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.