



Consumer Federation of America

Testimony of

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Also on Behalf of Consumers Union, Kids in Danger, Public Citizen,
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Before the
Subcommittee on Commerce, Trade and Consumer Protection
of the
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Legislative Hearing of the Consumer Product Safety Modernization Act,
H.R. 4040

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Chairman Rush, Ranking Member Stearns and members of the Subcommittee, I am Rachel Weintraub, Director of Product Safety and Senior Counsel for Consumer Federation of America (CFA), a non-profit association of approximately 300 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance the consumer interest through advocacy and education. I am testifying on behalf of CFA as well as Consumers Union, Kids in Danger, Public Citizen, U.S. PIRG, and Union of Concerned Scientists. Thank you for holding this hearing and for providing us with the opportunity to speak today.

First, we want to commend you for introducing this legislation to address the growing problem of unsafe and dangerous products that are increasingly ending up in our homes and in the hands of our children. 2007 is turning out to be the year of the recall, with product safety recalls at a record high level of 472. Many of the 20 million recalled products this year have included popular toys that have been found to have dangerous lead levels. As you well know, lead is a toxin that can reduce IQ points when ingested, and winds up causing other serious medical problems in children.

It is clear to all of us that something has gone wrong with our current safety system. Your bill, H.R. 4040, the Consumer Product Safety Modernization Act (CPSMA), correctly recognizes that the Consumer Product Safety Commission (CPSC) – the agency responsible for protecting consumers from unsafe and dangerous products in the marketplace – is broken. H.R. 4040 attempts to remedy this critical problem by increasing the Agency’s resources and legal authorities necessary to keep unsafe products out of the marketplace.

The CPSC is charged with protecting the public from hazards associated with at least 15,000 different consumer products. The Agency was created because the marketplace failed to police itself: litigation and various federal laws were not sufficiently preventing death and injuries from unsafe products. CPSC’s mission, as set forth in the Consumer Product Safety Act, CPSC’s authorizing statute, is to “protect the public against unreasonable risks of injury associated with consumer products.”¹ CPSC’s statutes give the Commission the authority to set safety standards, require labeling, order recalls, ban products, collect death and injury data, inform the public about consumer product safety, and contribute to the voluntary standards setting process. CPSC was created to be an agency that acts proactively to protect consumers. Unfortunately, the CPSC’s ability to be proactive has been thwarted by a shrinking budget, a lack of aggressive leadership within the agency, and statutory provisions that create obstacles to the effective prevention of product risks.

We are grateful that your legislation addresses these issues head-on. In addition to increasing authorization levels so the agency can hire more personnel and work harder to protect consumers from unsafe products, the bill would require testing of children’s toys and products by independent labs that are certified to meet safety standards, would make it illegal to sell recalled products, and would limit lead in toys and children’s jewelry to low levels.

We see this bill as an important step in the march to strengthen CPSC and improve the agency’s ability to protect the public from risks posed by unsafe products. We applaud you for addressing many of the key areas in need of reform, and we provide several modest

¹ Consumer Product Safety Act, 15 U.S.C. 2051, section 2(b)(1).

recommendations for strengthening and improving several sections of the bill. In addition, we raise additional issues that we believe the Committee should address to make the legislation truly comprehensive.

Before proceeding to a detailed explanation of our recommendations, we wish to emphasize the importance we place on four particular issues – Section 6(b), independent third-party testing of children’s toys and products, the need to include whistleblower protections, and language clarifying the reach of CPSC’s authority regarding the preemption of common law claims in any CPSC reform package.

It is imperative that we eliminate the secrecy language of Section 6(b) of the CPSA to enable the CPSC to inform the public about product-related dangers. While H.R. 4040 makes modifications to this section, it does not go far enough in removing the obstacles which prevent the timely release of information about serious hazards relating to children’s and other consumer products. With regard to independent third-party testing, we applaud the strength and clarity of the definition of an independent third party, but urge the Subcommittee to increase the scope of this provision by amending the definition of a children’s product to include those intended for children twelve and under.

Finally, any attempt to reform the CPSC must include protections for people who blow the whistle on wrongdoing and identify product safety hazards. Further, previous actions of the CPSC have necessitated a clarification of the impact of CPSC rules upon common law remedies.

