

**OVERSIGHT OF THE  
CONSUMER PRODUCT SAFETY COMMISSION**

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**HEARING**

BEFORE THE

SUBCOMMITTEE ON CONSUMER AFFAIRS,  
INSURANCE, AND AUTOMOTIVE SAFETY

OF THE

COMMITTEE ON COMMERCE,  
SCIENCE, AND TRANSPORTATION

UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

—————  
MARCH 21, 2007  
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Printed for the use of the Committee on Commerce, Science, and Transportation



U.S. GOVERNMENT PRINTING OFFICE

79-906 PDF

WASHINGTON : 2013

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ONE HUNDRED TENTH CONGRESS

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## CONTENTS

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	Page
Hearing held on March 21, 2007 .....	1
Statement of Senator Klobuchar .....	3
Statement of Senator McCaskill .....	24
Statement of Senator Pryor .....	1
Statement of Senator Sununu .....	2
Statement of Senator Thune .....	22

### WITNESSES

Dean, John C., President, National Association of State Fire Marshals .....	49
Prepared statement .....	51
Greenberg, Sally, Senior Product Safety Counsel, Consumers Union .....	28
Prepared statement .....	30
Locker, Esq., Frederick, General Counsel to the Toy Industry Association and Juvenile Products Manufacturers Association .....	53
Prepared statement .....	55
Moore, Hon. Thomas H., Commissioner, U.S. Consumer Product Safety Com- mission .....	8
Prepared statement .....	10
Nord, Hon. Nancy A., Acting Chairman, U.S. Consumer Product Safety Com- mission .....	4
Prepared statement .....	5
Letter dated July 20, 2006 from Laura M. Tarantino, Ph.D., Director, Office of Food Additive Safety, Center for Food Safety and Applied Nutrition .....	27
Weintraub, Rachel, Director of Product Safety and Senior Counsel, Consumer Federation of America .....	38
Prepared statement .....	40

### APPENDIX

Letter dated March 28, 2007 to Hon. Daniel K. Inouye from Martin B. Bennett, Former Compliance Officer, Consumer Product Safety Commis- sion .....	67
Response to written questions submitted to Hon. Thomas H. Moore by:	
Hon. Claire McCaskill .....	87
Hon. Bill Nelson .....	80
Hon. Mark Pryor .....	81
Response to written questions submitted to Hon. Nancy A. Nord by:	
Hon. Maria Cantwell .....	70
Hon. Claire McCaskill .....	78
Hon. Bill Nelson .....	69



# **OVERSIGHT OF THE CONSUMER PRODUCT SAFETY COMMISSION**

**WEDNESDAY, MARCH 21, 2007**

U.S. SENATE,  
SUBCOMMITTEE ON CONSUMER AFFAIRS, INSURANCE, AND  
AUTOMOTIVE SAFETY,  
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,  
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 10:37 a.m., in room SR-253, Russell Senate Office Building, Hon. Mark Pryor, Chairman of the Subcommittee, presiding.

## **OPENING STATEMENT OF HON. MARK PRYOR, U.S. SENATOR FROM ARKANSAS**

Senator PRYOR. I want to welcome everyone here to the Subcommittee today, and just at the outset let me say that Senators are welcome to submit their questions for the record and also enter any sort of documents they want for the record. We'll be glad to take those, as long as there's no objection.

I'd like to welcome the Commissioners today, and our expert witnesses on the second panel, for the time that they have taken to prepare their testimony and to be here and appear before us today. This is the first oversight hearing on the Consumer Product Safety Commission in the Senate since 2003. This will be the first in a series of hearings to examine the work of the CPSC and how this Committee can improve the Commission to meet today's and tomorrow's needs.

As we all know, the CPSC was started in 1973 to protect the public against unreasonable risk and injury associated with consumer products. At the time it was created, it had 786 full-time employees and was responsible for the safety of about 10,000 products. Today it is responsible for the safety of about 15,000 products, but they are down over 350 employees, down to 420 full-time employees.

So at the outset we can say that this is an agency that's in distress in some ways. The budget has been cut. The number of positions have been cut. Because of this year's budget, or at least the way it looks like it's going, it looks like there may be some retirements just because they can't meet the budget requirements. The testing facilities in Maryland are antiquated, and apparently they have closed the branch facilities around the country.

So I think most Americans would say that they want to see a healthy and well-operated CPSC, but for that to happen the admin-

istration and Congress have to work together to try to restore this agency to its previous levels or at least something close to that.

The administration has proposed a funding level that will force the CPSC to further reduce its workforce to 401 full-time employees for Fiscal Year 2008, so that's a loss of about 19 employees right there. This would be the fewest number of employees in the history of the CPSC. The importance of adequate staffing cannot be overemphasized. There are so many products out there; they need to do the testing; they need the oversight; they need people to look at the marketplace to see what's coming on the marketplace, and to do all the things that they do.

Consumer products under CPSC's jurisdiction probably lead to about 27,100 deaths each year and about 33.1 million injuries each year. If you calculate the cost of the deaths, injuries, loss of property, et cetera, you get about \$700 billion annually.

Now, while the CPSC has succeeded in reducing accidents, deaths, and injuries in some areas, unfortunately the overall number of deaths and injuries related to products has increased. If CPSC continues to be limited in terms of resources and authority, these numbers will continue to go up. In fact, there were about 2,000 more deaths last year than the year before.

Experts with different perspectives on product safety all agree on one point: The government needs to make up its mind about the proper role for the CPSC. The original mandate under the Consumer Product Safety Act was a broad one, to protect Americans from unsafe consumer products, yet the agency's ability to achieve that mandate has been curtailed over time by limits in its authority, in its funding and in the number of commissioners.

With the number of products in the marketplace exponentially larger today than it was in 1973, and given the number of imports that we're seeing coming into this country, I believe the CPSC's oversight of consumer products is needed now more than ever. In fact, going back to 1973, think about how many more—just in one category—consumer electronic products are on the marketplace today. The amount of new products out there that just didn't even exist back in 1973 is staggering.

In spite of this exponential growth, CPSC has virtually no presence in America's ports, and the Commission is losing some of its most experienced staff. We have new chemicals, new consumer products such as nanotechnology. These goods are much more complex, and I think it's imperative that we give CPSC the resources it needs to be effective.

So I look forward to hearing from the panels. What we're going to do for Senators is, we're going to do a 5-minute round of questions. We're going to ask the two witnesses to do 5-minute opening statements and try to watch your time. But before we do that, I want to recognize my distinguished Ranking Member, Senator Sununu.

**STATEMENT OF HON. JOHN E. SUNUNU,  
U.S. SENATOR FROM NEW HAMPSHIRE**

Senator SUNUNU. Thank you, Mr. Chairman. It is a pleasure to have both of our panelists on our first panel with us today. This is a good opportunity, early in the session, to get an overview of

how the Commission is doing, what the needs are in terms of resources, and infrastructure, and to begin talking about the potential reauthorization process.

It's been a long time since we've had reauthorization legislation for the Consumer Product Safety Commission. I think, as everyone who has worked on these issues before understands, it can be contentious. There are a number of issues that people feel very strongly and very passionately about, so that can always slow down the process on such legislation.

But I think the public and the government and the employees within a branch of government are always better served if there is good, clear authorization language that sets forth the mission, the scope of responsibility, the objectives of regulations, and of course sets clear guidelines for funding, infrastructure, and operations. So I hope that today's hearing might be the beginning of that process, and I look forward to the testimony of our witnesses. Thank you, Mr. Chairman.

Senator PRYOR. Senator Klobuchar, do you have an opening statement?

**STATEMENT OF HON. AMY KLOBUCHAR,  
U.S. SENATOR FROM MINNESOTA**

Senator KLOBUCHAR. Thank you, Mr. Chairman. I am pleased to be here today to address the many important challenges facing this incredibly important government body, the Consumer Product Safety Commission. Let me talk briefly about why I think it is so important to have a strong Consumer Product Safety Commission.

There are those that say that our modern marketplace can effectively self-regulate for product safety. I don't doubt that we all bear a measure of responsibility for our own safety, and I also don't doubt that some of our companies have taken important voluntary steps to improve product safety in the last few years. But as a former prosecutor and a mother, I am convinced that government has an important role to play in protecting the public from defective and dangerous and deadly products.

Senator Pryor went through the statistics. I'm not going to do that again. They are very troubling. And I would say, to carry out these roles that are so important to the safety of the people of our country, the government needs a first class agency with first class resources and a first class commitment to its central charge of protecting the public.

These are my concerns. Senator Pryor mentioned the staffing levels and how in 1977 CPSC had a staff of 900. The current number of staff hovers a little above 400. The Commission's 2007 Performance Budget Request calls for funding levels that would leave the staff at an all-time low.

Second, the laboratory, CPSC's testing laboratory, is critical to the Commission's compliance investigations and safety standard activities, but no major improvements to the lab have been made in 32 years. One of my major concerns, when you look at the type of complaints that have been coming in, is how CPSC is not equipped for the new product safety challenges on the horizon, including the increasing number of unsafe products being imported

from overseas and changing technologies that pose new risks to our consumers.

And of course there is the basic problem of a quorum. As we sit here today, the CPSC is paralyzed because it does not have enough commissioners. I can think of no more clear message indicating that the government does not have enough focus on this issue, when we don't even have a quorum for commissioners.

So those are my major concerns, and I look forward to hearing your testimony today and working together with you as a new member of this Committee. Thank you.

Senator PRYOR. Commissioner Nord?

**STATEMENT OF HON. NANCY A. NORD, ACTING CHAIRMAN,  
U.S. CONSUMER PRODUCT SAFETY COMMISSION**

Ms. NORD. Thank you, Mr. Chairman, Senator Sununu, distinguished members of the Subcommittee. I am very pleased to be here this morning because this is the first opportunity I have had to come before you since I was confirmed as a commissioner less than 2 years ago. I appreciate the invitation to my colleague, Mr. Moore, and myself to come before the Subcommittee this morning to give you an overview of the CPSC and answer your questions.

The CPSC is an independent, bipartisan commission charged with protecting the public from unreasonable risk of injury and death associated with more than 15,000 types of consumer products. Since its inception, the CPSC's work has contributed significantly to the decline in rates of death and injury related to the use of consumer products. While we are proud of the agency's record of achievement, there is still much work to be done. Ever more technologically complex products and an unprecedented surge of imports continue to present the agency with new challenges.

The CPSC has three main missions: First, to identify existing and emerging product hazards, and to address those hazards by developing mandatory safety standards when voluntary consensus standards are not adequate. Second, to investigate and respond to product-related incidents, and to conduct product recalls to get unsafe products out of the stream of commerce. And, third, to alert and educate consumers about product-related safety issues. I'd like to briefly describe each of these missions.

In the United States there is a well-established system of voluntary or what we prefer to call "consensus" product safety standards. This system has worked very well, and most U.S. product manufacturers adhere to these standards. However, in those instances where we find that consensus standards do not exist or are not adequate, the commission initiates a rulemaking to develop a mandatory product safety standard.

To monitor compliance with safety standards, CPSC staff conducts field inspections of manufacturing facilities and distribution centers, and also conducts surveillance in retail establishments and via the Internet. Recalls occur for products that contain a defect that poses a substantial product hazard, or for products that violate our mandatory safety regulations.

In 2006 the CPSC announced 471 product recalls, and this is an all-time record for the agency. And, Senators, we are now on track to exceed that number in this fiscal year. Two-thirds of these re-

calls were of imported products, and two-thirds of those were from China.

In addition to our surveillance at U.S. ports of entry, the CPSC has initiated four product-specific working groups with China to address this challenge. The commission is determined to make certain that imports meet the same high safety standards that American-made products must meet.

Recalls are announced and other important product safety information is disseminated by the CPSC through all forms of media to warn the public of specific product hazards and to educate consumers. Additionally, visits to CPSC's three websites have grown substantially, from 200,000 in 1997 to over 20 million last year.

All of CPSC's safety activities require collecting reliable data, and the CPSC collects a lot of data. CPSC's IT systems are critical to the efficient maintenance and processing of this data. To keep existing systems operating and current, the Commission's pending budget request to Congress has reallocated funds to maintain and, where necessary, replace aging network infrastructure and security features. Quality data is critical to the agency's decisionmaking process as it relates to voluntary standards development, compliance, consumer education, product labeling, and rulemaking initiatives.

Recently the CPSC underwent a 6-month assessment by the Office of Management and Budget and received the highest possible rating, which underscores the fact that we continually strive to set ambitious goals, achieve results, and improve efficiency. While we are proud of this recognition, consumer safety is never a completed task but always an ongoing process of research, standards development, enforcement, and public education.

Mr. Chairman, members of the Subcommittee, thank you so much for your support. I look forward to working with you during the next Congress as you look at this agency, and I certainly look forward to answering your questions this morning.

[The prepared statement of Ms. Nord follows:]

PREPARED STATEMENT OF HON. NANCY A. NORD, ACTING CHAIRMAN,  
U.S. CONSUMER PRODUCT SAFETY COMMISSION

Mr. Chairman, Senator Sununu, and distinguished Senators.

Thank you for your invitation, to my colleague Commissioner Moore and me, to come before the Subcommittee on Consumer Affairs, Insurance, and Automotive Safety, this morning to give you an overview of the U.S. Consumer Product Safety Commission (CPSC) and to answer your questions regarding our mission, our goals, our resources and our activities on behalf of the American consumer.

The CPSC is an independent, bipartisan Federal commission established by Congress and charged with protecting the public from unreasonable risks of injury and death associated with more than 15,000 types of consumer products under the agency's jurisdiction.

Since its inception in 1973, CPSC's work has contributed substantially to the decline in the rates of death and injury related to the use of consumer products. We estimate that overall, injuries and deaths associated with the use of products under our jurisdiction have declined by almost one-third since the agency's inception. These reductions include:

- A 45 percent reduction in consumer-related residential fire deaths;
- An 89 percent reduction in crib-related deaths;
- A 74 percent reduction in product-related electrocutions;
- A 47 percent reduction in consumer-related carbon monoxide deaths; and

- An 82 percent reduction in poisoning deaths of children from drugs and household chemicals.

These are absolute reductions—when the increase in the U.S. population is considered, the rate of these and many other categories of product-related injuries we have targeted have declined even more substantially.

While we are proud of these and the agency's many other achievements over the years, there is still much work to be done. Ever more technologically complex products, like those utilizing nano materials, and an unprecedented surge of imports (especially from China) continue to present the agency with new challenges. Consumer safety is never a completed task but always an ongoing process of research, standards development, enforcement and public education.

We accomplish our mission by executing five Federal statutes: The Consumer Product Safety Act, the Federal Hazardous Substances Act, the Flammable Fabrics Act, the Poison Prevention Packaging Act, and the Refrigerator Safety Act.

Within the purview of these statutes, the CPSC has three core missions:

1. To identify existing and emerging product hazards that create an unreasonable risk of injury and to address those hazards by developing mandatory safety standards when consensus standards fail to do so. We do this through our Office of Hazard Identification and Reduction;
2. To conduct product recalls and to investigate and respond to product-related incidents which we accomplish through our Office of Compliance and Field Operations; and
3. To alert and educate consumers about product-related safety issues, done by our Office of Information and Public Affairs.

I will explain each of these in a bit more detail.

#### **Standards Activities**

In the United States, there is a very well established and vibrant system of voluntary—or what we prefer to call consensus—product safety standards. Under the guidance of groups like the American National Standards Institute, ASTM International, and Underwriters Laboratories, who work to bring all stakeholders into the process, literally thousands of such product safety standards have been written and are continuously being revised. These standards cover everything from the wiring in your toaster to the performance of baby walkers.

Thus, when Congress created the CPSC, there was a strong preference in our statutes for deference to such consensus standards over the promulgation of mandatory CPSC-drafted regulations. Indeed, CPSC staff serves on many of the committees and participates in writing these standards and routinely contributes to many more.

This system has worked well, and most U.S. product manufacturers adhere to these standards. However, in those instances where we find that consensus standards do not exist or are not adequate to address a risk, the Commission will initiate rulemaking to develop a mandatory product safety standard.

At the current time we have 14 rulemakings underway, including one on all-terrain vehicle (ATV) safety, a product in which I know Chairman Pryor, as well as Chairman Inouye, Senator Stevens and other Senators, have been very interested. In fact, as the Chairman knows, the Subcommittee held an important hearing last year on ATV safety.

Another of our current rulemakings relates to portable generator safety, a subject in which Senator Bill Nelson has been very active, as well as has Senator Cantwell. The CPSC has been aggressive in disseminating our safety message on portable generators in states like Florida and Washington during their severe weather over the past couple of years, and we certainly appreciate the Senators' interest, support and encouragement with these efforts as we proceed on both of these rulemakings.

#### **Product Recalls**

Recalls occur for products that contain a defect that poses a substantial product hazard or for products that violate CPSC-issued mandatory safety regulations.

In Fiscal Year 2006, the CPSC announced 471 product recalls (representing over 120 million individual products), an all-time record for the agency. These recalls represented a wide range of consumer products and product hazards. Two-thirds of these recalls were of imported products, primarily from China.

Products that may be subject to a recall are identified through reports from consumers, through our own investigations and through reports from companies.

