical Revisions

(a) Under FFA, delete reference to enforcement under the FTC Act and replace with CPSA enforcement mechanisms. (Section 5(b));

Rationale: Modernizes and simplifies FFA enforcement process to be consistent with other CPSC Acts.

I agree.

(b) Delete section CPSA section 36, FHSA section 21 and FFA section 17;

Rationale: These congressional veto provisions are superseded by the Congressional Review Act.

I agree.

(c) Add "records" to inspection authority under FHSA to make consistent with CPSA (FHSA Section 11(b));

Rationale: Clarifies that FHSA inspection authority is coincident with that under CPSA.

I agree.

(d) Strike "dealer" and replace with "retailer" under Section 15 of FHSA;
Rationale: Makes clear in the FHSA that Commission has authority over the last commercial entity before the ultimate consumer.

I agree.

Title IV. Reauthorization of CPSC

Section 1. Authorization of Appropriations

CPSC to be authorized to be appropriated such sums as may be necessary to carry out its activities for FY '09 and thereafter. (Amends section 32 of CPSA).

Rationale: Multi-year authorization avoids decade and a half lapse like that which has occurred since 1990.

I agree.

Consumer Federation of America

July 30, 2007

CFA's Recommendations for CPSC Reauthorization

1. Increase CPSC's Budget
    a. Modernize Laboratory
    b. Testing and Research for CPSC Regulatory, Compliance, Enforcement and Recall Activities
    c. Nanotechnology
    d. Increase import surveillance
    e. Decrease FOIA delays through appropriating more funds for FTE's dedicated to FOIA compliance
    f. In depth studies on particular product areas such as playgrounds
    g. Policing the marketplace

2. Substantive Areas of Concern
    a. ATVS
    b. Recall Effectiveness
    c. Drowning Prevention
    d. Lead in Children's Products
    e. Lack of mandatory standards for certain children's products
    f. Baby Bath Seats
    g. Amusement Part Safety- authority over fixed site amusement parks
    h. Hazard Warning Labeling of toys on the Internet
    i. Furniture Tip-Over Prevention
    j. Yo-Yo Water Balls

3. Other Statutory Issues:
    a. Quorum- need an emergency solution
    b. 3rd party independent testing and certification of children's products
    c. Eliminate Cap on Civil Penalties for all Statutes CPSC administers
    d. Eliminate Section 6(b) of CPSA
    e. Changes to section 15(b)
    f. Require manufacturer and other identifying information on products
    g. Changes to section 37 of CPSA
    h. Banning sale and export of recalled products to consumers and other commercial entities
    i. Preemption

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EIGHT POINTS OF ACTION

Eight points of action[1] to help safeguard the health and safety of American consumers from the onslaught of unsafe Chinese-produced (and other imported) consumer products and foods.[2]

1. Provide increased resources to government safety agencies to prevent unsafe products from crossing our borders;
2. Hold suppliers, importers, distributors, and manufacturers accountable for bringing unsafe products to the market by requiring pre-shipment inspections and testing to ensure product safety;
3. Develop U.S. government-administered, third-party safety certification programs for all products;
4. Develop a product traceability program for both country-of-origin labeling for food and consumer products as well as for all components and ingredients
5. Require that importers post a bond to ensure they have sufficient resources to recall their products should they prove dangerous or defective;
6. Give all agencies with enforcement authority the power to levy meaningful civil penalties for manufacturers, importers, distributors, and retailers who fail to comply with regulations, and criminal penalties for those who knowingly and repeatedly jeopardize public safety;
7. Authorize mandatory recall authority for all government agencies; and
8. Require all government agencies to publicly disclose information pertaining to safety investigations and reports of adverse events.

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[1] These eight points were excerpted from the testimony of Donald L. Mays, Senior Director, Product Safety Planning & Technical Administration for Consumers Union, presented to the July 18, 2007 Commerce Committee Meeting entitled, "Ensuring the Safety of Chinese Imports: Oversight and Analysis of the Federal Response." Consumers Union (www.consumersunion.org) is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to provide consumers with information, education and counsel about good, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. Consumers Union's publications carry no advertising and receive no commercial support.

[2] Consumer Federation of America (http://www.consumerfed.org), a nonprofit association of 300 consumer groups and, a combined membership of more than 50 million people dedicated to advancing the consumers' interest through advocacy and education, joined Consumers Union in supporting the testimony presented.

Issues for Perfect CPSC Reauthorization

Organizations involved in formulating this list and which generally support these additions**, include:

American Academy of Pediatrics, Consumer Federation of America, Consumers Union, Danny Foundation, Kids in Danger. Safe Kids, U.S. PIRG

**Please note, however, that not every organization supports or has a position on every suggested change. Please consult with each individual organization to determine its position, if any, on a particular suggested addition.

Please further note that most suggestions seek to amend the Consumer Product Safety Act (CPSA). The CPSA is codified at 15 U.S.C. 2051-2084. It is Public Law 92-573; 86 Stat. 1207, Oct. 27, 1972.