As a framework for discussing some of the most significant provisions of the CPSMA, I will focus on our organizations’ core principles for product safety reform. We applaud the fact this legislation addresses many of these principles. First, I will focus on the issues that this legislation addresses and will include our recommendations for modest tweaks within these sections.

1. Strengthen CPSC

A. Increase Budget

With jurisdiction over many different products, this small agency has a monstrous task. In 1974, when CPSC was created, the agency was appropriated \$34.7 million and 786 full-time employees (FTEs). Now, 33 years later, the agency’s budget has not kept up with inflation, its deteriorating infrastructure, its increasing data collection needs, or the fast-paced changes occurring in consumer product development. The CPSC budget has also not kept pace with the vast increase in the number of consumer products on the market. CPSC’s staff has suffered severe and repeated cuts during the last two decades, falling from a high of 978 employees in 1980 to just 401 for the 2008 fiscal year. This is the fewest number of FTEs in the agency’s 33-year history and represents a loss of almost 60 percent.

The President’s 2008 budget would provide only \$63,250,000 to operate the agency. This represents a reduction of 19 FTEs and a small increase of \$880,000 from the 2007 appropriation. This increase does not provide for inflation, fails to allow CPSC to even maintain its current minimal programming, and will not allow for CPSC to invest in its research, resources and infrastructure.

Because of this historically bleak resource picture, our groups are extremely concerned about the agency's ability to effectively prevent and reduce consumer deaths and injuries from unsafe products. It is for this reason that we support section 201 of H.R. 4040. This section, entitled "Reauthorization of the Commission," sets up an appropriations schedule for CPSC through 2011. It increases budget levels by approximately 15 percent each year, ending in 2011 at \$100 million. We support these gradual increases, as we believe that these increases are the most effective way to strengthen the agency. We have suggested increases of between 10 and 15 percent each year with an end goal of approximately \$140 million because, if you adjusted CPSC's first budget of \$34 million to today's dollars it would result in a budget of approximately \$140 million. We suggest that this authorization be extended an additional two to five years to establish funding levels for a longer period of time, and increased to the suggested \$140 million. We also support the provision that appropriates \$20 million for 2009 through 2011 for CPSC's laboratory.

B. Restore Commission to Five Commissioners

Section 202, "Structure and Quorum," restores the Commission to five members, as was originally required in the Consumer Product Safety Act. We support this provision as we believe that additional members would result in a more robust and dynamic Commission that would strengthen and enhance the work of the Commission, thus better serving the public interest. We are sensitive to the concern that resources not be taken away from much needed product safety work, but we are confident that if the budget for the CPSC is increased as proposed in this bill, the expansion can occur without detracting from other important activities. This provision also includes a temporary quorum provision that would extend the current emergency quorum of two members from the time this bill is passed until 2008. This Subcommittee may wish to extend this emergency quorum to expire only after there is a full complement of Commissioners.

C. Streamline Rulemaking Procedures

The Consumer Product Safety Act, as amended in 1981, requires CPSC to engage in a three-step rulemaking process that is unnecessarily time-consuming. Section 204, "Expedited Rulemaking," makes the Advanced Notice of Proposed Rulemaking (ANPR) process under CPSA voluntary rather than mandatory. We support this provision as it allows the ANPR process when justified, but would also permit expedited rulemaking when necessary. The Subcommittee should consider requiring rulemaking "benchmarks" that require the CPSC to complete the rulemaking process within particular timeframes, or to submit an explanation to Congress as to why these benchmarks cannot be met. Such requirements could expedite the CPSC's glacial rulemaking process, while allowing the agency to exceed recommended benchmarks when justified, as well as provide notice to the public about the time limits for each stage of rulemaking.

D. Increase Full-Time Employees

While this bill reauthorizes the budget for CPSC until 2011, there is no provision directing CPSC to increase its staff or full-time employees (FTEs). We suggest that this bill include a provision that directs the commission to increase FTEs to at least 600 by October 1, 2013. While we support this increase of 200 FTEs, we hope that the Subcommittee will consider increasing staffing levels even faster, given the extraordinary product safety challenges the

nation is facing and the importance of providing CPSC with a benchmark to measure their growth given their potentially increased resources. We also would support a provision prohibiting the burrowing by political appointees into career positions.