Under Section 15 of the Consumer Product Safety Act, companies are required to report to the CPSC whenever they obtain information that any one of their products

fails to comply with an applicable consumer product safety rule, contains a defect which could create a substantial product hazard, or creates an unreasonable risk of serious injury or death. If the Commission determines that notification is required to protect the public, CPSC staff contacts the manufacturer, distributor or retailer and works closely with the company to give notice and undertake a recall or other corrective action voluntarily. CPSC staff works to make certain that the notice and the corrective action are executed in a manner that optimizes consumer safety as expeditiously as possible.

If necessary, the Commission may *order* a company to undertake a recall, after affording the interested party an opportunity for a hearing as required by CPSC's governing statute. CPSC's experience shows this to be a time-consuming and resource-intensive action; voluntary recalls are preferred because they can be conducted more quickly and offer more immediate protection to the public.

In addition to monitoring compliance with safety standards by conducting field inspections of manufacturing facilities and distribution centers, CPSC staff also conducts surveillance in retail establishments and via the Internet to assure ourselves that recalls have been effective in getting defective products off retail shelves.

Finally, because most of our recalls involve imported products, we undertake both routine and targeted surveillance and sampling of imported products at U.S. ports of entry, working in conjunction with the Bureau of Customs and Border Protection.

#### **Information and Education**

Recalls are announced and other important product safety information is disseminated through all forms of media to warn the public of specific product hazards and advise consumers on more general product use issues.

In addition, the agency maintains three websites that give consumers and others access to all manner of product safety information. Those sites are: *www.cpsc.gov*, *www.recalls.gov*, and our newest website, *www.atvsafety.gov*, which is part of a very significant information and education campaign now underway to advise consumers about a number of ATV safety issues. Visits to CPSC's websites have grown rapidly over the past few years from 200,000 in 1997 to over 20 million last year.

In an effort to communicate with hard to reach populations, the CPSC initiated the Neighborhood Safety Network, a grassroots outreach program that provides timely lifesaving information to 5,000 organizations and individuals who in turn share our safety message with hard-to-target consumers.

Our outreach efforts include making our product safety information available in Spanish. In fact, the CPSC maintains a Spanish language website. We are also active in signing up Hispanic groups to our Neighborhood Safety Network and reaching out through Spanish language media outlets like Telemundo and Univision.

Our staff is also able to reach out to consumers to warn of emerging hazards or when emergencies strike. For example, in response to the devastating hurricanes along our Nation's Gulf Coast, the CPSC partnered with the Florida, Mississippi, Alabama and Louisiana Departments of Health, Federal disaster agencies, the Red Cross and local emergency management agencies. We warned residents of the carbon monoxide hazards associated with improper portable generator use and also the dangers that consumers may encounter when returning to their property, including electrical, gas and standing water hazards.

#### **Information Technology and Data Collection**

All of these activities require collecting reliable data on product-related incidents and issues. And the CPSC collects *a lot* of data, most notably through our National Electronic Injury Surveillance System, or NEISS. NEISS is a statistical hospital-based product injury reporting system widely regarded as the best such system in the world, and which the Centers for Disease Control and Prevention and many other Federal, state, local, and even international government agencies rely upon to carry out their missions. We also collect data through our website, *www.cpsc.gov*, our consumer hotline, medical examiner and coroner reports, and a variety of media source reports. As mentioned earlier, manufacturers and retailers are also required to report to us on certain product-related incidents.

Obviously, CPSC's IT systems are central to the agency's safety mission. As veteran CPSC employees retire, the IT infrastructure has become increasingly essential to tracking and identifying emerging hazards at a state-of-the-art level. Accordingly, to keep existing systems operating and current, we are reallocating agency resources to maintain, and where necessary replace, aging network infrastructure and security features.

This reallocation will help the CPSC in collecting the quality data that is essential to the agency's mission and that facilitates the early identification of product hazards. Quality data is critical to the agency's decisionmaking process as it relates to

voluntary standards development, compliance, consumer education, product labeling, and rulemaking initiatives.

#### **International Activities**

Two-thirds of our recalled products are imports, and two-thirds of those come from China. Recognizing the continuous and significant increase in the number of imported consumer products entering the American marketplace, the CPSC established the Office of International Programs and Intergovernmental Affairs to provide a comprehensive and coordinated effort to ensure greater import compliance with recognized American safety standards. The CPSC is determined to make certain that imports meet the same high safety standards that products manufactured in America must meet.

However, we have found that many overseas manufacturers, particularly those from the developing world, are either ignorant of existing consensus and CPSC mandatory standards or simply choose not to design and manufacture their products to those standards. While a violation of a consensus standard does not, in itself, indicate a product is unsafe, the growing number of imported products that do not meet voluntary standards has strained our resources and challenged us to find new ways to work to ensure the safety of products in the stream of commerce.

To address the issues presented by imported products, the CPSC has negotiated Memoranda of Understanding with a number of foreign countries. These agreements generally call for close consultation on product safety issues. We are also anticipating our second U.S.-Sino Product Safety Summit this Fall, and in preparation for that, we have established several bilateral product-specific working groups that are developing concrete strategies for addressing the issue of unsafe imports. We are also working with various associations and standards groups to assure that a strong safety message is being delivered to Chinese manufacturers and exporters.

#### **Management Efficiencies**

Despite its relatively small size throughout its history, the CPSC has been highly effective and efficient at reducing product-related injuries and deaths. Within the parameters of its available resources, the challenge at the CPSC has always been to establish the highest safety priorities among the 15,000 product types under the agency's jurisdiction. The agency bears a broad responsibility, but with few exceptions, the record shows that the CPSC has performed effectively and efficiently in assuring the safety of the tens of thousands of consumer products that enter American homes every year.

To keep the focus of our resources on our safety mission, we have worked arduously to generate savings and implement efficiencies to offset the cost increases that we confront annually. For example, the agency has saved over \$1 million dollars per year because IT investments have allowed us to close field offices and support teleworking. Additionally, the agency foresees savings in rent at our headquarters in suburban Maryland as we begin to consolidate space to accommodate lower staff levels.

I know that the Senators are aware of our staff levels, and as with any organization, the challenge with fewer staff is to continue to maintain the agency's high standards and to achieve the agency's mission. With the help of management efficiencies and information technology, we at CPSC are doing that, and we will continue to strive to accomplish that because CPSC's safety mission is so critically important to the health and well-being of America's families.

Mr. Chairman, the CPSC logo represents the gold standard of consumer product safety, and I am proud of what the agency has accomplished and of the many fine professionals at the CPSC who work to keep hazardous products off the market. The staff at the CPSC is talented and resourceful. They include epidemiologists, toxicologists, engineers, chemists, and many others whose skills are highly sought and highly rewarded by the private sector. However, like you, they have chosen public service and serve no interest but the public interest. I am pleased and proud to serve the American people with them.

Thank you for your support, and I look forward to answering your questions.

Senator PRYOR. Thank you.  
Commissioner Moore?

#### **STATEMENT OF HON. THOMAS H. MOORE, COMMISSIONER, U.S. CONSUMER PRODUCT SAFETY COMMISSION**

Mr. MOORE. Thank you, Mr. Chairman, Mr. Ranking Member, and members of the Subcommittee. I am here to provide testimony,

as you have noted, on issues related to the reauthorization of the United States Consumer Product Safety Commission, CPSC.

The Commission, as you have stated, is charged by Congress with the critical responsibility of protecting the American public against unreasonable risk of injuries and deaths associated with unsafe consumer products. Indeed, protecting life is a crucial responsibility. Our work has resulted in an almost 30 percent decline in the rate of deaths and injuries related to hazardous consumer products since 1974.

It has been stated, I think, that despite significant reductions there remains on average about 27,100 deaths and 33.1 million injuries each year related to products under our jurisdiction. Moreover, the deaths, injuries, and property damage associated with unsafe products cost the Nation over \$700 billion annually.

Now, CPSC is a staff-intensive organization, with nearly 90 percent of its funding allocated to staff compensation and staff-related space rental cost. At the heart of CPSC's operation is its staff, without question our greatest and most important asset.

For Fiscal Year 2008, the President's request for our agency is \$63,250,000, which is an increase of \$880,000 above our Fiscal Year 2007 requested funding level, and will support the agency at approximately 401 FTEs. The request for Fiscal Year 2008 represents a reduction—a reduction—of 19 full-time equivalents.

As in the previous 2 years, we estimate that we will again be able to achieve these reductions through attrition, but we have reached a point where all are very concerned about the long-term impact of these continuous staff reductions on our agency. There are indications that the cumulative 3-year staff reduction of 15 percent, from 471 to 401, is going to make it difficult for us to maintain the broad range of skilled staff we need to address the full scope of injuries and deaths related to the 15,000 types of products under our jurisdiction.

This erosion of our most valuable asset comes despite the fact that we still have over 15,000 types of consumer products under our jurisdiction; creative new technologies constantly introduce potentially new product hazard issues; new consumer uses for products originally created for commercial use are being introduced; imports are increasing, many from countries that may not have similar consumer product safety standards; and, as I previously mentioned, despite the fact that we still face over 27,000 deaths and over 33 million injuries each year associated with consumer products under our jurisdiction.

I believe that regulatory policies should recognize that the private markets are the best engines for economic growth. Regulation, therefore, should be cost-effective, consistent, sensible, and understandable. Whenever appropriate, we encourage voluntary industry action to address safety requirements.

I point out to you that in 2006 alone, the Commission completed 471 cooperative recalls, 100 percent voluntary, involving nearly 124 million consumer product units that either violated mandatory standards or presented a substantial risk of injury to the public. Since 1990 we have worked cooperatively with industry to complete 352 voluntary safety standards while issuing only 36 mandatory safety standards. That is nearly a 10 to 1 ratio.

Effective voluntary action—effective voluntary action—is always preferable. However, if safety is not the goal of a certain industry or manufacturer, the commission must stand ready to protect the consumer expeditiously and without compromise. The key to the Commission’s continued success is funding—is funding—to successfully continue the mission of the agency. The commission must have the resources to respond quickly and effectively where the lives and health of the American public are at risk.

I thank the Subcommittee for allowing me to address my concerns at this hearing, and I look forward to working with you and your staff in this reauthorization process. Thank you very much.

[The prepared statement of Mr. Moore follows:]

PREPARED STATEMENT OF HON. THOMAS H. MOORE, COMMISSIONER,  
U.S. CONSUMER PRODUCT SAFETY COMMISSION

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to appear before you today to provide testimony on the United States Consumer Product Safety Commission (CPSC). The Commission is charged by Congress with the critical responsibility of protecting the public against unreasonable risk of injury and death associated with consumer products. This is a crucial responsibility because, often without CPSC’s intervention, the consequences of exposure to the hazards associated with dangerous products may literally be of a life and death nature for individual consumers unknowingly in possession of unsafe consumer products.

As you are aware, CPSC has not been reauthorized since 1992 and has not had a reauthorization hearing before this body since 2003. Although these proceedings could be an exceedingly intensive undertaking for the CPSC, I welcome this reauthorization process because I believe it presents a unique and much needed opportunity to focus on the Commission’s present and future agenda.

**The Mission**

In examining the legislative history of the statute creating the CPSC 30 years ago, we find that Congress, in its *wisdom* and *foresight*, was concerned about technological advances creating a variety of new products with greater potential for injury which would be less easily recognized and comprehended by the American consumer. Congress recognized that the dramatically increasing number of consumer products, and the consumer’s increasing reliance on more complex labor saving and recreational devices, would create increasing risk of injury from their use. Additionally, continuing product development demonstrated that previously acceptable risk levels were no longer reasonable in light of available safety technology.

Today, the risk of injury and death from unsafe consumer products continues to be enormous and costly. CPSC’s mission is to protect children and families against unreasonable risk of injury and death from about 15,000 types of consumer products. Our work has contributed significantly to the substantial decline in the rate of deaths and injuries related to hazardous consumer products since the agency’s inception. However, despite significant reductions over the years, there remains on average over 27,100 deaths and 33.1 million injuries each year associated with consumer products under CPSC’s jurisdiction.

Today, our reliance on consumer products in our lives is tremendous and growing. We rely on manufactured electrical and mechanized devices to assist us in too many of life’s activities to mention—at play, at work, in education, in travel, and particularly inside and outside of the home: in food preparation, in cleaning and making repairs around the home, in child-care, in trimming trees and grass, and on and on and on. To further complicate matters, we are beginning to see that more and more of these products are being manufactured abroad.

It is suggested in some circles that the modern, sophisticated marketplace of today can effectively regulate itself for product safety. I strongly submit that the previously discussed justification for governmental involvement in the protection of the consumer’s right to safety is even more compelling today than it was more than 30 years ago. Simply stated, competition and voluntary actions of today’s businessmen do not always suffice to safeguard the public interest. Competition does not and will not inevitably take the form of a rivalry to produce the safest product. The role of the CPSC in today’s consumer product marketplace remains compelling, substantial and relevant.

### CPSC's Budget and the Impact of Staff Reductions

For Fiscal Year (FY) 2008, the President's request for our agency is \$63,250,000 which is an increase of \$880,000 above our FY 2007 requested funding level and will support the agency at approximately 401 FTEs. If measured against our FY 2007 authorized FTE level, the request for FY 2008 represents a reduction of 19 FTEs. As in the previous 2 years, we estimate that we will again be able to achieve these reductions through attrition, but we have reached a point where we are very concerned about the long-term impact of these continuous staff reductions on our agency. There are indications that the cumulative three-year staff reduction of 15 percent, from 471 to 401, is going to make it difficult for us to maintain the broad range of skilled staff we need to address the full scope of the 15,000 products under our jurisdiction.

CPSC is a staff intensive organization with nearly 90 percent of its funding allocated to staff compensation and staff-related space rental costs. At the heart of CPSC's operation is its staff, without question, our greatest and most important asset. Over the last few years, because we have achieved our budget required staff reductions through non-targeted means such as attrition, early-outs and buy-outs, we have lost some very key staffers. For example, just to name a few, we have lost key experts in these areas:

- Poison Prevention,
- Chemical hazards as they relate to the Federal Hazardous Substances Act,
- Compliance of toys,
- Drowning prevention,
- Data collection and analysis,
- Emerging hazards,
- Fire-related hazards, and
- Legal knowledge of CPSC's regulatory process.

Over time we hope to be able to train replacements, but the experience in these areas that we have lost will take years to recover. Moreover, our ability to do succession planning is severely limited because of a lack of resources and our inability to have depth of personnel behind our key positions (no bench). In addition, dwindling resources and staff reductions have had some negative impact on our agency's ability to attract high level qualified candidates for our critical vacancies as well as our ability to retain some of our own top level employees.

There is no doubt that the President's funding proposal for FY 2008 presents challenges, particularly in light of the fact that this would be our third consecutive year of staff reductions. As I have indicated, since FY 2005, CPSC has been forced to reduce its funded FTE level by 15 percent from 471 to the FY 2008 proposed level of 401. This erosion of our most valuable asset comes despite the fact that we still have over 15,000 types of consumer products under our jurisdiction; creative new technologies constantly introduce potentially new product hazard issues (nanotechnology, Internet sales); new consumer uses for products originally created for commercial use are being introduced (portable gas powered generators); imports are increasing, many from countries that may not have similar consumer product safety standards (ATVs, cigarette lighters); and, as I previously mentioned, despite the fact that we still face over 27,100 deaths and over 33.1 million injuries each year associated with consumer products under our jurisdiction.

Our Field Division, which was combined with the Office of Compliance in 2005, has probably been the most affected. Since September of 2003, we have lost 43 people in the Field, 30 of which have *not* been replaced. Another 15 people left Compliance, six of whom were not replaced. One of the important duties of our Field staff was to provide outreach to local communities. We had public affairs specialists throughout the country that would appear on local television and radio shows, getting the Commission's message out at the local level. They would network with local affiliates of national organizations, such as Safe Kids, and make presentations to many different types of community groups. This was in addition to doing work for our Hazard Identification Division and doing work for Compliance (including trying to monitor the growing influx of imports at our port cities). In other words, they used to serve all three main areas of Commission work. Now they are primarily an investigative arm of Compliance. Their ability to do outreach at the State and local level has been largely eliminated. We lost creative, aggressive public relations specialists in the Field who had developed contacts over many years because they did not want to become mere investigators. I don't think we can be effective doing all of our outreach and education and information campaigns from headquarters, over the Internet or through our Neighborhood Safety Network. But, the reality is that

we can no longer afford to do all we use to do to serve the American public and this is an area that has suffered greatly.

#### **Addressing Product Safety Hazards Through Enforcement**

Aside from using its rulemaking authority, CPSC can act forcefully and quickly to remove dangerous products from the marketplace through two main enforcement activities. The first is in vigorously enforcing its current regulations; and the second is in utilizing its Section 15 authority to achieve recalls or corrective action plans when it is believed that a product meets the level of a substantial product hazard. I point out to you that in 2006 alone, the Commission completed *471* cooperative recalls (100 percent voluntary) involving nearly *124 million* consumer product units that either violated mandatory standards or presented a substantial risk of injury to the public.