Issues to be included to strengthen CPSC's Reauthorization:

1. Increase funding to CPSC.

2. Provide specific funding increases for the improvement of CPSC's laboratory.

3. Civil Penalties -- Amend section 20(a) of CPSA- to do one of the following:

-eliminate the cap

- create a scale where there would be greater fines for more egregious Section 19 violations or a sliding scale based on percent of companies income.

4. Amend section 15 (election of remedies) of CPSA. Manufacturers should not have the unfettered right to choose among the recall remedies. The compliance staff should have a check on the selection of remedies. The language should be changed from "may" to "shall" to set forth what recall remedies are acceptable.

5. Amend Section 37(a) to require manufacturers to report to CPSC when three or more lawsuits are filed (not settled) about the same product that allege that or death has been caused by that product and that product falls under CPSC's jurisdiction. Add requirements for manufacturers to report a product to CPSC when it is the subject of any combination of three civil actions filed, settlements in civil actions, settlements or claims where a civil action was not filed, or court judgments that involve an allegation of serious bodily injury or death.

6. Section 15 self-reporting requirement: Reduce the 30 day time allotted to manufacturers to report substantial product hazards to within 20 days of knowledge of the product hazard.

7. Repeal section 6(b) of CPSA, a major obstacle to timely release of product safety information.

8. Amend section 3 (a) (1) (I) of CPSA to close the fixed site amusement parks loophole by returning CPSC oversight to fixed sight amusement parks. Delete the following from section 3(a) (1) (I), "Such term does not include such a device which is permanently fixed to a site."

9. Amend section 24 of the Federal Hazardous Substances Act (FHSA, 15 U.S.C. 1261-1278, Public Law 86-613; 74 Stat. 372, July 12, 1960) to require choking hazard and other mandatory safety warnings to be posted on web sites and catalogues which act as the point of purchase.

10. Recall Effectiveness- Amend section 15 of CPSA to require manufactures to provide a means of directly communicating information of recall to consumers- either registration card, electronically or other means of technology.

- Require manufacturers, etc to report existence of recall to retailers and all commercial customers within 24 hours after issuing the recall or warning.

- Require all entities within stream of commerce to post recall to web site, if in existence, within 24 hours of issuance of recall

- Require manufacture, retailer, etc to communicate with known consumers, notice of the recall.

- Retailers, after receiving notice of the recall, must remove recalled product from shelves and web site within 3 business days.

- Retailers must post notice of recall in store for 120 days after issuance of recall.

11. ATV Safety- Require CPSC to pass a rule that would ban the sale of adult-size ATVs for use for children to codify the existing voluntary ATV action plans. Another approach is to support the passage for strong state laws that would set minimum age requirements for operating and riding ATVs through providing grant monies to encourage state legislatures and/or safety agencies to pass strong ATV state safety laws. CPSC staff should be allowed to advise state officials on implementing such laws. CPSC should have a database which helps understand which state laws are most effective. Require CPSC to issue annual reports documenting their efforts to reduce ATV deaths and injuries.

12. Baby Bath Seats- Language should direct CPSC to institute a ban on baby bath seats and to recall existing bath seats which don't comply with existing voluntary standards.

13. Direct CPSC to write regulations that ban the export of consumer products banned or recalled in this country from being sent to other countries.

14. Amend ethics and disclosure rules to require greater disclosure by CPSC General Counsel and others of interactions between CPSC staff, the General Counsel, Commissioners or Chairman, and stakeholders and their representatives.

15. Change language that would allow the CPSC to pursue mandatory rule making even if industry is working on a voluntary standard.

16. Make criteria for making a mandatory rule less difficult to pass and shorten the bureaucratic process.

17. Pre-market testing and approval for selected products, especially children's products.

18. Create availability of funding for extramural grants as part of an expanded research function of the CPSC

19. Require annual recall effectiveness reports to congress including actions/remedies taken and numbers of items returned/accounted for any active recall.

20. For the mandatory standards that exist, CPSC should require proof of testing to the standard. For instance, there have been 10 recalls of more than 2.3 million pacifiers since 2000 that don't meet the mandatory standard. CPSC should be able to require companies to prove they meet the standard before sale, rather than just recalling after the fact.

21. Require the CPSC to develop fire safety standards in the following areas: fire safe cigarettes, [1] fire safe candles,[2] residential bedding systems (mattresses, foundations, accessories, etc) and upholstered furniture.

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[1] Cigarette fires are the leading cause of fire deaths in the United States, resulting in 800 deaths, including 100 children, in 1998. New York State has a fire safe cigarette standard based on the National Institute of Standards and Technology (NIST) testing methodology for cigarettes. This is one example that the Commission could consider in developing a national standard for fire safe cigarettes.

[2] Candle fires resulted in 170 deaths and 1,200 injuries in 1998, representing a 750 increase in deaths from 1980 to 1998.