2. Disclosure of Product Safety Information to the Public

For many years, CFA and other consumer groups have urged Congress to eliminate section 6(b) of the CPSA. This section of the Act restricts CPSC's ability to communicate safety information to the public. This secrecy provision is unique to the CPSC and it prevents the timely release of information about serious hazards relating to children's and other consumer products. Under this provision, the CPSC is required to give a company an opportunity to comment on a proposed disclosure of information. If the company has concerns about the wording or the substance of the disclosure, they can object. CPSC must accommodate the company's concerns or inform them that they plan to disclose the information over their objections. The company can then sue the Commission seeking to enjoin them from disclosing the information. Thus, this provision creates a time-consuming process between CPSC and the affected company, often serving to delay or deny the release of important consumer safety information.

Two recent examples highlight the anti-consumer impact of this provision. First, on October 22, 2007, CPSC staff announced its results of a special evaluation of consumer lead kits. CPSC staff tested samples of commonly available test kits on a variety of products containing different levels of lead. CPSC found that, "many of the tests performed using the kits did not detect lead when it was there (false negatives); some indicated lead was present when it was not (false positives). Of 104 total test results, more than half (56) were false negatives, and two were false positives. None of the kits consistently detected lead in products if the lead was covered with a non-lead coating. Based on the study, consumers should not use lead test kits to evaluate consumer products for potential lead hazards."²

However, this study **fails to mention which lead kits the CPSC actually tested**—a critically important piece of information for consumers seeking to evaluate which kits to use or avoid and an example of the absurd limits placed on the agency by Section 6(b). In addition, the study fails to disclose the threshold lead level that was used as the reference point for determining false negative test results. This is critical information for others to assess the technical basis upon which the CPSC drew their conclusions. Contrast that process to that of *Consumer Reports* testing of lead kits. In the magazine's December 2007 edition, it has information about results from its recent testing of five home lead-testing kits and concluded that three of the five kits were useful though limited screening tools for consumers concerned about lead levels in the products in their homes. Importantly, the magazine disclosed the names of all five kits. Such information is vital for parents and families to have. The CPSC does a disservice to consumers when it fails to make this important information available to the public.

Second, and even more troubling, is the CPSC's knowledge of numerous, serious and well documented harms caused by Stand 'n Seal, a spray-on waterproofing sealant for tile grout. According to an October 8, 2007 article in the *New York Times*, after a new ingredient was added

² CPSC Press Release, "CPSC Staff Study: Home Lead Test Kits Unreliable," October 22, 2007, available on the web at <http://www.cpsc.gov/cpscpub/prerel/prhtml08/08038.html>.

to Stand 'n Seal in the spring of 2005, “calls from customers, emergency rooms and doctors started to pour into poison control centers and, initially in smaller numbers, to the Consumer Product Safety Commission’s own hot line.”³ One child stopping to talk to his father who was using the sealer, suffered damage to 80 percent of the surface area of his lungs.⁴ With complaints mounting, the manufacturer’s chief executive told staff answering the companies’ consumer hotline not to tell customers that others had reported similar complaints because doing so “may cause unnecessary public concern.”⁵ “Nearly three months passed between the time [the manufacturer] first received a report of an illness and the official recall by the Consumer Product Safety Commission, a period during which dozens were sickened.”⁶ The CPSC officially recalled the product on August 31, 2005. In the press release, CPSC acknowledged, “88 reports from consumers who have had adverse reactions after using the aerosol product, including 28 confirmed reports of overexposure resulting in respiratory symptoms for which medical attention was sought for coughing, irritation, difficulty breathing, dizziness and disorientation. Thirteen individuals required medical treatment, including overnight hospitalization.”⁷ The Commission did not disclose critical safety information to the public and used 6(b) as a shield to maintain the secrecy of these severe health effects. However, even after the official recall, the hazardous product remained on the shelves; the replaced product contained the same hazardous chemicals and many people were severely injured.

