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Legislative Hearing on the
CPSC Reform Act of 2007, S. 2045

Before the Subcommittee on
Consumer Affairs, Insurance and Automotive Safety

The Honorable Mark Pryor, Chairman

U.S. Senate

Committee on Commerce, Science and Transportation

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Chairman Pryor, Senator Sununu, members of the committee: I am Edmund Mierzwinski, Consumer Program Director of the U.S. Public Interest Research Group. U.S. PIRG serves as the federation of state PIRGs, which are non-profit, non-partisan public interest advocacy organizations with one million members across the country.

We are pleased to present our views at this Legislative Hearing on the CPSC Reform Act of 2007, S. 2045. The state PIRGs have long been concerned with the important matters of consumer product safety and the ability of the Consumer Product Safety Commission (CPSC) to protect all of us, but especially the littlest among us, children, from preventable hazards. For example, according to data¹ from the CPSC, at least 20 children died in 2005 from toy-related injuries. Nine of the children died from choking or asphyxiating on a toy, balloon or toy part. One child was killed due to intestinal blockages from small, powerful magnets.

Since 1986, we have conducted toy safety research and education projects to avoid such tragic and preventable deaths and injuries. Our annual *Trouble In Toyland* toy safety reports² over the last 21 years have led to at least 120 corrective actions or recalls by the CPSC and manufacturers. These reports have emphasized the hazards posed by choking on small parts, ingestion of magnets and the chronic hazards posed by unnecessary exposure to lead, phthalates and other chemicals known to be toxic.

We say “at least 120 corrective actions” because we believe that our reports have led to more actions than those reported to us.³ Over the last few years, CPSC has not responded to our Freedom of Information Act (FOIA) requests for information about recalls and enforcement actions taken as a result of our *Trouble in Toyland* reports. While we believe that the CPSC has grossly over-interpreted the notorious Section 6(b) of the Consumer Product Safety Act in denying us information on these toys that have already been prominently reported in the news, and indeed, have had actions taken on, we are pleased that your legislation would drastically improve the public’s right to know under Section 6(b).

We were also active in the legislative and regulatory process that led to the passage of the 1994 Child Safety Protection Act, which was the last major Congressional amendment to the CPSC’s authority.

Summary:

First, Mr. Chairman, we would commend you for your past efforts to improve the CPSC, including the recent enactment of your amendment to the 9/11 law that has temporarily reinstated the lapsed authority of the CPSC to conduct business with only two commissioners.

We believe that your new legislation, the CPSC Reform Act of 2007, S. 2045, is a critical, comprehensive, and long-overdue effort to restore the CPSC from its status as the little agency that couldn’t. We have detailed comments on the bill and suggestions for improving it even more.⁴

Recent news about the routine and repeated importation by a major U.S. manufacturer, Mattel, of millions of Chinese toys that grossly failed to meet U.S. safety standards has certainly shined important light on the plight of the CPSC. The CPSC is an agency that, over the years, has

suffered both from Congressional neglect and from efforts by opponents of consumer protection – both within and without – to destroy it.

Your bill includes provisions that will accomplish three important goals:

- First, it provides the CPSC dramatically increased funding, staffing and authority to hold corporate wrongdoers accountable;
- Second, it broadens and strengthens the ban on lead, a toxic chemical that causes brain damage and other problems and has no business in children’s products or toys at all;
- Third, it strengthens the government’s role in ensuring the safety of imported products while making it clear that any company that enters imported products into U.S. commerce is still responsible and cannot shift the blame to some lowest-cost third-party supplier thousands of miles away.

Our Views on Specific Elements of S. 2045:

Funding and Staffing:

As is well-known, the CPSC started in 1974 with a budget of less than \$35 million, which, if merely corrected for inflation, would today be over \$140 million. Yet, the agency’s 2007 budget is only \$63 million and the President’s modest 2008 proposals would cut the CPSC, in real terms. Conversely S. 2045 would increase the CPSC budget by about 10% each year to approximately \$140 million in 2014 while also directly providing additional funds to address its decrepit laboratory and the emerging safety issue posed by nanotechnology. We support these efforts, yet would suggest that while S. 2045’s increases recognize that the agency can only absorb so much growth each year, the annual increases could even be tweaked up slightly to reflect real increases of 10% each year (that is 10% after inflation). We also believe that the bill’s proposed staff level increases could be accelerated and given a higher ceiling, since the proposed increase from 400 to 500 employees by 2013 would still leave the CPSC at only about half its 1980 peak employee level. Nevertheless, we support the provisions.