In addition, CPSC staff, working with the U.S. Customs and Border Protection (CBP), prevented about *2.9 million* noncompliant cigarette lighters and fireworks from entering the U.S. and also prevented *434,000* units of toys and other children's products from entering the country. Unless interdicted, those goods would have competed with U.S. manufactured products, often undercutting them on price because the foreign manufacturers did not bother complying with our safety regulations. Our efforts to keep these violative products out of the marketplace protect not only the American consumer, but the American manufacturer as well.

In the future, the problems associated with increasing numbers of possibly dangerous imported products will present the Commission with more and more of a challenge. Increasing numbers of U.S. companies are either importing finished products or component parts made in other countries or establishing their own production plants outside of the U.S. In most cases, domestic companies are not going to have the same degree of control over these products as they would have if their products were being made in this country. This inability to have constant hands-on supervision can result in products entering this country that do not meet U.S. safety standards.

When products are required to meet a Federal mandatory standard, we can try to stop them at their port of entry before they get into the hands of consumers. CBP is very cooperative in helping us identify and sequester products that are potentially violative. However, both CBP and CPSC have limited manpower to inspect and test these products, relative to the tens of thousands of shipments that arrive daily at U.S. ports. Additionally, CBP has a much broader national security mandate that takes much of its resources.

We currently have five people cleared to use the CBP's computer system, the Automated Commercial System (ACS) database, and perhaps a total of 15 people to go to various ports around the country to inspect shipments that have been identified as possibly not meeting our safety standards. These inspectors do this in addition to the many other responsibilities that they have. CPSC simply doesn't have the personnel to do more than a cursory look at imports coming into this country. As I have indicated, in the last several years we have lost 30 Field personnel, largely as a result of budget cuts, who we have not been able to replace. This has impacted our entire Field operation, including port inspections. The new CBP computer system will help, but nothing can substitute for actually examining a shipment. Thus, we are frequently left to deal with products after they are in the stream of commerce, through our recall mechanism, which can often come after the product has already injured consumers.

Requiring a manufacturer, distributor or retailer to recall defective products is a primary mechanism in CPSC's continuous undertaking to address product safety hazards. However, announcing the recall is just one step in an overall process of eliminating the hazards presented by unsafe products in consumer's homes. We also have some responsibility to take all reasonable steps to ensure the removal of those unsafe products from potential consumer use. Given the limitations presented by CPSC's resources, it is tremendously important that the Commission maximize the effectiveness of this particular aspect of the recall process.

Another issue in the enforcement area lies within the civil penalty arena. I have supported, and continue to support, the elimination of the monetary cap on civil penalties. While the cap does rise periodically, the reality is that a \$1.825 million fine means very little to many of the corporations we regulate. Why do we need a cap at all? While Congress may want to take another look at the guidance given to us in the form of factors we shall consider when determining the amount of a civil penalty, we should not have any limit on the amount we can seek. It is one thing to limit the amount *one* consumer can recover against a company (and not a position I necessarily support either), but it is quite another to limit the government's ability to penalize a company on behalf of *all* consumers, thereby limiting

the deterrent effect of civil penalties. Perhaps some companies would be less likely to try to stall our agency by putting off reporting hazardous products if we had penalties that were more commensurate with the harm they can cause.

#### **CPSC's Important Safety Work Must Continue**

By most current measures, CPSC still provides both tremendous service and tremendous value to the American people and we are very proud of our staff's accomplishments. Our agency is the major factor in the substantial decline in the rate of deaths and injuries related to consumer products since 1974. During that time, through our standards work, compliance efforts, industry partnerships, and consumer information, there has been a *45 percent* reduction in residential fire deaths, a *74 percent* reduction in consumer product-related electrocutions, a *47 percent* reduction in consumer product-related carbon monoxide deaths, an *82 percent* reduction in poisoning deaths of children younger than 5 years of age, an *84 percent* reduction in baby walker injuries and a *89 percent* reduction in crib-related deaths.

Moreover, in FY 2006, we informed the public of hazardous products through 435 press releases, 12 video news releases and more than 1 million distributed publications while conducting about 500 television and radio interviews. CPSC also warned the public about product-related hazards through our hotline and consumer product safety information websites (*www.cpsc.gov*, *www.recalls.gov*, *www.atvsafety.gov*), which reached over 21 million consumers in 2006, and other outreach activities such as the Neighborhood Safety Network (NSN). The NSN outreach goal is to reach underserved consumers who may not routinely receive important safety information due to lack of access or exposure to the general means that we use to disseminate our safety messages and warnings.

Additionally, in FY 2006, the Office of Management and Budget (OMB) reviewed CPSC using their Program Assessment Rating Tool (PART) and assigned us a rating of "Effective." This is the highest rating a program can achieve and signifies that, based upon OMB's criteria; CPSC sets ambitious goals, achieves results, is well-managed and improves efficiency.

These numbers and activities by themselves demonstrate the indisputable consumer product safety role that the Commission continues to perform for the American consumer despite our shrinking resources. However, we have to be mindful of the fact that resource limitations and staff reductions have challenged and will impact our ability to fully respond to consumer product safety issues presented by the broad range of products under our jurisdiction. For example, with respect to FY 2008, although we will continue our work in reducing child drowning deaths at the annual project level, we will no longer address this area at the level of a strategic goal because resource limitations is a factor. At some point in the future, the Commission will make the ultimate determination but additional projects that could be delayed/deferred in the FY 2008 budget include:

- Bedclothes flammability,
- Development of projects dealing with emerging hazards such as consumer electronics,
- Support for voluntary standards and code revisions for fire sprinklers, lighting, ladders and ride-on mowers,
- Data analysis and technical review activities for smoke alarms, extension cords, temperature controls, glass top furniture, children's scald burns, child gate latch durability, and toy impact resistance guidance.

We at the Commission strongly feel that many, many deaths and injuries have been prevented as a result of the heightened attention given to safety issues by manufacturers and consumers due to CPSC's leadership. The product safety landscape is ever evolving because of more technologically complex products as well as a greater emphasis on imports. The results of our activities clearly illustrate the benefits of CPSC's Federal presence in today's consumer product marketplace and therefore provide substantial justification for present and future consideration for keeping our safety programs intact.

#### **Emerging Technologies**

The American consumer wants everything electronic to be smaller, faster, longer-lasting and more powerful. Nowhere is this more evident than in energy storage devices for cell phones, laptops, PDAs and other portable electronic devices. One result of this trend is the lithium-ion battery which first appeared commercially in 1991. Over time we have seen problems develop with the use of these batteries when, for example, they are put into too small a space or the device they are in is dropped. CPSC, in conjunction with several companies, recalled more than four million laptop batteries last year because of overheating which either did, or could, lead to a fire.

The chemical configuration of the lithium-ion battery is constantly evolving, with changes being made every few months. It is challenging for the battery manufacturers themselves to keep up with the developing technology, let alone the CPSC.

Another innovation finding its way into batteries and thousands of other products is nanotechnology. This is the ability to alter and create materials at the sub-atomic level. The physical properties of materials can change as they shrink to nanometer size. How to determine what human health and safety risks these changed materials may pose when used in consumer products will be a major challenge for our agency. I do not pretend to understand nanotechnology and our agency does not pretend to have a grasp on this complicated subject either. For Fiscal Year 2007, we were only able to devote \$20,000 in funds to do a literature review on nanotechnology. Other agencies are asking for, and getting, millions of dollars for research in this area. Given the many products already on the market using nanotechnology, from computer chips to Dockers® pants, I do not think it will be too long before the agency is asked to assess the risks of nanotechnology use in some consumer product under our jurisdiction. At this point in time we would be hard-pressed to make such an assessment. We simply do not have the resources to get up to speed in this area. We are forced to devote our limited resources to the hazards with which we have experience, such as fires, carbon monoxide poisoning and electrocutions.

Our main challenge, no matter whether it is keeping up with imports or understanding new technologies, is resources. When forced to make hard choices we have to opt for what it is possible for us to accomplish, given the personnel we have and the limited dollars we have to spend. We do not have the luxury of getting ahead of a problem, we have to wait until one develops and then try to solve it, usually after it has killed or injured consumers. This dilemma is causing many sleepless nights for some CPSC staffers. With the help of the administration and Congress, we have to get beyond our present posture of thinking of how we can do without and move to the position of thinking of what more we can do.

#### **Present and Future Activities**

I strongly feel that the role of the Commission is essential to the U.S. marketplace in an increasingly competitive international marketplace. The Consumer Product Safety Commission and the marketplace must work together to develop international consumer product safety standards and enforcement compatibility so we can enhance international trade and export opportunities without lowering U.S. safety standards.

With approximately three-quarters of our recalls comprised of foreign manufactured products and over half of total recalled products originating in China, CPSC must establish a definitive strategy for increasing compliance of foreign manufactured products with U.S. safety standards. With that goal in mind, the Commission established the Office of International Programs and Intergovernmental Affairs. Through the efforts of this office, CPSC has signed 12 Memoranda of Understanding with its government counterparts abroad, including China. These agreements seek to establish closer working relationships between the signatories, as well as provide a formal mechanism for exchange of information. Interdisciplinary technical teams have also been established to determine in what areas Chinese manufacturers are more consistently noncompliant and to develop strategies for increasing compliance in those areas. In addition, other strategies for increasing the compliance of imported products with U.S. safety standards are being evaluated.

#### **Conclusion**

In closing, while I believe that consumers must take responsibility for their own safety, there clearly is a role for the CPSC to assure that products are designed safely and recalled where there is a problem. I think that consumers should be informed about the products they purchase and take reasonable care in using them. Mr. Chairman, I believe that our government is now attempting to move into a new era of accountability. It is my hope that this will be an era where well reasoned, and I emphasize the word reasoned, government action will be the rule, and not the exception.

I also think that reasoned Commission action reflects a pragmatic approach to resolving safety problems and recognizes that regulation is only one of many options that can be employed to address safety issues. We will work actively to achieve safety goals, and I expect, as is often the case, industry will respond reasonably. But, if safety is not the goal of a certain industry or manufacturer, the Commission stands ready to protect the consumer expeditiously and without compromise.

As Congress envisioned more than 30 years ago, the Commission should have the capability to handle increasingly technologically complex products as well as the capability to uncover high injury risks and defective products using today's sophisti-

cated data sources. To successfully continue the mission of the agency, the Commission must have the resources and the flexibility to respond quickly and effectively to critical situations where the lives and health of the American public are at risk.

I would like to thank the Subcommittee for allowing me to address my concerns at this hearing and I look forward to working with the Members of the Committee and its staff in this reauthorization process.

Thank you.

Senator PRYOR. Thank you, and thank you both for keeping your comments to 5 minutes. Senator Sununu has to leave in just a few moments, so normally I would start by asking questions, but I'll let him go first because he has some scheduling constraints.

Senator Sununu?

Senator SUNUNU. Thank you, Mr. Chairman. In truth, Senator Pryor wants me to go first because he thinks all my questions are softballs—

[Laughter.]

Senator SUNUNU.—so we're going to give you an opportunity to warm up a little bit—

Senator KLOBUCHAR. Exactly.

Senator SUNUNU.—and then he'll come in with the heavy artillery.

Senator PRYOR. Yes. Once we get him out of the room, we'll get some things done around here.

[Laughter.]

Senator SUNUNU. Ms. Nord, as I understand it, the commission currently doesn't have a quorum under which it can operate, and you pushed for a number of action items prior to losing that quorum in January. Are there any pending items, or items you see on the horizon, that you think aren't being addressed at the moment because of the lack of a quorum?

Ms. NORD. Senator, you are correct. The commission does not have a quorum by operation of our statute. We did anticipate that we would go for a period of time without a quorum. That has happened in the past, and indeed prior to my confirmation the commission I think went for five or 6 weeks without a quorum.

So it is something that we're familiar with, and we do plan when we anticipate that this is going to happen. Prior to losing the quorum, we pushed out, if I may use that phrase, a number of regulatory proposals, including a very important final rule dealing with generator safety, an advance notice of proposed rulemaking which would potentially ban lead in children's jewelry, and a number of other regulatory proceedings.

Because we pushed those proposed proceedings out there, we are now at this point collecting comments from the public, and the staff is doing their work. So right now, today, if we had a quorum, there really wouldn't be anything teed up for commission action. However, as months pass and the staff does their work on these issues, there will become issues that will be ripe for commission action, so it really is very important for us to get our quorum back.

Senator SUNUNU. When does it become a problem?

Ms. NORD. I would be giving you an off the top of my head response, sir, because each of these regulatory proceedings is different from another, but I am not aware right now of any proceeding that is ripe for action, that is sitting there waiting for the

commission to vote. But, again, that's dependent on how quickly the staff does their work and tees these things up.

Senator SUNUNU. In your testimony you talked about the importance of IT, information technology, and data collection. How much of your budget do you put into IT and data collection efforts?

Ms. NORD. This is the very first time that the commission has put in place a line item, if you will, a part of its base that is allocated to information technology, which I just find very, very surprising. The way we have done this in the past is basically pull from savings, and it has been a rather ad hoc-ish way of proceeding. But this year, because IT is so important, and because it is getting so much more important, these are really critical tools that we need in order to do our job, so we have really got to plan for this.

Senator SUNUNU. What is the amount of the—

Ms. NORD. It's \$1 million.

Senator SUNUNU. \$1 million? So 3 percent?

Ms. NORD. It's \$1 million, and frankly, sir, what that does is allow us to maintain our current systems, to replace hardware on a schedule, to make sure that our software licenses are up to date.

Senator SUNUNU. How does that compare with other Federal agencies? I would imagine that would be dramatically lower.

Ms. NORD. I would have to come back to you with that information.

Senator SUNUNU. What are the most effective and/or most important pieces of information technology or data collection that you are using at the moment?

Ms. NORD. Information technology has allowed us to become much, much more efficient than we were in the past. We have automated a number of our processes, and consequently are able frankly to do more with less.

Senator SUNUNU. In what areas, for example?

Ms. NORD. Well, to give you a couple of examples, Section 15 of the Consumer Product Safety Act requires people to report potentially dangerous products to us. We have tried to automate all that reporting, the data collection, and the data distribution within the agency, and that has resulted in a much, much quicker processing of these Section 15(b) reports.

Senator SUNUNU. When did that begin? How long have you been—

Ms. NORD. I'd like to come back to you. My recollection is, it's about 18 months ago, but I'd like to come back to you with a precise answer.

Senator SUNUNU. That would be fine.

Ms. NORD. Another example, we have people, State and local officials, who partner with us in all 50 states, and we contract with them to basically help us be another set of eyes and ears on the ground, if you will. And we have now automated the reports that they send us, so that they are coming in on the web, and that has made again the processing of that information so much more efficient. It's coming in electronically and it's coming in consistently.

Senator SUNUNU. And that has happened, similarly, in the last year to 18 months?

Ms. NORD. Again, I'd like to get back to you, but that is my recollection.

Senator SUNUNU. Thank you very much.

Thank you, Mr. Chairman.

Senator PRYOR. Now we also have a circumstance where Senator Klobuchar has to preside in the Senate here in the next few minutes, so we're going to let her go next.

Senator Klobuchar?

Senator KLOBUCHAR. Thank you, Mr. Chairman.

I wanted to follow up a little bit on the issue of the quorum that Senator Sununu raised. We're going on 3 months—is that right?—without a quorum.

Ms. NORD. We lost the quorum on January 15th.

Senator KLOBUCHAR. OK, and you have acknowledged that there are these growing threats with technology and some of the new changes that are going on, and I would think that there would be some circumstances where some new threat would come up. It may not be something that you would have to hear in a matter of days, but you must have some opportunities and some ability to take some kind of emergency action, and I just don't understand how you can do this when you don't have a quorum.

Ms. NORD. Right now we are continuing to conduct recalls at a record pace, and frankly that is the mechanism that we use to address those kinds of issues. And those are done at the staff level, so—

Senator KLOBUCHAR. Well, then, what does the Commission do? I mean, if you're doing all of this at the staff level, I would think the major decisions about rules and changes going forward within the ever-changing world of technology, would need a quorum. I practiced law in the regulatory area in Minnesota, and I just was never familiar with this, where we had an agency that didn't have a quorum.

Ms. NORD. Well, as I indicated, unfortunately this is a situation that we have had to deal with from time to time. The commission votes on regulations. We vote to issue subpoenas, and a subpoena is generally issued after a fairly extensive back-and-forth between the staff and whoever is being—

Senator KLOBUCHAR. So you would not have any opportunity to issue subpoenas now when you don't have a quorum.

Ms. NORD. That's right, but we also don't have any of those cases teed up.

Senator KLOBUCHAR. OK.

Ms. NORD. We cannot accept settlements of more than \$50,000. However, again, before we lost the quorum, the commission delegated to the staff the authority to accept settlement amounts on four particular cases that were in the final processes of being negotiated, so we tried to again address that concern.

The commission would have to vote or would have to have a proceeding to determine that we had an imminent hazard, and that may be what you're addressing. However, in the history of the commission I think there has only been five instances where we have had an imminent hazard.

Senator KLOBUCHAR. Do you know what those instances are?

Ms. NORD. I don't, but I'll surely get back to you.