Section 205 of H.R. 4040 regarding “Public disclosure of information” does not delete section 6(b), but rather amends it in a number of ways. This provision requires that any industry response to the CPSC in these circumstances be provided within 15 days versus the current 30 day time frame; does not require that CPSC publish information in the Federal Register; expands an exception of this rule to include potential violations of not just specific prohibited acts, but all violations of any CPSC rule; and creates the option for a shorter time frame if the CPSC publishes a finding that the public health and safety require a shorter period of notice. While these changes are positive, this legislation continues to retain the most significant provision depriving the public of important safety information. The bill does not eliminate the ability of a company to institute a court proceeding to enjoin release of the information. The failure to eliminate the threat of a lawsuit is a significant shortcoming of this provision, as it is the threat of lengthy and resource intensive litigation that compels CPSC to maintain the secrecy or delay the disclosure of important product safety information. Our groups would also support a requirement that the CPSC create a searchable adverse event database. This data base should contain consumer complaints and industry reports of safety concerns relating to toys, other children’s products as well as other consumer products.

Our groups support the provision set forth in section 203, “Submission of copy of certain documents to Congress.” CFA, other consumer groups, and members of Congress have been hindered from having access to CPSC’s budget requests to the Office of Management and Budget (OMB). Thus, reinstating Section 27(k) of the CPSA which requires the Commission to

³ Lipton, Eric, “Dangerous Sealer Stayed on Shelves After Recall,” New York Times, October 8, 2007.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ CPSC Press Release, “CPSC, Tile Perfect Inc. Announce Recall of Stand 'n Seal Grout Sealer Due to Respiratory Problems,” August 10, 2005, available on the web at <http://www.cpsc.gov/CPSCPUB/PREREL/prhtml05/05253.html>.

simultaneously submit budget requests and legislative recommendations to both OMB and to Congress will illuminate what budget the Commission actually requests.

3. Ban Lead from Children's Products

Recently, lead has increasingly been found in a variety of children's products, including toys, jewelry, lunch boxes, bibs, cribs and other items. Lead has been found in products made by large manufacturers, as well as in those made by smaller companies. We support a ban on lead in all children's products, which currently does not exist. While lead in the paint and surface coatings used in children's products is limited to 0.06 percent by weight of lead (600 parts per million (ppm), a standard set in the 1970s), there is no mandatory law prohibiting the use of lead in children's jewelry or in other children's products. We support a bright line ban on the use of lead in children's products to no more than trace amounts. This is because experts confirm that there is no safe level of lead exposure. Serious, acute and irreversible harm can come to children as a result of exposure to lead. Finally, there is no justifiable reason why such a dangerous additive should be used in children's products, as safer alternatives almost always exist.

Section 101 of the CPSMA would require that any children's product not in compliance with this rule be considered a banned hazardous substance, whether or not the lead is accessible to a child. Section 101 sets up a three part standard for lead: (1) The bill requires a phase out over time from 600 ppm; to 250 ppm two years after the date of the act; and to 100 ppm four years after the bill is passed, for lead in children's products unless CPSC finds that 100 ppm is not feasible. This provision covers these levels of lead for "any part of the product." (2) Alternatively, instead of the phase out, children's products could have 90 ppm of soluble lead for any part of the product, as determined by the Commission by rule. (3) In addition, the bill also amends the current ban on lead in paint by reducing it from 0.06 percent to 0.009 percent. The scope of the bill includes "children's products" designed or intended primarily for children 12 years of age or younger.

Overall, our groups view this provision as a positive improvement over the status quo. We applaud the definition of a children's product defined as that for a child 12 and younger and support a bright line test for all children's products, however we are unfamiliar with the term "primarily intended for" and are concerned about potential unknown consequences to this new terminology. We would appreciate further clarifications in two other areas as well.

First, we are not clear about what standard the phase-in option of the bill is requiring. We recommend that the language be preceded by the following statement, which is included in S. 2045:

"the prohibition contained in section 2(A) shall apply without regard to whether the lead contained in such children's product is accessible to children."

Second, we are concerned that option 2, the alternative test for 90 ppm soluble lead, is ambiguous. We understand that there are many measures of solubility which may lead to differing results, and are unsure why a CPSC rule here should be required. Accessible or soluble lead may not present itself until a product ages. We fear that this option may allow products with higher levels of lead to remain in children's products. We hope to work with the Subcommittee to clarify some of these ambiguities and base regulations on total lead level.

4. Require Independent Third-Party Testing

To assure that products are safe when they enter the American and global stream-of-commerce, safety must be infused into the earliest stages of the supply chain. For this reason, independent third-party testing of final products, as well as components, must be required. Third-party testing entities must be independent from and have no financial relationship with the manufacturer producing the product. Testing must be conducted to identify design flaws as well as violations of existing regulations, such as those governing the use of lead paint. Components and final products must be tested at numerous stages of production and tests must be conducted randomly throughout the manufacturing process. Products should also be certified that they meet the appropriate standards and should bear a label indicating that they are certified.