Quorum, Commission Size and Authority:

CPSC is responsible for the safety of 15,000 consumer products ranging from chain saws to kitchen appliances to children’s toys. Part of the goal of strengthening the agency should be for the Congress to reinstate its 5 Commissioners, as S. 2045 would do. The bill also wisely extends the temporary 2-commissioner quorum so the agency can continue to do the people’s business. It limits the power of political appointees and requires the CPSC, an independent agency, to notify Congress concurrently of proposals sent to the executive branch.

We strongly support these provisions, especially the bill’s provision (provided that the budget increases go through so that the CPSC can fund the positions) reinstating 5 commissioners as a long-term solution to re-establishing the agency’s importance in the eyes of billion-dollar manufacturers that have ignored it, as well as to the public and its staff.

The Public’s Right To Know and the Notorious 6(b):

In our discussions with current and former CPSC staff, and in our own experience as noted above, nothing has proved more unnecessarily harmful to the CPSC’s ability to protect the public than Section 6(b) of the Consumer Product Safety Act, which gives corporate wrongdoers power over the CPSC’s ability to disseminate information about dangerous products to the public. While a consumer can search the National Highway Traffic Safety Administration’s databases

for information about complaints (even those that have not led to action), the CPSC often cannot even disclose remedial actions it has already taken.

U.S. PIRG will continue to support outright repeal of Section 6(b). Nevertheless, your thoughtful proposal to amend it in numerous ways to limit manufacturer obstinacy and threats of costly litigation has much merit.

We concur with the detailed comments of the Consumer Federation of America that S. 2045's Section 7 amending Section 6(b) should be itself amended in several ways to clarify its effect. In particular, the new language should apply to prohibited acts under all of CPSC's statutes, not merely the CPSA; should not eliminate current exceptions to 6(b)'s limitations and should include an exception for finding that the public health and safety demands immediate notice for information received under section 15(b).

Toxic Lead Hazards:

Exposure to lead can affect almost every organ and system in the human body, especially the central nervous system. Lead is especially toxic to the brains of young children. A child exposed to a single high dose of lead—such as by swallowing a piece of metal jewelry containing lead—can suffer permanent neurological and behavioral damage, blood poisoning, and life-threatening encephalopathy. Exposure to low doses of lead can cause IQ deficits, attention deficit hyperactivity disorder, and deficits in vocabulary, fine motor skills, reaction time, and hand-eye coordination. PIRG studies have found lead levels in children's jewelry at 28% by weight or more.

Children are more vulnerable to lead exposure than adults, since young children often put their hands and other objects in their mouths; their growing bodies absorb more lead; and children's developing brains and nervous systems are more sensitive to the damaging effects of lead. Currently, while lead is explicitly banned in paint (at levels based on 1970s science), the CPSC must jump through numerous hoops before it can recall other products containing lead (except those with banned lead paint). Among other regulatory hurdles, it must first determine that levels of lead in any product are "accessible" to ban the product. While, positively, the CPSC is proceeding (through a rulemaking in response to a Sierra Club petition) to ban lead in metal components of children's jewelry, the better, precautionary approach is to simply ban lead in all children's toys and products (including, for example, plastic jewelry).

S. 2045 takes that precautionary approach. It lowers allowable lead paint levels and bans lead, except in trace amounts, in other children's products. Nevertheless, we would urge the committee to review the recent House testimony⁵ of the American Academy of Pediatrics, which offers a comprehensive review of current and historical lead standards and defines trace levels even lower than the laudable proposals in S. 2045. **We concur with these findings from AAP:**

- The CPSC should require all products intended for use by or in connection with children to contain no more than trace amounts of lead.
- The Academy recommends defining a "trace" amount of lead as no more than 40 ppm, which is the upper range of lead in uncontaminated soil.³¹ This standard would recognize that contamination with minute amounts of lead in the environment may occur but can be minimized through good manufacturing practices.

- “Children’s product” should be defined in such a way as to ensure it will cover the wide range of products used by or for children. This standard should cover toys intended for use by or with children under the age of 12 years.
- The limit on lead content must apply to all components of the item or jewelry or other small parts that could be swallowed, not just the surface covering.
- Legislation or regulations should limit the overall lead content of an item, rather than only limiting lead content of its components. A single product may contain numerous component that could cumulatively contain a dangerous level of lead.

Corporate Accountability:

The bill, S. 2045, takes numerous steps to hold corporations accountable for the safety of products that they enter into commerce. Quite simply, today, manufacturers are more afraid of Wal-Mart’s (and other retailers) demands for the lowest priced product than they are of threats from the CPSC for breaking the law.

Most importantly, the bill (Section 17) increases CPSC civil penalty authority from the current “business as usual” cap of \$1.8 million dollars to a more imposing \$100 million. The section also broadens criminal enforcement provisions. Section 15 establishes greater penalties for “repeat importation” offenses. Section 16 would broaden the scope of prohibited acts under the agency’s authority. It would also give the CPSC authority that it does not now have to prevent the dumping of products that pose hazards onto other countries.