Senator KLOBUCHAR. I mean, I'm just picturing if we were at a place in time, we would certainly want to have a quorum to deal with them.

I just want to follow up on something you just said about the record number of recalls. I would think, then, that this shows that the risk of consumer products is going up, not down, and especially when we see, as I mentioned, these products coming in, the imports coming in from places, primarily China. I am still very confused about why we would be seeing staffing levels going down when you have these kinds of clearly rising problems.

Ms. NORD. With respect to whether more recalls indicates more unsafe products, what I think it actually indicates is a couple of things: First of all, a growing economy, more people, more products, so you would expect to see that. It also shows that the current legislative strategy that was envisioned in the Consumer Product Safety Act 35 years ago is working quite well.

Not only have we had a record number of recalls, ma'am, but we have also had a record number of reports under Section 15(b), which means that more and more companies are reporting to us, and we are then basically going through those reports, making determinations: this is a problem, this isn't a problem. So frankly it shows that the Commission is really doing its job very effectively.

Now as to how we do that with fewer people, as I indicated, part of the answer to that is the fact that we are becoming much, much more efficient at doing this. Technology, I can't emphasize to you enough how important technology is to us in doing our job.

Senator KLOBUCHAR. Mr. Chairman, if I could just ask one more question? I'm going to view that as a "yes."

[Laughter.]

Senator KLOBUCHAR. That was a little joke, Mr. Chairman. I was just asking if I could ask one more question.

Senator PRYOR. Ask away.

Senator KLOBUCHAR. Thank you.

You know, I appreciate your kind words about your staff and being more efficient, but when you look at the fact that some of these products are even getting in the hands of kids and people in our country, I think that points us toward this issue of import surveillance. My understanding is that CPSC has very limited import surveillance.

What I'd like to see is that we would be catching these products before they get into the hands of the public, and that the current Office of International Programs is not enough to do this. Could you comment on that?

Ms. NORD. Yes. I think imports is one of our biggest challenges, and it's something that we really need to do more work to get our hands around. The number of imports has burgeoned over just the last couple of years, and it is a challenge for us.

We are trying to address it in a couple of different ways, ma'am. First of all, we do have a good, strong, close working relationship with Customs, and I would like to make sure that that relationship is even closer. We have CPSC people in the major ports. For example, out in Long Beach our CPSC Compliance Officer is a former Customs agent, and she works very, very closely with Customs out

in Long Beach, which is the major port where these products are coming in.

We are also now in the process of entering into a relationship with Customs whereby we will become authorized to use what's known as their Automatic Commercial Environment, which is basically a computer system of all shipments that are coming into the United States. Obviously, we need security clearance to do that, and we've got five or six of our customs people already cleared to begin using this process. We've been doing it informally, but we're going to now formalize that arrangement and expand it so that we have a better sense of what shipments are indeed coming in and we can pinpoint them more precisely for Customs to inspect.

But the biggest challenge and the biggest—well, the best way to solve this problem is to make sure that the unsafe products don't ever get onto the boat and come to the United States, and that really is the challenge. We've got to work with the Chinese government and other foreign governments to make sure that their manufacturers have the same sense of their responsibility here as U.S. manufacturers do. There are things that we can do and are doing with the Chinese government, and frankly there may be some statutory changes that need to be made in order to beef up our authorities there.

Senator KLOBUCHAR. Thank you.

Ms. NORD. Thank you.

Senator PRYOR. Thanks, Senator Klobuchar.

Let me ask, if I may, about the budget that you're under. Madam Chair, I understand that you support the President's budget but you would also like to see an increase in funding. Is that fair to say?

Ms. NORD. As the Chairman of the CPSC, I support the President's budget, sir.

Senator PRYOR. And what about an increase in funding?

Ms. NORD. If you were to increase our funds, I could certainly put them to good use.

Senator PRYOR. Yes. And if there is not an increase in funding, you're going to have to cut employees, as I understand?

Ms. NORD. The budget request supports 401 full-time employees.

Senator PRYOR. Right, and you'll lose some, I guess, 19 employees. I assume that you're going to tell me that you are better equipped to do your mission if you have more employees. Is that fair to say?

Ms. NORD. Not necessarily. I think we need to make sure that we put our resources to the best use. In some cases it may be that technology is where we want to go. I mean, more people doesn't absolutely mean better compliance or better carrying out of our mission. I think we have to make sure that we've got the right mix there.

Senator PRYOR. Well, I understand the sort of hypothetical, general nature of your comments there. We're talking about the here and now with your agency.

Ms. NORD. Yes.

Senator PRYOR. Would you be better served with more employees or not?

Ms. NORD. Again, if we have more employees, I can put them to good use.

Senator PRYOR. OK. And do you think that you can make up for the loss of employees by better technology? I'm talking about this year.

Ms. NORD. Technology is absolutely critical.

Senator PRYOR. I understand that, but I'm talking about this year. Can you make up for the loss of personnel with more technology?

Ms. NORD. Sir, with 401 employees and—well, with the budget request that the President put to the Congress, we will do the job that we laid out in the budget. If you give us more employees, we presumably will do more. However, I just have to emphasize to you that we need to make sure that we have got the technical and the technology capabilities to have those employees working as efficiently as they possibly can.

Senator PRYOR. Well, you've been there 2 years. Are they doing that or not? Do you have the technology or not? I'm really not trying to argue with you. I'm trying to help you out here.

Ms. NORD. Yes, I understand that.

[Laughter.]

Senator PRYOR. I'm trying to increase your budget. I mean, I've been talking to colleagues in the Senate about trying to help CPSC. To me it's an agency in distress. I'm trying to get you some more money here, some more resources, but you tell me you don't need them?

Ms. NORD. Let me tell you what I would do with more.

Senator PRYOR. In other words—let me stop here.

Ms. NORD. OK.

Senator PRYOR. Let me ask the other Commissioner for his perspective on that.

Would you like to see us, if we could find the money in the budget, would you like to see us increase your budget?

Mr. MOORE. Very definitely.

Senator PRYOR. And if we could get you more employees, would you be more able to do your job?

Mr. MOORE. Without question.

Senator PRYOR. And I understand the President's budget, and I understand how the budget works here, but if we could do that, in my view I think American consumers would be well-served. Do you agree with that?

Mr. MOORE. Absolutely.

Senator PRYOR. OK. Let me move on, then, because I understand you're an administration appointee, and I understand sometimes you don't want to be in a position of conflicting with what the President's budget request is. But it seems to me that when you answered Ms. Klobuchar's question—and I'll go ahead and ask you, Madam Chair—it seems to me when you answered Ms. Klobuchar's question about imports—she called it import surveillance—about imports, it seems to me that you're in a much stronger position to monitor the imports if you have more people to do it.

In other words, it seems to me, just as someone on this Committee, that you're shorthanded already. It's very hard for you to do your core mission already. And when you're faced with these

enormous number of imports coming in, it seems to me you're better served by having more people to do that. Is that fair to say?

Ms. NORD. Certainly we could put more people to work but, sir, that is only part of the answer. We need to make sure that we've got people working with the Chinese government to put in place strategies that are going to prevent unsafe products from getting on the boats and coming to the United States in the first place. And that is, I think, as important a part of the answer as it is having people—

Senator PRYOR. Let me ask this: Are you working on that right now?

Ms. NORD. We are.

Senator PRYOR. OK, and are we making any progress there?

Ms. NORD. We are making some progress. We are going to be sitting down in May for some major negotiations with the Chinese government on a whole series of types of consumer products. In the fall the Chinese government is going to be coming to Washington for the Second U.S.-Sino Safety Summit. I am hopeful that in the fall I can come back to you and report to you that we have made progress but, as I'm sure you know, sometimes in negotiations with the Chinese, you count progress in small steps.

Senator PRYOR. Yes, exactly. I mean, I think that's great. I think it's great you're meeting with them, but in the meantime I'm going to do my best to try to get you some more resources so you can do your job.

Now let me ask—you mentioned, both of you in your testimony basically said that recalls are at a record level. I just want to tell you all, when I was the Attorney General of Arkansas, we had an experience in our house where someone saw one of our baby strollers or car seats, and it had been recalled, and we didn't know about it.

And so I talked to my staff in the Attorney's General office—this is five, six, 7 years ago now—and actually we worked with the CPSC, with NHTSA, and with the FDA, I believe, and we did a deal where we hooked onto you all's websites and made that information available. And then what we did is, we publicized it all around the State of Arkansas to tell people there's one place to go for child product safety. We called it *childproductsafety.com*. There's one place to go. In fact, they're still doing it in the AG's office.

And so I think what you all do is very valuable, I think it's very helpful. I think sometimes it's hard for people to find the information, and I would encourage you all to just consider ways to make that information more readily available. That's one of the challenges I think you face.

But let me talk, if I can, about your facilities. I understand your lab is dilapidated, it's old, it needs improvement. Mr. Moore, let me ask you. Tell me about the condition of the lab. It's in Gaithersburg, Maryland, right?

Mr. MOORE. Yes.

Senator PRYOR. Tell me about the condition of the lab.

Mr. MOORE. Well, I'd have to review it again. I haven't been out there in a while. But in terms of the work that the staff does out there, I think it's very effective. There's a continuing need for

equipment, but I don't know precisely what that equipment would be without consulting with the staff out there.

Senator PRYOR. For their expertise?

Mr. MOORE. Yes, yes, yes. I know we have a storage facility out there which is overfilled at this point, and it's a growing need. It's a growing need that grows over time. And if you don't mind, I'd like to talk with those people out there and get back with you.

Senator PRYOR. Sure, that would be great.

Madam Chair, do you know anything about the lab, the facility?

Ms. NORD. Yes, sir. Our laboratory facilities are located in Gaithersburg, Maryland. They are on a 1950s former Nike missile tracking site. It is not a very efficient operation from a physical layout standpoint. Our staff does a fabulous job in making do with resources that I frankly think are not adequate.

We have had conversations with GSA over the past several years. GSA has been doing some band-aid type fixes to the lab. We were in GSA's budget back in, I believe, 2005 perhaps, for a major overhaul of the lab. Unfortunately, Hurricane Katrina happened, and those kinds of resources are now being redirected in other places.

So we have been having ongoing conversations with GSA to try to fix this problem. Those conversations are going on right now, and I would like to come back to you in about 6 weeks to 2 months and sit down and brief you.

Senator PRYOR. That would be great. I'd like you to do that. One last question before I turn it over to Senator Thune and let him ask questions. On the issue of the quorum, and I know we've talked about that already, would this all be solved if we went back to having five commissioners? It seems to me that would help, that you wouldn't get in these gaps where you are losing a quorum. Would that help?

Ms. NORD. Five commissioners would certainly mean that we wouldn't lose our quorum unless something extraordinary happened.

Senator PRYOR. Do the two of you think we at least should consider putting five commissioners on this agency, given the breadth of the things that you do and the number of things that you do?

Ms. NORD. Sir, I have not thought about that in any sort of hard way, and I'd like to do that before responding.

Do you have—

Senator PRYOR. Mr. Moore?

Mr. MOORE. Not at this point. I agree with her that we ought to look at it more carefully before we put something on the record on it.

Senator PRYOR. OK.

Senator Thune?

**STATEMENT OF HON. JOHN THUNE,  
U.S. SENATOR FROM SOUTH DAKOTA**

Senator THUNE. Thank you, Mr. Chairman, and I appreciate you holding this hearing. Oversight is obviously an important part of the job that we do here in the Congress, and so I appreciate our witnesses being here today. I want to welcome Commissioner Moore and Chairman Nord, who is a native South Dakotan. Nice

to have you with us today, and I hope that you'll make it back to our home state frequently.

I have a particular interest in the Commission's proceedings with regard to all-terrain vehicles or ATVs. As you know, ATVs are an important part of daily life for many South Dakotans who make a living on a farm or a ranch. In fact, horses all around South Dakota are breathing a sigh of relief as more ranchers jump on their ATVs each morning to do chores and leave the horse in the barn. But we also have a lot of South Dakotans who use ATVs for recreation in the Black Hills.

I guess what I would like to ask is, have you noticed any trends in the comments the commission has received in response to the proposed rulemaking on ATVs, and do you believe the commission will make any changes in the proposed rule based on the comments that have been received?

Ms. NORD. I think it would be premature for me to speculate on what the Commission is going to do, since this is indeed open for—well, I think the comment period just closed, but we are in active rulemaking. The balance that we need to make here is to respect and indeed help people who use ATVs as work vehicles in the environment you described, and also for people who use them for recreation.

On the other hand, sir, we are seeing more and more deaths associated with all-terrain vehicle usage. Many of these deaths are kids, frankly, who jump on an adult size ATV, a machine that they have absolutely no business being on and they don't have adequate training for, and they're not wearing the proper safety equipment.

So we've got to respond to that hazard pattern as well, and hopefully we can find a way to respond to that and drive those deaths down, those unnecessary deaths down, while still making sure that the machines are available for recreation and for work on farms and ranches.

Senator THUNE. Some are calling, as this whole rulemaking process is going on, for more regulation or legislation. Do you believe that further regulation or legislation should occur at the Federal level or at the State level?

Ms. NORD. Well, I think you've identified a real key point here. The solution to this problem doesn't rest exclusively at the Federal level. We will, through our rulemaking, look at the machine itself to make sure that the machine is as safe as it can possibly be.

But, you know, states have the authority to put in place licensing requirements and determine really how the machine is used in the local environment, and states really do need to be looking at that. That's something for the states, not the Federal Government, to do.

Senator THUNE. I appreciate your response to that, and look forward to, as this process becomes final, knowing a little bit more about what those rules might do in terms of how they're going to pertain to the use of those vehicles.

Commissioner Nord, you had mentioned in your testimony that two-thirds of our recalled products are imports, and two-thirds of those come from China. And I guess the other question I would have is, what are the most dangerous products coming from China, and what can we do make sure that those imported products are as safe as American-made products?

Ms. NORD. I don't know the answer to what is the most dangerous product. I know we are really focusing our activities in four areas, and that would be toys, electrical products, fireworks, and cigarette lighters, and that's really where we're focused.

What we can do to address it and make sure that Chinese-manufactured products meet the same standards as U.S.-manufactured products, there are a number of things that we can do. One of the things that I think is really important to explore is the role of voluntary standards in this whole process.

With U.S. manufacturers, there is in place a very vibrant system of standards writing that goes on here in the U.S., and most U.S. companies participate in voluntary standards activities and comply with those standards. For example, I'm sure you all are familiar with Underwriters Laboratory. That would be an example of a voluntary standards body, and indeed our statute specifically says to us that if there's a voluntary standard in place, we don't put in place a mandatory standard. We let the voluntary standard do its work.

The problem is that in China there isn't the sense of needing to comply with voluntary standards, so you see things coming into the U.S. that do not comply with voluntary standards in the same way that U.S.-manufactured goods do, and that is really, really a critical element for getting a handle on this. If we can export that, either in a way that is non-mandatory, or if we need to beef up our statute, it may be that we do have to do that, but we need to make sure that imports meet the same voluntary standards that U.S.-manufactured products generally meet.

Senator THUNE. Thank you, and thank you, Mr. Chairman. I want to thank both of you for your service to our country and keeping Americans safe, particularly those who cannot protect themselves, such as infants, children, and the elderly. So thank you for the good work that you do.

Thank you, Mr. Chairman.

Senator PRYOR. Thanks, Senator Thune.

Senator McCaskill?

**STATEMENT OF HON. CLAIRE McCASKILL,  
U.S. SENATOR FROM MISSOURI**

Senator McCASKILL. Thank you, Mr. Chairman.

Back in March of 2006 you promulgated a rule on mattress flammability that took an unprecedented step of proposing to preempt State common law on tort claims. The preemption language was added to the rule's preamble after the notice and comment period closed, providing no opportunity for the public to review it or evaluate it.

I would like your comments on that. I am deeply troubled by an agency being in a position to think that it knows better than the states as to what remedies should be afforded people in our courts, and I think it is a dangerous precedent that we are preempting State common law without opportunity for comment on that preemption.

Ms. NORD. Is that to me?

Senator McCASKILL. Yes. Either one of you. I know you're both dying to answer.

Ms. NORD. Thank you for the question. Because the preemption—well, first of all, all agencies are required to make a statement of the preemptive effect of their rules, and that's by virtue of an Executive Order issued in 1996, so we do need to make a statement of the preemptive effect of our rules. Because that statement is only our view, it is not part of the rule, so consequently that's why it's in the preamble. It is not part of the rule, and that's why it was not out there for public comment, because it is not formally part of the rule.

And, frankly, these are issues that a court is going to decide, really, not the commission. The particular language that you're talking about was put in the mattress standard preamble under the terms of the Federal Flammable Fabrics Act, and it was done after receiving guidance from our general counsel that that was the correct interpretation of the Federal Flammable Fabrics Act.

You should be aware that the commission administers five different statutes, and each of them has a little bit different preemptive language in them, so what we would determine is appropriate under the Federal Flammable Fabrics Act is not necessarily the same preemptive effect that we would articulate under, for example, the Federal Hazardous Substances Act or the Consumer Product Safety Act. And indeed, under the Consumer Product Safety Act there is a specific savings clause that addresses just what you're talking about, that does not exist in the Federal Flammable Fabrics Act.