Section 102 of H.R. 4040, “Mandatory Third-Party Testing for Certain Children’s Products,” amends section 14(a) of CPSA and applies to any manufacturer or private labeler of a children’s product that is subject to a consumer product safety standard under any Act enforced by the Commission. This would require testing by non-governmental independent third parties qualified to perform tests and would require that certificates be issued certifying conformity to the applicable safety standard. We support this provision. It is a meaningful provision that establishes a clear definition of an “independent third party.”

We also very much applaud the inclusion of section 104 of this bill. This provision will ensure that infant durable products will be tested to what are now mandatory as well as voluntary standards through requiring the Commission to promulgate rules that are substantially the same or more stringent than such voluntary standards. We suggest one addition to this provision which would include consultation with an Infant and Toddler Product Review Panel that would review, report to and advise the Commission regarding the existing guidelines for durable infant or toddler products and the promulgation of consumer product safety standards. Membership of the panel should be comprised of representatives of—(A) (i) the juvenile product manufacturers industry; (ii) consumer groups; and (iii) independent child product engineers and experts; and (B) Consumer Product Safety Commission engineers, with representatives of the industry, not exceeding 40 percent of the membership of the Panel.

In addition, we suggest one additional change to this provision. “Children’s Products” are defined narrowly, as those designed or intended for use by children “primarily for children six years of age or younger.” However, recognized authorities such as the American Academy of Pediatrics have recommended that children’s products be defined as those intended for children twelve years-old and younger, as the ban on lead provision in this bill includes. The disparity between these two sections means that other hazards not including lead, such as those involving sharp edges, choking, suffocation, and thermal hazards, to name a few, do not have to be tested for in the case of products intended for children between the ages of 7 and 12. Finally, as we mentioned previously, we are concerned about the implications of the new “designed or intended primarily for” language.

We support the provision in the CPMA that creates a role for CPSC to play in ensuring that testing laboratories meet accreditation standards established by CPSC. The CPSC is limited by its current budget, staff, expertise, and distance from off-shore manufacturing to engage in

product-testing at the earliest stages of the supply chain. However, we believe that a publicly accountable entity should have oversight of these third-party overseers to set consistent and high standards. Ultimately the responsibility falls on the manufacturers and/or importers (many of which are based in the United States) to be more fully engaged in testing and policing the component parts that make up their products, as well as their final products.

5. Hold Manufacturers, Retailers, and Importers Accountable and Responsible

Global and American manufacturers, retailers, and importers need to take responsibility and be held accountable for safety at every stage of the supply chain. As our economy is becoming increasingly global and the supply chain is becoming more complex with transactions becoming more arms-length, our priority must be that safety never falls through the cracks. Safety should never be “lost in translation” or compromised for a better price.

However, global manufacturers have not been able to comply with existing laws and regulations, such as those banning lead in paint up to 0.06 percent of weight. While our groups agree that certain additional authority and strengthening of existing standards is necessary, such as the CPSMA proposals for independent third-party testing and expanding the ban on lead in all children’s products, enforcement mechanisms must also be in place to ensure compliance with these laws.

Currently, limited enforcement mechanisms are in place. Very low caps exist on the amount of civil penalties the CPSC can assess against an entity in **knowing** violation of its statutes. The current civil penalty is capped at \$7,000 for each violation, up to a total of \$1.83 million. A “knowing violation” occurs when the importer, manufacturer, distributor or retailer has actual knowledge or is presumed to have the knowledge a reasonable person would have or should have if the person acted reasonably to determine the truth. Knowing violations often involve a company’s awareness of serious injury or death associated with its product.

Our groups support completely eliminating this cap on the amount of civil penalties that CPSC can assess. We acknowledge that the House passed H.R. 2474 this October, which increased the civil penalties that CPSC can assess to \$10 million; however, we fear that such a modest increase in the cap may not be enough of a deterrent to prevent violations of CPSC’s rules. We do not want any manufacturer to be able to consider civil penalties a part of doing business.