Section 22 would establish new law creating protection for corporate whistleblowers. While we have not had a chance to evaluate this section in detail and encourage the committee to contact the Government Accountability Project for a review, this is an important step. No one, whether he or she is an employee of any firm, or of the government, or even a consumer, should suffer the threat of retribution for good faith disclosure of information about product hazards.

Improving Corrective Action Plans Under CPSC Recall Authority:

The bill (Section 13) also limits the ability of manufacturers to game the process of recalling hazardous products by taking less action than would be effective at protecting the public. The bill would require CPSC approval of corrective action plans, which now are often poor excuses for protecting the public.

Because the process of a mandatory recall is so difficult, and is subject to numerous delays and possible litigation by affected companies, the CPSC nearly always instead negotiates voluntary recalls. But with the CPSC under pressure to take action as quickly as possible, the company involved doesn’t have to agree to aggressively, if at all, remove the recalled product from commerce. It can simply agree, for example, to a “repair” or a “stop sale” of a recalled item, and leave old hazardous product on the shelves, provided any new product meets standards. As we noted in our 2006 *Trouble In Toyland* report, the first major CPSC action⁶ concerning the hazards posed by powerful, tiny rare-earth magnets was not a recall, but merely a “replacement” program:

In November 2005, a 21-month old boy named Kenneth Sweet Jr. died of blood poisoning and tissue necrosis; an autopsy showed that two separate sets of magnets had pinched parts of his small intestine.

CPSC and [the manufacturer] Rose Art did not recall Magnetix toys on store shelves. Instead, Rose Art told consumers who are “uncomfortable having the product in your home” to return the sets to the company for a free replacement product suitable for children under the age of six. As of September 30, 2006, MEGA Brands [acquirer of Rose Art] had received approximately 13,000 requests for replacements. This means that most of the four million Magnetix toys sold before March 31 have not been returned and could remain in homes across the United States.

“Uncomfortable having the product in your home” is not an adequate product safety standard.

Strengthen Import Protections:

For better or worse, we live in a global economy. Manufacturers seeking lowest-cost producers routinely stretch supply chains to China or other countries. While the manufacturer, importer, retailer or distributor is appropriately responsible under the CPSA and other laws enforced by the CPSC for ensuring that any product that it enters into commerce meets U.S. standards (and should not blame some sub-contractor when it does not), Congress should also take steps to better protect consumers from the hazards posed by imported products.

The bill, S. 2045 takes several steps, which we support, to improve import safety.

Section 10 (which applies to all children’s products, not only imports), establishes new third party certification for all children’s products. The section prohibits their importation without such certification. Importantly, the third party certification is administered under the authority of the CPSC. It would not be as useful were it not. Also, importantly, we would read Section 18 (preemption) as making it clear that mere certification of a product would not grant any immunity or shield from liability under state law. The committee should be wary of any attempts by industry associations to change this.

Section 14 provides for improved identification of importers (and others). Section 20 would require the bonding of any importer, to ensure that it can pay for any necessary recalls, cost of holding at the port or product destruction. Section 19 improves the CPSC’s ability to share information with both state enforcers and agencies of foreign governments. We are well aware of the European Commission’s concerns over the current limitations on sharing hazard information with them; we believe that Section 19 will ameliorate their concerns.

We would also urge the committee to review recent House testimony⁷ by Public Citizen’s Global Trade Watch, which points out that current and proposed trade pacts may limit the effect of your actions to strengthen import safety, or may subject them to trade sanction challenges.

Relationship to State Laws:

U.S. PIRG is a strong supporter⁸ of the principle that federal law should serve as a floor of health and safety protection but that states should be allowed to protect their consumers, workers and environment better. As a former state attorney general, Mr. Chairman, I know you agree that states often act more quickly than federal agencies or Congress and provide an important complement to federal efforts. Yet, far too often, the Congress ignores this and trades passage of a weak federal law for “federal uniformity” in response to the baseless demands of self-interested industry organizations.

We commend the committee for the strong anti-preemption language included in Section 18,⁹ including its admonishment of former CPSC Chairman Hal Stratton's attempt to invent authority to preempt state causes of action for compensation by consumers burned in mattress fires.¹⁰

Nevertheless, in the area of state preemption, just as in the area of children's exposure to toxic products, we believe in the precautionary principle. So, we have the following recommendations to amend and strengthen the section.