So we had a general counsel's opinion on this and that's what I followed.

Senator MCCASKILL. Was there a public discussion about this? Did the commission discuss it in a public meeting? And, you know, since this hadn't really occurred, this is unprecedented, I'm just curious how it came to be.

Ms. NORD. It was certainly discussed during our open meeting to vote on the rule, of course. And because it's not part of the rule, it would not properly be out there for public comment. Again, a court will be making the ultimate decision as to what the statute means, so this is not part of the rule and consequently is not appropriately out there for public comment.

Senator MCCASKILL. I guess my point would be that if the court is going to decide, then I'm trying to figure out why there was a need to include it, if it doesn't have any force of law and it is, you know, not something that's going to be held out for public comment; why would the commission think it was important to include this, since this is not something that had been included before?

Ms. NORD. Because we're required by the Executive Order to state the preemptive effect.

Senator MCCASKILL. OK. Thank you, Mr. Chairman.

Senator PRYOR. Thank you, Senator.

Let me ask one last follow-up, since we've talked about some specific cases. The lead in lunchboxes, first, just factual background: Why is the lead there in the first place? I understand it's part of the fabric. Tell me why lead is in there in the first place.

Ms. NORD. Lead is a component of vinyl. As I understand it, sir, and you're getting a little bit beyond my technical knowledge base here, but as I understand it, it's a stabilizing agent. I can certainly

get you a more technical answer to that question, or I can have one of our scientists come up and talk to you about it.

Senator PRYOR. OK. As I understand it, you all looked at lead in lunchboxes and you, as I understand it, looked at it the first time, you did some testing. The testing was not good for lead in lunchboxes. Changed your testing, did a change in testing methodology. Am I right?

Ms. NORD. No, no. That's incorrect.

Senator PRYOR. What happened?

Ms. NORD. Under the Federal Hazardous Substances Act, which is what we would use to regulate children's products, the Act very specifically says that we have to, in the case of this particular product, we must be looking at accessible lead. That is not total lead but accessible lead. How much lead does the consumer come in contact with?

Senator PRYOR. Right.

Ms. NORD. So what we would first do is test the lunchbox to see if indeed there is lead in it at all, and that's what we did. And then making the determination that yes, indeed, there is lead, then you have to do the second part of the analysis: Is the lead accessible to the consumer? And that's the second piece of this.

And when they did the second test, which is the swipe test, that is when the staff said, you know, "We're not finding accessibility." In this particular case, sir, they did a series of tests. They came back to each of the commissioners individually and said, "OK, this is what the tests are showing us." Each of the commissioners individually, without consulting with each other, told the staff to go back and test more just to make sure.

That's important because, sir, the Consumer Product Safety Commission has a long history of protecting the public against the hazards of lead. Banning lead, in residential house paint. We've recalled products over time if they have lead in them that is accessible to a consumer.

We've got an ongoing rulemaking dealing with lead in children's jewelry. The hazard there, sir, is that children will swallow it and it will get down into their system. We dealt with lead in miniblinds where the lead, unlike lunchboxes, did come to the surface and got into the dust. We know how to deal with lead, and we are committed to making sure that this is a hazard that we address.

Unfortunately, with the lunchboxes, we just weren't finding it.

Senator PRYOR. OK, but even after you sent your findings over to FDA, didn't they send out a letter to the manufacturers?

Ms. NORD. I think if you read that letter, you'll find that they say that it might be a problem. And you have to understand that the FDA is dealing with a very different Act than the Act that the CPSC is administering. I believe what the FDA said is that it might be viewed as a food additive, and as I understand the Food, Drugs and Cosmetic Act, there is a very different standard there. But again, I think that's a question that needs to go to the FDA. We have to administer the Federal Hazardous Substances Act, and that's what we did.

Senator PRYOR. OK. Well, we'll submit the FDA's letter for the record, so we'll have it and everybody can be clear on it.

Ms. NORD. Surely.

[The information referred to follows:]

U.S. FOOD AND DRUG ADMINISTRATION  
Washington, DC, July 20, 2006

CFSAN/Office of Food Additive Safety  
Letter to Manufacturers and Suppliers Concerning the  
Presence of Lead in Soft Vinyl Lunchboxes

Note to: Suppliers or Vendors of Soft Vinyl Lunchboxes:

The Food and Drug Administration (FDA) is directing this letter to manufacturers and suppliers of soft vinyl lunchboxes marketed in the United States. Based on testing performed by the Consumer Product Safety Commission (CPSC), we have learned that the interior polyvinyl chloride (PVC) linings of certain flexible lunchboxes contain lead (Pb).<sup>1</sup> We believe that the source of the lead is likely to be lead-containing compounds used as adjuvants in the manufacture of PVC. Because neither lead nor lead compounds are authorized for use in the manufacture of PVC food-contact articles such as lunchboxes, and some migration of lead to food as a result of such use may reasonably be expected, we urge companies to refrain from marketing such lead-containing lunchboxes.

While the amount of lead that may transfer to food from these lunchboxes is likely to be relatively small, it has been a longstanding objective of the FDA to reduce, to the extent practicable, consumer exposure to lead from foods. The adverse health effects of elevated lead levels in children are well-documented and may have long-lasting or permanent consequences. Because lead accumulates in the body, these effects can occur even at low exposure levels, and may include delayed mental and physical development, and learning deficiencies.

Any component of these lunchboxes that is reasonably expected to become a component of food is potentially a food additive, subject to the premarket approval requirements of the Federal Food, Drug, and Cosmetic Act (FD&C Act). Specifically, substances that are reasonably expected to migrate to food because of their intended use are defined as food additives (FD&C Act Section 201(s)) if they are not prior sanctioned or generally recognized as safe (GRAS) for their use. All food additives are required to undergo FDA premarket approval in accordance with Section 409 of the FD&C Act. However, neither lead nor any lead compound is authorized for use in PVC food-contact material.

According to the CPSC data, a small amount of the lead present in the interior linings of the lunchboxes is transferable by a swipe test. This implies that a small amount of lead may reasonably be expected to transfer to food that contacts the interior lining and could be deemed to be an unsafe food additive within the meaning of section 409 of the FD&C Act, and therefore adulterated within the meaning of section 402(a)(2)(C) of the statute. Therefore, the lunchboxes containing the lead compounds may be subject to enforcement action.

As always, manufacturers and suppliers are encouraged to consult with the agency regarding the regulatory status of component substances of food-contact articles, including those that may be under consideration as alternatives to lead compounds.

Please do not hesitate to contact us if you have any questions concerning this matter.

Sincerely,

LAURA M. TARANTINO, PH.D.,  
*Director, Office of Food Additive Safety,*  
Center for Food Safety and Applied Nutrition.

Senator PRYOR. And I would like to know more, and we don't have to wear out this audience because we have the next panel waiting, but I'd like to know more about your testing, because it seems to me I don't know how a swipe test is done. I don't know how to do it.

But it seems to me if you have food rolling around in a lunchbox, you know, apples, sandwiches, whatever they are, are rubbing on this all the time, and there's lead in it, and any of the lead comes off, it would seem over time, especially the longer you use the

<sup>1</sup>Unpublished data. See *U.S. Consumer Product Safety Commission Q&As: Vinyl Lunch Boxes*.

lunchbox, that it could be a health hazard. But we'll leave that for a second discussion.

Did you have any follow-ups? OK, what I would like——

Mr. MOORE. May I?

Senator PRYOR. Yes, sir. Go ahead.

Mr. MOORE. Because I don't think there should be any lead in a product such as a child's lunchbox. But as the Chairman has noted, we are bound by the limits of our statutes.

Senator PRYOR. OK. Well, like I said, we'll look at that. We'll continue to look at that, and maybe we ought to have a rule that there's not any lead in a lunchbox. But we'll look at that for you and we'll continue on that.

If I may, I want to thank this first panel. We've kept you longer than I thought we would, but I'd like to have the second panel come up. And what I'll do is introduce you all as you're making your way to the microphones.

First we're going to have Ms. Sally Greenberg, Senior Product Safety Counsel, Consumers Union; then Rachel Weintraub, Director of Product Safety and Senior Counsel, Consumer Federation of America; then John C. Dean, President, National Association of State Fire Marshals; and then Frederick Locker, General Counsel, Toy Industry Association and the Juvenile Products Manufacturers Association, testifying on behalf of the Consumer Product Safety Commission Coalition of the National Association of Manufacturers.

So as soon as everybody gets situated and finds their place, I will recognize Ms. Greenberg. So let's let everybody sit down and we'll get going here. And like I said, we'd love to ask questions here in a few moments, but if you all can limit your opening statements to 5 minutes or less, that would be great.

Ms. Greenberg, why don't you go first, please?

#### **STATEMENT OF SALLY GREENBERG, SENIOR PRODUCT SAFETY COUNSEL, CONSUMERS UNION**

Ms. GREENBERG. Thank you, Mr. Chairman. Good morning, Chairman Pryor, other members of the Subcommittee, Senator McCaskill. My name is Sally Greenberg. I'm Senior Product Safety Counsel for Consumers Union. We are the nonprofit publisher of *Consumer Reports* magazine. Thanks for providing me the chance to come before you today to provide our views on the work of the Consumer Product Safety Commission.

We think there are two paramount questions before the Committee today: Does the CPSC have the resources necessary to fulfill their mission? And is the CPSC using those resources it has in order to best fulfill its mandate?

The CPSC is a vitally important Federal agency with many dedicated career staff who are committed to consumer safety. The CPSC has jurisdiction over 15,000 products. The great importance of CPSC is that it has jurisdiction over so many children's products—we've already talked some about that this morning—including toys, clothing, bath seats, high chairs, and cribs, all used by children. In any given year, 27,000 people die and 33 million people are injured by products under CPSC's purview.

Yet when we look at the history of congressional support and funding for CPSC, things have never looked so bleak. And, Mr. Chairman, I appreciate your comments earlier about the funding situation at the commission, and I do hope you will take that message to your colleagues, because if you read through the performance overview statement it's actually very sad.

The commission is at an all-time low in terms of employees. And I was a little surprised that Chairman Nord wasn't willing to say that more employees are needed, because the 2008 Budget report just says it. A lot of our core strategic efforts and our core mission is really suffering as a result of the dwindling number of resources.

For example, CPSC says in the budget report for this year that they will no longer make child drowning death reductions a strategic goal because of resource limitations, yet drowning is the second highest cause of deaths to young children. They also go on to talk about because of staff reductions, core functions like safety standards enforcement, consumer outreach, won't be carried out.

One of the things we did was look at the budget of the National Highway Traffic Safety Administration which oversees the safety of our roads and highways. There are 43,000 people dying on our roads and highways every year. And they have a budget of \$800 million.

When you look at CPSC's budget, we see that 27,000 people die because of consumer products under their jurisdiction every year, and yet their budget is only \$63 million. If you did the percentages, and gave the Commission a percentage increase, you'd have them at \$502 million, and yet we see their budget at \$63 million. So this is an agency whose resources have been dwindling for a long time, and it's a great area of concern for us.

One of the things I want to talk about is the issue of recalls and what we think is really a broken recall system. One-third to one-half of all products recalled in the last 6 years are used by children. And of those 111 children's products recalled last year, a third exposed children to risk of bodily injury, falling, laceration, and impact injuries.

Here is the problem: The term "recalled product" suggests that a product has been successfully returned—returned, repaired, or replaced—but that is in fact rarely the case. Ten to 30 percent of all recalled products ever get returned. In other words, 70 to 90 percent are still in the home and are still exposing children, particularly, to many times life-threatening injuries and even death.

CPSC claims that they have tried to improve recall effectiveness, the effort to get recalled products out of the homes, but when consumer groups in 2003 went to the CPSC with a petition asking for simple registration cards on children's products, the CPSC voted down that petition. And to add insult to injury, once a product is recalled, CPSC won't make public how many products actually come back. We don't know why they won't do this. It would be useful information for consumers to have.

One of the things that we're doing is supporting two pieces of legislation that have been introduced in the House to provide product registration cards on many children's products above a certain price point. And the other piece of legislation we're supporting, and we'd like to see introduced over here in both cases, is a mechanism

for testing products, durable children's products, before they get into people's homes, because it has proven so difficult to get them back if they prove dangerous or defective.

We have a number of other areas of concern that are in our written testimony. Let me just speak for 1 more minute and then I'll close. The commission, as we talked about at length, as you, Mr. Chairman, and Senator McCaskill talked about at length this morning, is suffering from lack of a quorum. And we know that that has been going on now for a couple of months, since January, and the position of chairman has been vacant since July.

We believe that the fact that this position has lain vacant for so many months is itself a statement on the lack of regard for the work of the CPSC. However, while the commission needs leadership, to be sure, its work is too important to allow the chairmanship to go to a political appointee with no demonstrable experience in or commitment to consumer protection. CPSC is a regulatory agency and requires, we believe, a chairman who has shown a commitment to using the regulatory process for consumer protection.

We just want to direct your attention to 4(a) of the Consumer Product Safety Act, which says that the President shall appoint the commissioners with the advice and consent of the Senate, but in making such appointment the President shall consider individuals who, by reason of their background and expertise in areas related to consumer products and protection of the public from risks to safety, are qualified to serve as members of the Commission. So I'll close by saying that we urge the Senate to give thorough consideration to the current nominee under this Section 4(a). And I thank you for your time.

[The prepared statement of Ms. Greenberg follows:]

PREPARED STATEMENT OF SALLY GREENBERG, SENIOR PRODUCT SAFETY COUNSEL,  
CONSUMERS UNION

Good morning, Chairman Senator Pryor and Ranking Member Sununu, and other members of the Subcommittee. I am Sally Greenberg, Senior Product Safety Counsel for Consumers Union (CU), non-profit publisher of *Consumer Reports*.<sup>1</sup> Thank you for providing me the chance to come before you today to provide our views on the work of U.S. Consumer Product Safety Commission (CPSC).

For the past 71 years, Consumers Union (CU) has been testing and reporting on products and services in order to arm consumers with the information they need to protect themselves in the marketplace. CU's mission is to work for a fair, just and safe marketplace for all consumers.

CU applauds the Subcommittee for holding this oversight hearing. We believe that there are two paramount questions before the Committee today—does the CPSC have the resources necessary to fulfill its mission? And is the CPSC using the resources it has to effectively fulfill its mission? CU's serious concerns in both of these areas are discussed below.

**U.S. Consumer Product Safety Commission**

Every Congress that has reauthorized the CPSC during the past 30 years has reaffirmed its clear and unmistakable purpose: the CPSC is charged with the mandate

<sup>1</sup> Consumers Union 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 goods, services, health, and personal finance. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* and *ConsumerReports.org* with more than 6.2 million paid circulation, regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions that affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

to reduce or eliminate unreasonable risks of injury and death to consumers from more than 15,000 types of products. There are 27,100 fatalities and 33.1 million injuries per year associated with products under the CPSC's jurisdiction. Deaths, injuries and property damage from consumer product incidents cost the Nation more than \$700 billion annually. The CPSC's viability is of critical importance to the safety of children, since the Commission has jurisdiction over the safety of so many children's toys and products like bath seats, high chairs, and cribs.

However, we believe the CPSC currently is at a crossroads which will determine its ability to be effective in the future. Among our concerns are the following: (i) the failure of Congress to provide CPSC with needed regulatory and enforcement authority and the failure of the CPSC to seek new regulatory and enforcement authority or to aggressively use the authority it possesses; (ii) budget cuts resulting in a crippling loss of their most experienced and knowledgeable staff; (iii) increasing numbers of counterfeit, dangerous and violative imported products; (iv) new and emerging technologies in product production (e.g., nanotechnology); and (v) the changing demographics of the U.S. population. In addition, CU is concerned that the CPSC will not be able to adequately address areas that we consider to be of high priority, including: increasing the effectiveness of product recalls and reporting of product hazards; decreasing import of unreasonably dangerous imported products; drowning prevention and pool safety, reducing deaths relating to CO poisoning from consumer use of portable electric generators and home heating appliances; improving ladder safety (i.e., strength and stability); furniture safety (preventing deaths and injuries from furniture tip over and glass tables); removal of lead from all products intended for use by children (e.g., jewelry, toys, and clothing); all-terrain vehicle safety (increasing safe use of all-terrain vehicles by adults, and ending their use by children under 16 years old); and identifying dangers associated with products developed through the use of new technologies—particularly nanotechnology.

The CPSC must have the resources—and the will—needed to inform and to protect the public from new and emerging hazards. CU strongly urges this Subcommittee to recommend significant increases in the CPSC's budget in order to enable the Commission to better protect consumers from unreasonably dangerous products. However, added resources will not be enough. We also strongly urge the Subcommittee to continue its oversight to ensure that the CPSC uses its resources appropriately to fulfill its mission relating to current and emerging hazards.

Specific areas of increasing challenge to the CPSC and its effectiveness are discussed in detail below.