We also suggest improving the criminal penalty section of the CPSA by elimination of one of the more counterintuitive provisions of the Act, which requires “receipt of notice of noncompliance” from the Commission before any person could be fined under the criminal penalty provision. Those who violate the law in a criminal manner should not get a free pass for a first violation. We support the removal of this clause and also support the inclusion of jail time for anyone who knowingly commits a prohibited act as defined by CPSC’s statutes, as well as the removal of the “willfully” standard for those who authorize any prohibited act, and the inclusion of asset forfeiture as a criminal penalty. Criminal violators of CPSC’s regulations must be punished in a meaningful way for criminal behavior, as such behavior compromises the health and safety of our nation. We support this bill’s inclusion of asset forfeiture as a penalty for a criminal violation of CPSC’s statutes in section 214.

6. Recall Effectiveness: Direct-to-Consumer Notification of Recalls

The ability of CPSC to conduct effective recalls of unsafe products is critical to protecting the public from unreasonable risks associated with consumer products. Our groups support requiring that manufacturers (or distributors, retailers, or importers) of products intended for use by children provide with every product a Consumer Safety Registration Card that allows the purchaser to register information through the mail or electronically. Such information should be allowed to be used by a company solely to contact the purchaser in the event of a recall or potential product safety hazard. Product Registration Cards are required to be attached to car seats to provide a mechanism to directly notify consumers who purchased a recalled car seat. These methods would be more effective than the current approach, which relies heavily upon the media to convey the news of the recall and retailers to post notices in their stores.

Consumers who do not hear of product recalls are at greater risk of tragic consequences, including death or injury. By being dependent upon the media and generic forms of notice to broadly communicate notification of recalls to the public, CPSC and the companies involved are missing an opportunity to communicate directly with the most critical population -- those who actually purchased the potentially dangerous product. Consumer Safety Registration Cards or a similar electronic system would provide consumers the opportunity to provide manufacturers their contact information enabling manufacturers to directly notify consumers about a product recall.

To improve recall effectiveness, we support the inclusion of Section 104, which requires manufacturers of infant durable products to provide a means of directly communicating information about recalls to consumers through a registration card, electronically or by other means of technology.

Our groups also support the concept of section 211 of the CPSMA, which allows the Commission to prohibit the export of products if they do not comply with any safety standard, are banned as hazardous, or are the subject of a voluntary recall or other corrective action. We support not merely “allowing” the Commission to prohibit export in these circumstances, but rather we urge the Subcommittee to “require” the Commission to prohibit the export of such products. The export of recalled and hazardous products to other countries should simply be prohibited.

Section 208 of the CPSMA, “Corrective Action Plans,” amends section 15(d) of the CPSA and provides that the plan for corrective action should be as prompt as practicable, and that the Commission may approve, reject, amend or revoke previous acceptance of the action plan. We would also support the inclusion of a definition for what type of plan is in the public interest.

7. Traceability

When the product safety net fails and an unsafe product enters the market, it can be difficult to isolate the source of the problem. For example, a problem may have occurred at the manufacturing phase by a subcontractor of a subcontractor. Tracking this down can be incredibly time-consuming and can delay a meaningful corrective action plan. Further, more than

one manufacturer may have used the same subcontractor, so knowing the source of the safety failure is critical to isolating the problem. Thus, products should contain some type of label, mark or number on a product that would directly indicate the source, date and production group.

Section 210 of the CPSMA, “Identification of Manufacturer, Imports, Retailers, and Distributors,” requires manufacturers to submit to CPSC any identifying information, such as the retailer or distributor and all subcontractors. This will help CPSC to more readily identify all of the segments of the supply chain. In addition, section 103, “Tracking labels for durable products for children,” requires indications on product or packaging that enables a consumer to ascertain the source, date, and cohort. This will be useful for consumers as they attempt to identify whether the product they own may be subject to a recall. Our groups also support that this provision require this information on both the product and the packaging, as packaging materials are often discarded. However, we have questions about qualifying the language with the phrase, “to the extent feasible” and wonder who has the authority to make that determination.