Ideally, we believe that the language in Section 12 of the Safety Assurance for Every Consumer Product Act, HR 3691, more clearly achieves the goals of Section 18 of S. 2045. In particular, that section states:

No consumer product safety standard promulgated by the Commission after the date of enactment of the Safety Assurance for Every Consumer Product Act, or any other action taken by the Commission after that date, shall contain a preemption provision which affects any action for damages or the liability of any person for damages under the statutory law or the common law of any State, unless such provision is expressly authorized by statute.''

Alternatively, we would suggest a modification to Section 18(a), which include a complex relationship between sections (a) and (c), as modified by the words "to an extent greater than," which we would suggest could be changed to the following:

"No consumer product safety standard promulgated by the Commission after the date of enactment of the CPSC Reform Act of 2007, or any other action taken by the Commission after that date, shall preempt any State or local law that would be in addition to the preemption of State regulations permitted under subsection (a), as limited by subsection (c)."

Again, we want to commend the committee for recognizing the importance of allowing state enforcement, legislation and common law that provide greater protection than federal law.

Conclusion:

We commend you, Mr. Chairman, and your co-sponsors for introducing this important legislation. The CPSC Reform Act of 2007, S. 2045, is a critical, comprehensive, and long-overdue effort to restore the CPSC from its status as the little agency that couldn't. We hope that you find our comments helpful. We look forward to working with you and your committee staff to enact it into law. We would also be happy to discuss other possible actions under the committee's jurisdiction to protect consumers from hazards. Under the CPSC's jurisdiction alone, for example, we urge you to hold hearings on ATV safety, extending the Child Safety Protection Act to the Internet, improving recall effectiveness and investigating the chronic and developmental hazards from unnecessary exposure to toxic phthalates (plastic softeners) in children's products. Thank you.

Endnotes

¹ In addition, approximately 202,300 people sought treatment in hospital emergency rooms in 2005 for toy-related injuries; at least 152,400 (75 percent) of those injured were children under 15 years old and at least 72,800 (36%) were children younger than five years old. At least 166 children choked to death on children's products between 1990 and 2005, a rate of about 10 deaths a year, accounting for more than half of all toy-related deaths. See Toy Related Deaths and Injuries, CPSC Memo of 5 October 2006, available at <http://www.cpsc.gov/library/toymemo05.pdf>.

² These reports and other information about toy safety are available at our website www.toysafety.net Our main website is www.uspirg.org.

³ As of 2002, CPSC had informed us of 105 PIRG-initiated recalls and enforcement actions. We estimate that the last four reports resulted in at least 20 additional CPSC enforcement actions, including four recalls. In some cases, the CPSC has provided us general information to this effect (e.g., "we found that 2 toys on the 2006 PIRG list violated the small parts rule and we have recalled them"), but CPSC has not told us the specific names of the products recalled, even though the products appear on a public list in our report.

⁴ The committee also has had referred to it several other laudable bills to reform the CPSC that have been introduced by committee members and other Senators. Our comments on S. 2045, the most comprehensive bill, apply equally to any similar provisions of these bills. We would be happy to provide committee or personal staff with detailed comments on any of the other bills.

⁵ See testimony of Dana Best, M.D., M.P.H., American Academy of Pediatrics at a Hearing on Protecting Children from Lead-Tainted Imports of the Subcommittee on Commerce, Trade, and Consumer Protection of the House Energy and Commerce Committee,, 20 September 2007, available at http://energycommerce.house.gov/cmte_mtgs/110-ctcp-hrg.092007.Best-testimony.pdf

⁶ Child's Death Prompts Replacement Program of Magnetic Building Sets, CPSC release of 31 March 2006 available at <http://www.cpsc.gov/cpscpub/prerel/prhtml06/06127.html>

⁷ See testimony of Lori Wallach, Director, Public Citizen's Global Trade Watch, at a Hearing on Protecting Children from Lead-Tainted Imports, Subcommittee on Commerce, Trade and Consumer Protection of the House Energy and Commerce Committee, September 20, 2007 available at http://energycommerce.house.gov/cmte_mtgs/110-ctcp-hrg.092007.Wallach-testimony.pdf

⁸ See our website resources on why state preemption of stronger consumer and environmental laws is a bad idea at <http://uspirg.org/us-law-policy>

⁹ We also recognize the important provision, Section 21, establishing the right of state attorneys general to bring actions under the CPSA. If it hasn't already, we suggest the committee seek comment from the National Association of Attorneys General.

¹⁰ We urge the committee to review the testimony of Professor David Vladeck at a hearing of the Senate Judiciary Committee, "Regulatory Preemption: Are Federal Agencies Usurping Congressional and State Authority?" held on 12 September 2007, for a discussion of this CPSC episode and similar efforts by other Bush agencies to preempt state consumer law even when they haven't been granted Congressional power to do so. Hearing available at <http://judiciary.senate.gov/hearing.cfm?id=2935>