#### *1. Budget Cuts Resulting in a Crippling Loss of Staff and Functions*

The CPSC is critically underfunded and understaffed. According to CU's review, the staffing level at the CPSC has been steadily dwindling, and has resulted in the "brain drain" of too many of the most experienced and knowledgeable staff at the Commission. When the CPSC opened its doors in 1974 its budget was \$34.7 million, rising in 1977 to \$39 million budget with a staff of 900.<sup>2</sup>

The staffing level at the CPSC has been steadily dwindling. The budget for fiscal 2007 culminates a two-year reduction of full-time positions from 471 to 420—a total loss of 51 employees. The Commission's 2008 Performance Budget Request notes in a bleak statement: *The Commission's request for 2008 of \$63,250,000 represents an increase of \$880,000 from 2007. Because of the cost increases described below, the increase of \$880,000 will require a decrease of 19 FTEs.*<sup>3</sup>

Indeed, the Commission's Budget Request reads like a cry for help to support critical programs and is justified, in our view.

If mandatory salary increases are taken into account, the Commission stands to lose an additional 19 employees,<sup>4</sup> dropping staff levels to 401, leaving the Commission understaffed and full time employees (FTEs) at an all time low.

The \$39 million allocated to CPSC in 1977 would be worth \$125 million today. Yet CPSC's funding request of \$63 million means that CPSC is funded at half of its original level in 1977 and the number of staff has consequently dropped by more than half.

The CPSC already has acknowledged in its budget document that it will not be able to continue to focus on a past strategic goal of great importance to CU—reducing child drowning deaths. Drowning is the second leading cause of accidental death

<sup>2</sup>Understanding Government Report, E.Marla Felcher, "U.S. Consumer Product Safety Commission: Paper Tiger of American Product Safety."

<sup>3</sup>U.S. Consumer Product Safety Commission, 2008 Performance Budget Request, Submitted to Congress, February 2007, <http://www.cpsc.gov/cpsc/pub/pubs/reports/2008plan.pdf>.

<sup>4</sup>U.S. Consumer Product Safety Commission, 2008 Performance Budget Request, Submitted to Congress, February 2007, <http://www.cpsc.gov/cpsc/pub/pubs/reports/2008plan.pdf>.

for children under 14 and most drowning incidents occur in residential swimming pools. Further budgeting and staffing cutbacks will clearly result in reduced enforcement of safety authority. Without adequate policing, unsafe products can continue to more easily infiltrate the marketplace.

Offers for sale of banned imported products, such as “Kinder Eggs,”<sup>5</sup> monitored by CU, appear to be much worse recently. In addition, the presence of counterfeit products in the U.S. marketplace has increased. We believe that part of this increase results from fewer CPSC representatives present at border points of entry. In addition, the CPSC has been forced to reduce the number of field staff that normally would lead investigations and follow up on product-related injuries and deaths. CU is concerned that CPSC’s inadequate budget is preventing it from having the critically needed staff and resources to properly police the marketplace. We believe that the CPSC *must* have the resources it needs to monitor imported consumer products that may pose safety hazards, and take whatever actions are needed to keep unreasonably dangerous products off the market. CPSC must be able to work more collaboratively with U.S. Customs to prevent dangerous and violative products from crossing the borders into this country.

## 2. *Lack of Adequate Manufacturer Focus on Safety and Ineffective System of Recalls*

According to the July 28, 2006 CPSC *Nursery Product-Related Injuries and Deaths to Children under age 5* Annual Memorandum, an estimated 59,800 children under age five were treated in hospital emergency rooms for injuries associated with nursery products in 2005. We believe the number of injuries and deaths from using such products is far too high and that most are preventable.

These trends are confirmed in a report,<sup>6</sup> based on CPSC data, due to be released next week from the Chicago advocacy group, Kids in Danger. Kids in Danger’s report indicates that there were 111 recalls of children’s products in 2006—representing 35 percent of all product recalls. Of the 111 products recalled, about a third were recalled because they exposed children to risk of bodily injury—falling, laceration and impact injuries. Indeed, these recalled products caused 177 injuries and six deaths in 2006.

This is not a new phenomenon. In the years from 2001 to 2006, children’s product recalls ranged from one-third to one-half of all recalls, with a high of 55 percent in 2001 to a low of 31 percent in both 2004 and 2003. This year alone nearly 19 million children’s product units were recalled. Between 1993 and 2003, the children’s product industry had recalled almost 60 million items.

The term “recalled product” suggests that a product has been, or will be, returned, repaired or replaced, by a manufacturer. This rarely is the case. Despite the fact that, once a product is recalled, the CPSC and the manufacturer draft a recall notice and send it out over the wires, this vital information often does not reach the very people—such as parents, day care centers and other caregivers—who should see it. There is no law requiring manufacturers to try to find purchasers of the product or to notify parents or day care centers if a product proves dangerous and must be recalled. Further, there is no requirement that manufacturers advertise a product recall in the same way they advertised the product in the first place—high chairs, cribs, strollers, infant swings and carriers often continue to be used for months or years after they have been recalled. As a result only a very small percentage of recalled juvenile products ever make their way back to the manufacturer. In fact, a CPSC study estimates that manufacturers cannot account for 70–90 percent of sold infant products after they have been recalled.<sup>7</sup>

Recall effectiveness is a major concern. Fifteen children, for example, have died in five different brands of recalled cribs,<sup>8</sup> and many more of these cribs presumably remain in homes and day care centers.

In an effort to improve recall effectiveness, consumer groups petitioned the CPSC<sup>9</sup> asking that the Commission require simple registration cards on products intended for use by children. Registration cards have proven an effective means for facilitating recalls: A 2003 National Highway Traffic Safety Administration survey found that almost three-quarters (73 percent) of parents/caregivers who said they

<sup>5</sup> Hollow chocolate eggs (made by Italy’s Ferrero Group) containing “surprise” toys, banned in the United States since 1997, when the CPSC warned that the toys could pose a choking hazard to children under 3.

<sup>6</sup> Upcoming, “Unexpected Danger: Children’s Product Recalls in 2006,” Kids in Danger, March 2007. [www.kidsindanger.org](http://www.kidsindanger.org)

<sup>7</sup> “It’s No Accident,” Marla Felcher, Common Courage Press, 2001.

<sup>8</sup> Kids In Danger Newsletter, 2002.

<sup>9</sup> *Federal Register*, Vol. 66, No. 148, Wednesday, August 1, 2001.

obtained the car seat new also said that a registration card came with the seat. Of these, 53 percent mailed back the card.<sup>10</sup>

The Commission denied the consumer groups' petition on April 28, 2003, citing concerns about the effectiveness of registration cards,<sup>11</sup> Consumers Union and other groups are supporting legislation to require registration cards with certain baby products.

In addition to the challenges of effectively notifying consumers about recalled products, once a product is recalled by CPSC, the Commission will not release information on the number of units that have been successfully recalled. This prevents the public and news organizations from accurately estimating how many dangerous products remain at large, the extent of the remaining risk, or whether the particular recall outreach was successful. We discuss this at length below in our comments related to Section 6(b).

In response to the deficiencies in the system outlined above, consumer groups have supported two bills introduced in the 109th Congress and expected to be introduced shortly in the 110th:

- H.R. 6141, the "Child Product Safety Notification Act," sponsored by Congresswoman Jan Schakowsky (D-IL), directs the CPSC to promulgate a consumer product safety standard requiring manufacturers of juvenile products (such as toys, cribs high chairs, bath seats, playpens, strollers, and walkers), and small appliances to establish and maintain a system for providing notification of recalls to purchasers. Manufacturers would be required to improve their notification of consumers by either distributing products safety notification cards that could be returned to them by consumers, or by creating a method of registering buyers electronically.
- H.R. 4896, the "Infant and Toddler Durable Product Safety Act,"<sup>12</sup> also sponsored by Representative Schakowsky, would better ensure the safety of infant and toddler products by requiring independent testing of certain durable goods before they are sold on the market. The legislation would require manufacturers to pretest "durable" products likely to be used by children under five, including cradles, cribs, toddler beds, high chairs, safety gates, play yards, and strollers.

Under their General Product Safety Directive, the European Union requires pre-market testing and recordkeeping to show that products are essentially safe *prior* to going to market. The U.S. has no similar regulations.

We encourage the Senators on this Subcommittee to sponsor similar legislation to better protect U.S. consumers.

#### Section 6(b)

Last year, my brother-in-law's airbag failed to deploy during a 65 mph crash. As a result, he was badly injured, but happily alive. However, he wanted to see whether drivers of the same vehicle had experienced similar airbag failures. He went to the National Highway Traffic Safety Administration's ("NHTSA") website, entered in his car's make and model, and learned that, indeed, there were several similar complaints. He decided not to buy the same model again. If a parent finds that a highchair collapses, he or she cannot do what my brother-in-law did—check CPSC's website to see if there have been other complaints—because under Section 6(b) of the Consumer Product Safety Act (CPSA) the Commission cannot provide the information unless the product has been recalled. This restriction is a major obstacle to consumer information and consumer safety.

Section 6(b) acts as a kind of reverse Freedom of Information Act, barring the release of consumer complaint information unless and until the agency has sent a copy of it to the named manufacturer, allowed the manufacturer 30 days to comment on the information, reviewed the manufacturer's comments regarding the accuracy of the information and the fairness of releasing it, and determined that dis-

<sup>10</sup> Motor Vehicle Occupant Safety Survey, <http://www.nhtsa.dot.gov/people/injury/research/2003MVOSSVol5/pages/ExecSumm.htm>.

<sup>11</sup> <http://www.cpsc.gov/LIBRARY/FOIA/FOIA03/petition/Intended.pdf>.

<sup>12</sup> Introduced by Congresswoman Jan Schakowsky. Cosponsors include: Mrs. McCarthy of NY, Mr. Lantos of CA, Ms. Norton of DC, Ms. Millender-McDonald of CA, Ms. Kilpatrick of MI, Mrs. Christensen of VI, Mr. Grijalva of AZ, Mr. Serrano of NY, Mr. McDermott of WA, Mr. Gutierrez of IL, Ms. Brown of FL, Ms. De Lauro of CT, Mr. Meehan of MA, Mr. Moran of VA, Mr. Davis of IL, Mr. Lipinski of IL, Ms. Lowey of NY, and Mr. Waxman, CA.

closure of the information would effectuate the purposes of the CPSA. Exceptions to these restrictions are extremely limited.<sup>13</sup>

The resource drain on the Commission staff for these procedures is enormous and unfair. The effect of Section 6(b) is to make the release of some information almost impossible. Objections by any manufacturer can lead to a long struggle. Even newspaper clippings on a particular product cannot be released by the CPSC without prior review.

Indeed, before the 111 children's products were recalled in 2006, 928 failure incidents were reported. Unlike under NHTSA's system described above, if a product hasn't been recalled, the CPSC is unable to provide consumers with information about previous safety complaints. Parents looking to buy a crib or high chair will often want to be sure it has a good safety record. They ought to be able to check on the CPSC's website for previous complaints. Perhaps if they could have, some of the 928 incidents last year related to the 111 recalled products might have been avoided. Unfortunately, parents and caregivers must go to other websites with consumer reviews, such as *Amazon.com*, rather than consulting the CPSC, to see if consumers have reported product has safety concerns with products on the market.

We think the statute should be changed. CU recommends that Congress repeal Section 6(b) of the CPSA because it prevents public access to important—and possibly life saving—product safety information in the files of CPSC . . .

While we understand that life—even for children—is not risk free, too large a percentage of unsafe products are marketed for children or to children. Products intended for use by children should be tested for safety *before* being sent into the marketplace because once they arrive in consumers' homes, the ineffectiveness of our current recall process means that getting them back is unlikely.

#### Reporting Requirements Under Section 15(b) of Consumer Product Safety Act

One of most important sections of the Consumer Product Safety Act is 15(b). That section requires companies to report to the Commission if they learn that their product may create a "substantial risk of injury to the public."<sup>14</sup> In July of 2006, Chairman Hal Stratton announced a final interpretive rule change<sup>15</sup> on Section 15(b), which he argued was intended to demystify the reporting process. Chairman Stratton noted in his statement, "I thought it essential that this agency engage regulated parties to determine how best the CPSC could accomplish its goals without creating a drag on commerce."

In the previous 2 years, industry groups had asked the CPSC to revise its interpretive rules. Apparently this final rule was the Commission's response to industry's request. The revised interpretive rules added three factors companies were to consider in deciding whether they were obligated to report a product hazard under Section 15: (1) obviousness of the hazard, (2) product warnings and instructions and (3) consumer misuse. The interpretative rules also allow manufacturer to consider such issues as to whether the product meets voluntary standards when considering whether to report incidents to the CPSC. Reliance on voluntary standard is, in our view, misplaced trust in standards that often do not address safety concerns.

We commend to members of the Committee the full statement of CPSC Commissioner Thomas Moore in response to these interpretive 15(b) changes. CU shares Commissioner Moore's concerns about the impact of these changes on reporting of hazardous products:

The Commission was created to protect consumers, sometimes even from what might be viewed as an obvious risk and, with regard to children, sometimes even from the inattentiveness of their own parents. Our work on child-resistant cigarette lighters and baby walkers are evidence of that. The power of section 15(b) is its requirement that information that could prevent the injuries or deaths of consumers be reported to the Commission. Even with these revisions, the Commission's position remains, *when in doubt, report*. It is the Commission that will ultimately decide whether a product defect presents a substantial product hazard, not the manufacturer. Adding more unexplained factors that manufacturers might grasp at to decide they do not need to report is likely to

<sup>13</sup> Section 6(b)(1) requires that the CPSC must, at least 30 days prior to "public disclosure" of information, notify each manufacturer or private labeler identified in the documents of the forthcoming release and give them an opportunity to submit comments, and take reasonable steps to ensure accuracy.

<sup>14</sup> CPSA, Section 15(b).

<sup>15</sup> <http://www.cpsc.gov/pr/strattonsec15.pdf>.

do the manufacturers (not to mention consumers) a disservice and adds nothing by way of real guidance, clarity or transparency.<sup>16</sup>

Consumers Union believes these new rules are unnecessary and confusing. Moreover, simply because a company reports under 15(b) does not automatically trigger CPSC action—indeed, one CPSC official estimated that only 50 percent of 15(b) reports trigger CPSC activity.<sup>17</sup> Reporting safety hazards is critical because it ensures that when hazards come to the attention of a company, they are reported to the Commission and when warranted, necessary action is taken. CPSC is mandated to carry out this function. By giving companies reasons *not* to report, we believe the new interpretive rules may discourage companies from erring on the side of caution and thereby heighten the risk that consumers will be exposed to product hazards.

#### All-Terrain Vehicles

The CPSC faces the perennial problem of stemming the tide of deaths and injuries from use of All Terrain Vehicles (ATVs). ATVs rank consistently as one of the most hazardous consumer products—ATV-related injuries requiring emergency room visits increased to 136,700 in 2005. Children under 16 suffered 40,400 of those injuries. In 2005, 120 children under 16 operating ATVs were killed. The steady trend of increasing numbers of injuries and deaths should be a concern to Congress and to the CPSC.

Pursuant to a petition filed by the Consumer Federation of America, CU has supported a ban on the sale of ATVs to children under the age of 16 (and other safety measures). We are also concerned that the CPSC is moving forward with an ill-advised rule on ATVs that proposes teen and pre-teen ATVs and even junior ATVs for children between 6–8 years old, without having conducted the proper testing or research to proceed.

But we also think Congress can play a pivotal role in helping to reduce the injuries and deaths from ATVs. We believe that states should be encouraged to enact model ATV safety legislation like the kind drafted by the American Academy of Pediatrics. AAP's Model Statute is an excellent and comprehensive approach to ATV regulation, providing for training and licensure of ATV riders and requiring safety gear like helmets and proper clothing.

We urge this Subcommittee to schedule field hearings on ATV safety similar to the hearing the CPSC held in West Virginia in 2003. Congress could then consider providing financial incentives to states to adopt ATV safety laws.

There is precedent for this approach. In 2000, Congress passed and President Clinton signed a law requiring that states enact a 0.08 percent BAC (blood alcohol content level) law by October 1, 2003 or lose a portion of highway funding. Federal law currently offers financial incentives to the states to adopt a 0.08 percent permissible blood alcohol level for drivers and has been successful in persuading states to adopt this provision. Prior to this law, 18 states and the District of Columbia had passed 0.08 percent BAC laws. In the 2 years since, the total number of states with 0.08 percent BAC laws has increased to 33 and the District of Columbia.

#### 3. Other CU Priority Safety Areas for CPSC Focus

CU is concerned that due to shortfalls in its budget, the CPSC will not be able to adequately address areas that we consider to be of high priority, including: product safety issues affecting children (*e.g.*, toy hazards, lead in children's jewelry, and pool safety); reinitiating efforts to reduce incidents of consumer injury and death from cooking fires (there are 80 deaths, 2,440 injuries, and over 47,000 residential range top fire annually); other product-related fires (*e.g.*, products powered by lithium-ion batteries); decreasing all-terrain vehicle accidents and deaths; carbon monoxide poisonings relating to use of portable electric generators<sup>18</sup> and home heating appliances; identifying and addressing potentially unreasonable risks posed to con-

<sup>16</sup>Statement of the Honorable Thomas H. Moore on the Publication of the *Federal Register Notice Seeking Public Comments on Proposed Revisions to 16 C.F.R. Part 1115*. <http://www.cpsc.gov/PR/MooreCFR1115.pdf>.