8. Internet and Catalogue Labeling

Our groups support extending the small parts choking hazard warnings required on toy packaging since 1994 to Internet and catalogues advertisements. The 1994 law requires express hazard labels on toys for children between three and six years old that contain small parts banned for sale to children under three due to choking hazards. With more and more purchases being made through e-commerce (one industry estimate predicts Internet toy sales will increase 57% this quarter from the third quarter 2006), and with the point of purchase now including Internet sites and catalogues, it makes sense to upgrade safety rules to reflect the growing number of purchases that are made without the toygiver seeing the actual package that includes the warning. We, therefore, strongly support section 105 of the CPSMA, which updates CPSC’s hazard warning requirements by extending this provision to include Internet and catalogue advertisements.

We urge the Subcommittee to include the following provisions to the CPSMA, which are not currently in this legislation.

1. Support Enforcement by State Attorneys General

Our groups also support permitting a State to bring a civil action on behalf of residents to enforce provisions of Acts under CPSC’s jurisdiction because state Attorneys General serve an important role in protecting the public. This will be a critical tool that will help buttress the CPSC’s limited enforcement capabilities, help consumers to obtain redress for harms they have suffered, and deter wrongful conduct.

2. Oppose Preemption

In February 2006, the Draft Final Rule for Flammability of Mattress Sets (“Draft Final Rule”) was made available to the public. Consumer groups opposed this Draft Final Rule not because of its substantive requirements but because of the novel language added to the preamble after the notice and comment periods expired that purported to preempt state common law remedies. Our groups support explicit Congressional clarification of the limited reach of CPSC’s authority to prevent the Commission from usurping well established state regulatory authority and common law claims.

3. Support Whistleblower Provisions

Any comprehensive product safety bill should include whistleblower protections. We believe that such protections are critical and that these protections should include private sector employees as well as CPSC staff. By using the freedom to warn, whistleblowers can and do serve the public by preventing avoidable tragedies. Whistleblowers are the best possible resource for early detection of product safety hazards, if they can safely act.

The House has previously acknowledged the value of federal whistleblowers, and the limitations of current law to protect them, when it passed, on March 14, 2007 by a vote of 331 to 94, HR 985, the Whistleblower Protection Enhancement Act. Last August, Congress approved landmark, best practices whistleblower provisions for all ground transportation workers as part of the 9/11 law.

Whistleblower protections, and the inclusion of another provision giving more resources and a stronger mandate to the CPSC Inspector General, will send a strong signal to CPSC managers that agency employees must be free to do their jobs without fear of having their research suppressed or distorted.

4. Study on Racial Disparities

Evidence from the CDC and the American Academy of Pediatrics indicates that minority children are more likely to have fatal accidents, drown, suffocate, or be poisoned than their white counterparts. For example, the fatal unintentional drowning rate for 5 to 14-year-old African Americans was 3.2 times higher than that for whites. The CPSC should be required to study racial disparities in the rates of preventable injuries and deaths related to suffocation, poisoning, and drowning including, but not limited to, those associated with the use of cribs, mattresses and bedding materials, swimming pools and spas, and toys and other products intended for use by children. We have provided staff with suggested language.

5. Bonding

This summer's recall of tires from an overseas importer highlighted a serious problem: some importers may not be able to afford the costs of conducting a recall if safety hazards exist. If a company is benefiting from the sale of its products in the United States, it must be able to prove that they can cover the costs of a recall. All product sellers, including importers, must be required to post a bond or something equivalent to ensure that recalls could be effectively conducted. We support directing the Commission to promulgate a rule to require manufacturers and others involved in the distribution of a consumer product to post a bond (or something similar that is acceptable to the Commission) to cover the costs of a potential "effective recall," holding the product at port, and/or the destruction of the product.

6. Industry Sponsored Travel

Disturbing information about travel by Commissioners paid for by toy industry and other manufacturing interests came to light just last week. The cozy relationship between regulators and the regulated industry should be addressed with new restrictions on industry-paid travel for high-ranking CPSC staff.

Conclusion

On behalf of CFA, Consumers Union, Public Citizen, Kids in Danger, U.S. PIRG and Union of Concerned Scientists, we support the introduction of this legislation as it represents a crucial first step forward in improving and strengthening CPSC's ability to protect the public from harmful products. We urge the Subcommittee to consider the modest tweaks we have discussed as well as the additional provisions we have recommended. We look forward to working with the Subcommittee to further improve this legislation and to ultimately enact the strongest possible legislation into law to reform, reauthorize, and enhance the ability of the CPSC to protect children and others from hazards posed by unsafe products. We look forward to working with you and your staff on achieving this critical goal.