<sup>17</sup>Conversation with officials at Office of Compliance at the U.S. Consumer Product Safety Commission.

<sup>18</sup>CU commends the CPSC for initiating a rulemaking proceeding to examine regulatory approaches that could be used to reduce portable generator-related deaths and injuries, particularly those related to carbon monoxide poisoning (71 Fed. Reg. 74472, December 12, 2006). CU also commends the Commission for issuing a new portable generator mandatory labeling rule, approved by the Commission on January 4, 2007, but noted that “education and warnings alone are not enough” and urged CPSC to take critical next step in requiring all generators be equipped with a CO detector that automatically shuts down the unit if it detects dangerous levels of CO. See <http://www.cpsc.gov/cpspub/prerel/prhtml07/07074.html>.

sumers through the use of or exposure to products created with nanotechnology, using nanoparticles.

Two other areas of concern bear mentioning. First, there are nearly 50,000 residential cooking fires each year, killing and estimated 80 people and injuring almost 2,500. Cooking fires account for about 10 percent of fire deaths in recent years. Mitigating cooking fires was once a priority of the CPSC who developed technological fixes to the problem in their lab. The project was later dropped due to industry pushback.

Injuries from glass furniture now amount to more than 20,000 serious injuries per year. Although there are safety standards in Europe that require safety glass in furniture, there are no safety standards here. Yet these hazards have long fallen below the radar of the CPSC.

Both of these safety hazards are ones we believe the CPSC needs to address.

#### 4. Trends and Factors Exacerbating the Impact of CPSC'S Lack of Adequate Funding

CU is also concerned that a number of trends are presenting the CPSC with great challenges to their efforts to reduce the number of unreasonably dangerous products on the market. These trends (discussed more in detail below) include: (i) the increasing number of counterfeit, dangerous, and violative products on the market, (ii) new and emerging technologies (*e.g.*, nanotechnology), and (iii) the changing demographic of the American consumer. CU also is concerned, that in addition to the above trends, the CPSC also is hampered by other factors beyond the lack of adequate resources. These factors, discussed in detail below, include: (i) the lack of a permanent chairman and lack of a quorum, (ii) lack of manufacturer focus on safety and insufficient deterrents available in the form of strong civil penalty authority, and (iii) inadequate laboratory facilities.

##### A. Trends Exacerbating the Impact of CPSC'S Lack of Adequate Funding

(i) *Increasing Numbers of Counterfeit, Dangerous, and Violative Products*—We are very concerned that current trends are increasing the risk that unsafe products will make their way to the marketplace—and too many remain on the market even after safety hazards are uncovered.

As the world's large, powerful retailers squeeze manufacturers to reduce prices, we have seen evidence that quality and safety can also be reduced. Today, more than ever, pressure from major retailers has created a “speed to market” mantra that can leave little time and few resources for the product safety testing and quality assurance process. Off-shore design and manufacturing is too often conducted by companies who have inadequate knowledge of U.S. voluntary and mandatory safety standards. In addition, sometimes foreign manufacturers lack an understanding of how consumers will use the products they produce because use of the product is not prevalent in their country. For example, the manufacture of gas grills is moving rapidly from the U.S. to China where the concept of grilling food on a gas heated cooking grid is unfamiliar. We believe that a recent result is the manufacture of substandard and sometimes dangerous gas grills; since 2004, there have been more than one dozen product safety recalls on gas grills—in all cases the defective products or components were made outside of the U.S. Over a similar two-year period just 10 years ago, when most gas grills were U.S. made, there were no recalls.

Also of concern to CU is the widespread lack of compliance with voluntary safety standards. The March 2006 issue of *Consumer Reports* features an article on furniture tipover, a problem that results in 8,000 to 10,000 serious injuries and almost 10 fatalities each year, mostly to young children. Although ASTM—International publishes a safety standard to prevent furniture tipover injuries, many of the products CU tested do not comply. In fact, since the CPSC requested that ASTM develop an industry safety standard, the numbers of annual fatalities associated with falling furniture have actually *increased* by 50 percent. In today's highly competitive marketplace, there is often little incentive for manufacturers to meet voluntary safety standards.

(ii) *New and Emerging Technologies in Product Manufacturing and Production*—CU is very concerned that the “brain drain” impacting the Commission may prevent the CPSC from aggressively investigating safety issues relating to new and emerging technologies—particularly those relating to the manufacture of consumer products created with nanotechnology, using nanoparticles.

*Nanotechnology*—Relating to nanotechnology, the CPSC's, sole mention of nanotechnology in its 2008 Performance Budget request is, as follows:

Nanomaterials represent a wide range of compounds that may vary significantly in their structure, physical and chemical properties, and potentially in their behavior in the environment and in the human body. CPSC staff will continue to

participate in interagency activities for nanotechnology. *Goal:* Staff will use the information gained from its participation in interagency activities, along with other information collected on the use of nanomaterials in consumer products, to identify issues and projects for future consideration. Staff will prepare a draft status report of this effort.<sup>19</sup>

We believe that the CPSC must be much more proactive in arming itself with a detailed understanding of the dangers posed to consumers by cutting-edge products, especially those created through nanoengineering. We urge this Subcommittee to ensure that the CPSC has the laboratory equipment and resources needed to assess any unreasonable risks to consumers, and the will to follow through.

*Lithium-Ion Batteries*—An additional area of concern is fire and burn related dangers relating to lithium-ion batteries. On August 16, 2006 the CPSC announced a sweeping recall involving batteries, manufactured by Sony, which came with 33 different computers sold April 1, 2004 through July 18, 2006. The recall involved 4 million rechargeable lithium-ion batteries (sold separately and as replacement parts) for dozens of Dell laptop computers, due to the danger that they could overheat and catch fire. Of the 4.1 million suspected batteries, 2.7 million were distributed in the U.S. At the time of the recall, Scott Wolfson, public affairs spokesman for the CPSC, stated to *Consumer Reports* that the hazards stem from quality-control issues at battery manufacturing facilities in Japan and China.

Additional recalls were conducted of Sony laptop batteries, eventually bringing the total number of Sony's recalled laptop batteries to about 9.4 million. Overheating problems affecting rechargeable lithium-ion batteries have been an ongoing issue. Lithium-ion batteries pack high amounts of energy into a small package and, subsequently, can produce a lot of heat. Despite the wide-spread attention given to batteries in laptops, the dangers are not limited to these products. The CPSC has logged 339 incident reports between 2003 and 2005 involving potentially faulty laptop computer batteries as well as cell phone batteries. The incidents ranged from smoking and charring, to batteries bursting into flames and skin burns. Cell phone batteries have been associated with more serious burn injuries because of the close proximity between the telephone and the user's head and face.

Issues relating to lithium-ion batteries require research, investigation, and market surveillance to ensure that unsafe electronic products do not present an unreasonable risk to consumers. We encourage the CPSC to continue to urge the development of safety standards for these batteries, and to strongly encourage manufacturers to focus more attention on quality control. In addition, we urge the Subcommittee to follow the CPSC's activities in this area closely.

(iii) *Changing Demographics of the U.S. Population*—The CPSC itself has identified a disturbing trend, and has documented that from 1991 to 2002, the number of older adults (75 and older) treated in U.S. hospital emergency rooms for products-related injuries increased 73 percent. This increase is almost three times the group's increase in population. Many of the injuries were related to common household products such as yard and garden equipment, ladders, step stools, and personal use items. As the population ages, it is even more important that manufacturers work to reverse this recent trend with products that are not defective and unreasonably dangerous when used by the elderly.

#### B. Legal and Regulatory Factors Exacerbating the Impact of CPSC'S Lack of Adequate Funding

(i) *Lack of a Permanent Chairman and Quorum at the Commission*—The Commission has suffered from lack of a quorum after the departure of Chairman Hal Stratton in July of 2006, and has since been working with only two commissioners and forced to operate without a quorum for some months. That this position lay vacant for so many months is itself a statement on the lack of regard for the work of the CPSC. However, while the Commission needs leadership, to be sure, its work is too important to allow the chairmanship to go to a political appointee with no demonstrable experience in or commitment to consumer protection. CPSC is a regulatory agency and it requires a chairman who is willing to protect the public from risks to safety by regulating industry where necessary. Section A of the Consumer Product Safety Act<sup>20</sup> provides useful guidance to Congress and the President on this point:

<sup>19</sup>U.S. Consumer Product Safety Commission, "2008 Performance Budget Request, *Saving Lives and Keeping Families Safe*," Submitted to the Congress, February 2007. <http://www.cpsc.gov/CPSCPUB/PUBS/REPORTS/2008plan.pdf>.

<sup>20</sup>Consumer Product Safety Act, 15 U.S.C. 2051–2084, Public Law 92–573; 86 Stat. 1207, Oct. 27, 1972.

An independent regulatory commission is hereby established, to be known as the Consumer Product Safety Commission, consisting of five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate. In making such appointments, the President shall consider individuals who, *by reason of their background and expertise in areas related to consumer products and protection of the public from risks to safety, are qualified to serve as members of the Commission.*

We urge this Committee and the Senate, therefore, to keep this in mind and carefully examine the background and qualifications of the current Administration nominee.

(ii) *Inadequacy of Civil Penalties*—The use of civil penalties to penalize suppliers for selling or failing to report unsafe products is often an ineffective deterrent. The \$750,000 civil penalty levied against Wal-Mart in 2003 for failing to report safety hazards with fitness machines cost the company an equivalent of the sales rung up in only 1 minute and 33 seconds. For large retailers and manufacturers, paying civil fines are a small cost of doing business. In 2006, CPSC negotiated out of court settlements in which six companies agreed to pay \$2.3 million in civil penalties to the U.S. Treasury for failing to report under 15(b).<sup>21</sup>

The Consumer Product Safety Act's Section 15(b) requires that manufacturers, distributors, and retailers who learn that their product either: (1) fails to comply with an applicable consumer product safety rule or with a voluntary consumer product safety standard; (2) or contains a defect that could create an unreasonable risk of serious injury or death (*i.e.*, a "substantial product hazard") must immediately notify the CPSC—unless the company knows the CPSC has already been informed.<sup>22</sup> The history, however, of manufacturers' failure to report in a timely manner under this section is all too well known. Especially of concern are manufacturers' failures to report children's products known by them to have caused injury or death. Included among companies failing to report are Wal-Mart and General Electric (GE)—two of the wealthiest corporations in America. We believe the cap on the fines CPSC can levy for failure to report known hazards weakens the power of the reporting statute. Current total fines may not exceed \$1,850,000 for any related series of violations. This amount is too small to be an effective deterrent for large corporations. CU believes in lifting the cap on fines.

We believe that if the level of fines is not so easily calculable, companies will view the potential fines as a *bona fide* deterrent to the nonreporting of product safety hazards.

(iii) *Inadequacy of CPSC Laboratories*—CU understands that the effectiveness of the CPSC in fulfilling its mission is seriously impaired by a lack of capital investment. This failure to equip CPSC staff with state-of-the-art laboratory equipment is disturbing. The CPSC must be given the resources needed to keep abreast of advancing science and technology. Without these resources, the Commission is handicapped—and is little able to investigate products developed with new technologies, such as nanotechnology.

I thank the Chairman and other members of the Subcommittee for the opportunity to testify, and I look forward to answering any questions you have.

Senator PRYOR. Thank you.  
Ms. Weintraub?

**STATEMENT OF RACHEL WEINTRAUB, DIRECTOR OF  
PRODUCT SAFETY AND SENIOR COUNSEL, CONSUMER  
FEDERATION OF AMERICA**

Ms. WEINTRAUB. Chairman Pryor and members of the Subcommittee, specifically Senator McCaskill, I am Rachel Weintraub, Director of Product Safety and Senior Counsel for Consumer Federation of America. CFA is a nonprofit association of approximately 300 consumer groups with a combined membership of over 50 million people, that was founded in 1968 to advance the consumer interest through advocacy and education.

<sup>21</sup> CPSC 2008 Performance Budget Request, submitted to Congress February 2007.

<sup>22</sup> See 15 U.S.C. § 2064(b).

The Consumer Product Safety Commission plays a critical role in protecting consumers from product hazards. CPSC saves society \$700 billion each and every year. CFA believes that a stronger CPSC, one with more funds, more staff, and an improved authorizing statute, can better serve the public than a less robust agency.

Last September the commission voted to approve a budget request of \$66.838 million, which is a \$4.468 million increase over the President's 2007 budget request. This request would have maintained current staff levels at 420 full-time employees and covered the cost of information technology necessary to maintain CPSC's program activities.

However, the President's 2008 budget, as we have discussed, would fund only 401 full-time employees, the fewest number in the agency's history, and provide \$63.25 million to operate the agency. This is a reduction of 19 full-time employees and a small increase of just \$880,000 from the 2007 appropriation.

The agency's budget has not kept up with inflation, has not kept up with its deteriorating infrastructure, has not kept up with increasing data collection needs, has not kept up with the fast-paced changes occurring in consumer product development, and has not kept up 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 this next fiscal year, a loss of almost 60 percent. This is so significant because 90 percent of the agency's costs cover staff expenses.

There are vast consequences to this budget. The CPSC's laboratory, as we discussed, is old and outdated. However, the 2008 performance budget does not request any funds at all to improve this laboratory which serves a crucial role in CPSC's compliance investigations and safety activities. Further, sophisticated, high-tech products such as the Segway device, lithium batteries, and those with nanotechnology, pose particularly resource-intensive challenges. The 2008 performance budget does not provide any funds or an opportunity for CPSC staff to adequately study emerging technologies in the consumer products market.

To deal with imported products, along with their work with Customs, CPSC seeks to sign Memorandums of Understanding with other countries. We hope that these lead to concrete efforts to prevent unsafe products from entering the United States. To achieve this, the CPSC must work to prohibit the export of products that don't meet voluntary or mandatory safety guidelines.

We have a number of substantive issue areas of concern. CFA is profoundly dissatisfied with CPSC's current rulemaking on all-terrain vehicles. Serious injuries requiring emergency room treatment increased to 136,700 in 2006, and deaths in 2005 reached an estimated 767. CPSC's rule changes the way ATVs have been categorized by engine size to a system based upon speed. CPSC staff admitted that speed-limiting devices, upon which these categories depend, fail consistently.

This categorization failed to take weight of the ATVs into consideration. And, further, while 45 percent of ATV incidences involve an ATV tipping over, CPSC has not conducted stability tests or re-

search because CPSC staff has not had the resources to perform the necessary tests.

The ability of CPSC to conduct effective recalls of unsafe products is critical to protecting the public from risks associated with unsafe consumer products. However, the 2008 budget appropriates no funds for this purpose.

An emerging hazard necessitating CPSC action involves toy manufacturers' use of strong, small magnets in toys. The ingestion of more than one of these magnets poses serious risks of death or injury to children. CPSC has conducted four recalls of these products. However, given the seriousness of the consequences of ingestion of these magnets, some of these recalls were not even called recalls, and another triggered action only after the magnet already came out of the toy.

CPSC's budget does not include a number of important programs or activities that it has in the past. For example, the commission has no plans for in-depth studies on playgrounds or ATVs, and no longer includes child drowning deaths as one of its strategic goals, even though it's a leading cause of death among children.

While we have grave concerns about numerous issues before the commission, there are aspects worthy of praise which we would like to articulate. First, CFA has a deep respect for CPSC staff, who have continued to work diligently and effectively throughout the commission's budget cuts, loss of experienced senior level staff, and loss of a quorum. Second, CPSC's National Electronic Injury Surveillance System is working effectively.

We have concerns about the loss of a quorum. We also have a number of suggestions about improvements to CPSC statutes: First, to increase the cap on civil penalties, which is currently capped at \$1.825 million. Second, eliminating Section 6(b), which we feel handicaps the agency and ties their hands to provide information to the public. And, third, to improve recall effectiveness.

In conclusion, this Subcommittee must make sure that the Federal Government lives up to the commitment it made to protect consumers from product-related deaths and injuries when it created the Commission. CFA urges more funds to be appropriated to the Commission, and amendments to its statute, so that the Commission can grow to incorporate a changing and more complex marketplace.

[The prepared statement of Ms. Weintraub follows:]

PREPARED STATEMENT OF RACHEL WEINTRAUB, DIRECTOR OF PRODUCT SAFETY AND SENIOR COUNSEL, CONSUMER FEDERATION OF AMERICA

Chairman Inouye, and members of the Subcommittee, I am Rachel Weintraub, Director of Product Safety and Senior Counsel for Consumer Federation of America (CFA). CFA is a non-profit association of approximately 300 pro-consumer groups, with a combined membership of 50 million people that was founded in 1968 to advance the consumer interest through advocacy and education. Thank you for the opportunity to speak today.

**I. Introduction**

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."<sup>1</sup> CPSC is charged with protecting the public from hazards

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

associated with over 15,000 different consumer products. Its 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.

The Consumer Product Safety Commission (CPSC) plays an extremely critical role in protecting American consumers from product hazards found in the home, in schools and during recreation. CPSC saves \$700 billion in societal costs each year.<sup>2</sup> We know from past experience, from survey data, and from consumers who contact us, that safety is an issue that consumers care deeply about and that CPSC is an agency that consumers support and depend upon to protect them and their families.

While Consumer Federation does not always agree that the CPSC is acting in the best interest of consumers, indeed CPSC has denied several petitions CFA has filed to better protect the public and CFA has opposed numerous aspects of CPSC's rulemakings and inaction on other issues, CFA still believes that a stronger CPSC, one with more funds and more staff, can better serve the public than a less robust one struggling to re-set and limit its priorities. In addition, CFA has deep respect for CPSC staff: they are dedicated and hardworking and have worked diligently while weathering the storms of budget cuts and a lack of quorum.

## II. CPSC Budget

With jurisdiction over many different products, this small agency has a monstrous task. This challenge is heightened by the fact that, over the past two decades, CPSC has suffered the deepest cuts to its budget and staff of any health and safety agency.<sup>3</sup>

In 1974, when CPSC was created, the agency was appropriated \$34.7 million and 786 FTEs. Now 32 years later, the agency's budget has not kept up with inflation, has not kept up with its deteriorating infrastructure, has not kept up with increasing data collection needs, has not kept up with the fast paced changes occurring in consumer product development, and has 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 this next fiscal year. This is a loss of almost 60 percent.

While every year an estimated 27,100 Americans die from consumer product related causes, and an additional 33.1 million suffer injuries related to consumer products under the jurisdiction of the CPSC, this agency, with its reduced staff and inadequate funds, is limited in what it can do to protect consumers. Due to these constraints, CPSC cannot even maintain its current level of safety programs, let alone invest in its infrastructure to improve its work in the future.

Because of this historically bleak resource picture, CFA is extremely concerned about the agency's ability to operate effectively to reduce consumer deaths and injuries from unsafe products. It is for this reason that CFA believes that one of the most important things that can be done to protect consumers, including children, from unsafe products is to assure that CPSC has sufficient funding. CPSC's current budget, staff, and equipment are stretched to the point of breaking. CPSC salaries and rent currently consume almost 90 percent of the agency's appropriation. The remaining 10 percent of the agency's budget pays for other functions (such as supplies, communications and utility charges, operation and maintenance of facilities and equipment) that merely allow CPSC to keep its doors open for business each day.

## III. 2008 Budget Numbers

In September of 2006, Acting Chairman Nord and Commissioner Moore voted unanimously to approve the Executive Director's recommendations as proposed in her memorandum.<sup>4</sup> The memorandum included a budget request of \$66,838,000 which is a \$4,468,000 increase over the President's 2007 budget request. This request would maintain current staff levels at 420 FTE and cover the costs of information technology. Both the staffing and information technology are necessary to maintain CPSC's current level of program activities.<sup>5</sup>

However, this budget request was rejected by the Administration. The President's 2008 budget would fund only 401 full time employees ("FTE"), the fewest number of FTEs in the agency's over 30 year history, and provide only \$63,250,000 to oper-

<sup>2</sup>U.S. Consumer Product Safety Commission, 2008 Performance Budget Request, submitted to Congress, February 2007, page 72. On the web at <http://www.cpsc.gov/CPSC/PUBS/REPORTS/2008plan.pdf>.

<sup>3</sup>See Appendix 1, at the end of this document.

<sup>4</sup>This document is not publicly available.

<sup>5</sup>Record of Commission Action, Commissioners Voting by Ballot, Fiscal Year 2008 Performance Budget Request, September 7, 2006. Available on the web at <http://www.cpsc.gov/LIBRARY/FOIA/ballot/ballot06/FY08.pdf>.

ate the agency. This is a reduction of 19 FTEs and a small increase of \$880,000 from the 2007 appropriation. This increase does not provide for inflation, will not allow the CPSC to maintain its current programming, and will not allow for the CPSC to invest in its research resources and infrastructure.

Funding for the CPSC has remained essentially flat for the past 2 years, forcing staff decreases of 31 FTEs in 2006 and 20 FTEs in 2007. Since 2000, the CPSC has lost 79 FTEs, a loss of 16 percent. This loss in staff is particularly significant because “CPSC is a staff intensive organization with nearly 90 percent of its recent funding absorbed by staff compensation and staff related space rental costs.”<sup>6</sup> CPSC estimates that to maintain its current staffing level of 420 FTEs, which already requires limiting CPSC’s programs; CPSC would need an additional \$2,167,000. CPSC is required by various Federal rules to increase costs for staff such as a projected 3 percent Federal pay raise, increased Federal Employee Retirement System contributions and two additional paid work days.

CPSC faces additional cost increases of \$50,000 for rental space, though it is off-setting that by saving \$500,000 in returning unused space, as a result of the reduced number of staff, which is currently causing a lot of commotion at the agency. In addition, “annual costs for service contracts are growing faster than CPSC is able to find off-setting savings.”<sup>7</sup> These costs include required system enhancements for payroll and accounting that cost \$250,000.

CPSC estimates that it needs an addition \$1,000,000 to update CPSC’s operating systems but admits that this amount is a minimum amount that will not allow them to implement new software systems. Improvements in the CPSC’s information technology are critical. The Commission has requested funds for improving their information systems for many years and the needs are growing exponentially. Especially with such reduced staffing, CPSC needs mechanisms to increase efficiency at every level and IT is the best way to facilitate those efficiencies. IT is critical to what staff at CPSC do every day. In practically every aspect of CPSC’s work, “CPSC relies on IT in our related technical, compliance, outreach and operational areas.”<sup>8</sup>

#### **IV. Consequences of the 2008 Budget Request**

“CPSC has maximized staff efficiencies and cannot absorb further reductions without having an impact on its product safety activities.”<sup>9</sup> Below are just a few examples of how this limited budget affects CPSC.

##### *A. Laboratory Will Not Be Modernized*

Much of CPSC’s equipment, particularly at the Commission’s laboratory, is old and outdated. However, the 2008 performance Budget document does not even request any funds to improve the laboratory. This exemplifies how limited this budget is. CPSC’s testing laboratory serves a crucial role in CPSC’s compliance investigations and safety standards activities. In spite of the laboratory’s critical importance, no major improvements have been made in the past 32 years. Rather, CPSC and GSA have made only slight modifications to its infrastructure, which was originally designed for military use not laboratory use. Currently, CPSC staff working at the lab are working under merely adequate conditions. If the laboratory were to be modernized, the CPSC would increase productivity and efficiency. For example, each time the CPSC must conduct a test on a baby walker, due to a compliance investigation such as a recall or a standard setting activity, the specialized equipment must be rebuilt due to limited space and limited existing equipment. Therefore, each test takes up more time than it would if the equipment existed permanently and prevents CPSC engineers from working on other projects. Moreover, with increasingly more complex products under CPSC’s jurisdiction, the facilities at the laboratory are becoming more outdated every year.

##### *B. CPSC Will Not Be Able To Regulate Effectively*

CPSC’s funding directly affects its ability to regulate effectively. Most of the recalls brought about by the agency are the result of voluntary agreements reached

<sup>6</sup>U.S. Consumer Product Safety Commission, 2008 Performance Budget Request, submitted to Congress, February 2007, page v. On the web at <http://www.cpsc.gov/CPSCPUB/PUBS/REPORTS/2008plan.pdf>.

<sup>7</sup>U.S. Consumer Product Safety Commission, 2008 Performance Budget Request, submitted to Congress, February 2007, page v. On the web at <http://www.cpsc.gov/CPSCPUB/PUBS/REPORTS/2008plan.pdf>.

<sup>8</sup>U.S. Consumer Product Safety Commission, 2008 Performance Budget Request, submitted to Congress, February 2007, page vi. On the web at <http://www.cpsc.gov/CPSCPUB/PUBS/REPORTS/2008plan.pdf>.

<sup>9</sup>U.S. Consumer Product Safety Commission, 2008 Performance Budget Request, submitted to Congress, February 2007, page vi. On the web at <http://www.cpsc.gov/CPSCPUB/PUBS/REPORTS/2008plan.pdf>.

between CPSC and manufacturers and/or distributors. However, in every recall matter it considers, the Commission must be prepared with research evidence to convince the company of the need for action. In cases where the agency must file a complaint and litigate the matter, the agency may require even more extensive testing and research data for use as evidence at trial. This testing and research, whether leading to a recall or trial, may need to be contracted out and is very costly. This contingency is one with enormous ramifications. In effect, not having sufficient resources puts the CPSC in a terrible position as an enforcement agency. It can't put its money where its mouth is—so to speak—because it can't be sure it will have the money needed to follow through on its enforcement actions.

#### *C. Changing Consumer Product Market—New Products and More Imports*

This concern is further exacerbated as new products and new technologies come on to the market. Sophisticated, high tech products, such as Segway devices, which CPSC engineers may have never seen, much less have expertise with, pose particularly resource intensive challenges. Products such as computer lithium batteries that have recently been subject to recall as well as products involving nanotechnology challenge the Commission's limited resources. For the CPSC to live up to its safety mandate, it must be able to keep pace with the ever-changing development of technology. The 2008 Performance Budget does not seem to provide funds or an opportunity for CPSC staff to adequately study these and other emerging technologies in the consumer product market.

Another aspect of the changing consumer product market is that every year, more and more consumer products are imported into the United States. According to CPSC, two thirds of all recalls involved products manufactured overseas. CPSC has two programs dealing specifically with this issue. The first is its program with the U.S. Customs and Border Protection. In 2006, CPSC field staff and U.S. Customs staff prevented about 2.9 million noncompliant cigarette lighters and fireworks from entering the United States<sup>10</sup> and also prevented 434,000 units of toys and other children's products from entering the country.<sup>11</sup> The 2008 Performance Budget includes a goal of import surveillance for one product for which fire safety standards are in effect and one product for which safety standards are in effect. These are limited goals due to limited resources.

The second is the relatively new Office of International Programs and Governmental Affairs which seeks to have signed Memorandums of Understanding with seventeen countries by the end of 2008. These memoranda establish closer working relationships and set up frameworks for exchanging safety information with CPSC's counterparts in other countries. CFA hopes that these memoranda lead to concrete efforts to prevent unsafe products from entering the United States and we believe that to achieve this, the CPSC must work with other countries to prohibit the export of products that don't meet voluntary or mandatory safety guidelines. Specifically, compliance with safety standards should be made a necessary condition of receiving an export license for certain products which have had pervasive safety problems. Further, products should be required to be tested/certified by an independent third party laboratory to determine if products meet safety standards. If they do not, products cannot be exported to United States. This protects the marketplace before products enter the stream of commerce. Critically, this will not rely on the customs program which has many other competing homeland security priorities. Ultimately the responsibility falls on the manufacturers, many of which are not based in the United States and they must be more fully engaged in policing their products.

#### *D. Freedom of Information Act*

CPSC had an internal policy of responding to Freedom of Information Act (FOIA) requests within 20 days. Recently, there has been a large backlog and many responses now take considerably longer than 20 days. This is due in large part to the staff allocated to work on FOIA requests. At the end of 2004, CPSC had 15 FTEs devoted to responding to FOIA requests. As of March of 2006, CPSC had 8 FTEs devoted to the same efforts. These staff reductions like many in the Commission were achieved through attrition and retirement buy-outs. As of December 31, 2005, the FOIA backlog was 145 requests. At that time the commission anticipated that

<sup>10</sup>U.S. Consumer Product Safety Commission, 2008 Performance Budget Request, submitted to Congress, February 2007, page 21. On the web at <http://www.cpsc.gov/CPSCPUB/PUBS/REPORTS/2008plan.pdf>.

<sup>11</sup>U.S. Consumer Product Safety Commission, 2008 Performance Budget Request, submitted to Congress, February 2007, page 36. On the web at <http://www.cpsc.gov/CPSCPUB/PUBS/REPORTS/2008plan.pdf>.

it would have a backlog of 90 requests at the end of 2006.<sup>12</sup> A recent Associated Press article included a telling example:

Tom Curley, President and CEO of The Associated Press and a member of the Sunshine in Government Initiative, a media coalition, related how it took a year for an AP reporter to get lab reports on lead levels in lunch boxes that the Consumer Product Safety Commission had deemed safe. The tests revealed that one lunch box in five contained lead levels that some medical experts considered unsafe. “Why did it take a year for the commission to respond to a relatively simple request that FOIA says it was supposed to answer in 20 working days?” Curley said.<sup>13</sup>

Responding to requests for information from the public is a critically important function of the agency and one that ultimately leads to improved products and a safer public, yet under this budget proposal CPSC is limited in how they can respond and fulfill the public’s request for information.

## V. Substantive Issue Areas of Concern

### A. All-Terrain Vehicles (ATVs)

One of CFA’s priority issues before CPSC is all-terrain vehicle safety. It is no secret that CFA is extremely dissatisfied with CPSC’s current rulemaking on ATVs. Serious injuries requiring emergency room treatment increased to 136,700 in 2005. Since 2001, there has been a statistically significant 24 percent increase in serious injuries from ATVs. The estimated number of ATV-related fatalities increased to 767 in 2004. Children under 16 suffered 40,400 serious injuries in 2005. Since 2001, there has been a statistically significant increase of 18 percent in the number of children under 16 seriously injured by ATVs. Children made up 30 percent of all injuries. In 2005, ATVs killed at least 120 children younger than 16 accounting for 26 percent of all fatalities. Between 1985 and 2005, children under 16 accounted for 36 percent of all injuries and 31 percent of all deaths.

One of our biggest concerns with CPSC’s proposed rule is that it will change the way ATVs are categorized. CPSC is seeking to change the way ATVs have been traditionally categorized—by engine size to a system based upon speed. Since the late 1980s, adult size ATVs have been defined as an ATV with an engine size of over 90cc’s. The CPSC proposes to alter the age/size guidelines by creating a system that limits the maximum speeds of ATVs intended for children under the age of 16.

The Commission’s rule proposes Teen ATVs, intended for children between 12–15 years old, with a maximum speed of 30 mph; Pre-teen ATVs, intended for children between 9–11 years old, with a maximum speed of 15 mph; and Junior ATVs, intended for children between 6–8 years old, with a maximum speed of 10 mph. We are not satisfied that the Commission has adequate evidence to support this rule. CPSC staff admitted that speed limiting devices upon which the above outlined categories depend, do not work consistently. This categorization fails to take weight of the ATV into consideration, which significantly impacts the consequence of a crash or tip over. Further, we are vastly concerned that the Commission has neglected researching critical aspects of this issue, partly because it simply cannot afford to do so.

For example, 45 percent of ATV incidents involve an ATV tipping over, thus raising the issue of an ATVs inherent stability. However, CPSC has not conducted stability tests or research. When Commissioner Moore asked CPSC staff about this lack of information, CPSC staff responded, “CPSC staff has not had the resources to perform the necessary tests and evaluations to develop a comparative analysis of the current market of ATVs for steering, pitch stability, lateral stability, braking, and other handling features.”<sup>14</sup>

This is unfathomable—the factors that staff are not studying comprise those aspects of ATVs that are most involved in ATV incidents leading to death and injury. Failures of these systems are critical to ATV crashes and tip-overs. However, the Commission is moving forward on an ill-advised rule without studying these issues due, at least to a significant degree, to a lack of resources. We fear that not only will this rule not save lives, but that it may lead to younger children riding larger, faster and potentially more dangerous machines.

<sup>12</sup> See <http://www.epsc.gov/library/foia/foia061406.pdf>.

<sup>13</sup> Associated Press, “Democrats push for open government agenda: ‘Sunshine Week’ bills in Congress to counter Bush administration secrecy,” March 14, 2007. available on the web at: <http://www.msnbc.msn.com/id/11203718/>.

<sup>14</sup> CPSC Staff Response Regarding Follow Up Questions from Commissioner Moore after June 15, 2006, ATV Safety Briefing, July 11, 2006.

### *B. Recall Effectiveness*

The ability of the CPSC to conduct effective recalls of unsafe products is critical to protecting the public from unreasonable risks associated with consumer products. However, the 2008 Performance Budget does not describe any efforts to improve recall effectiveness. In 2001, CFA filed a petition with CPSC urging them, among other things, to issue a rule that would require that manufacturers (or distributors, retailers, or importers) of products intended for children provide along with every product a Consumer Safety Registration Card that allows the purchaser to register information, through the mail or electronically. Such information will allow the manufacturer to contact the purchaser in the event of a recall or potential product safety hazard.

The Commission denied CFA's petition in March of 2003 and has not undertaken any concrete efforts to broadly increase recall effectiveness other than the creation of a website dedicated to recalls. Unfortunately, the website requires a consumer to take proactive steps to obtain recall information, even though research indicated that direct-to-consumer notification is the best method for informing consumers about recalls. Direct ways to inform consumers who purchased the recalled product exist and would be more effective than the current approach which relies upon the media to convey the news of the recall.

When consumers do not hear of product recalls, their lack of information can lead to tragic consequences, including death or injury. By relying solely upon the media and manufacturers to broadly communicate notification of recalls to the public, CPSC and the companies involved are missing an opportunity to communicate with the most critical population—those who purchased the potentially dangerous product. Product registration cards or a similar electronic system provide consumers the opportunity to send manufacturers their contact information enabling manufacturers to directly notify consumers about a product recall. The 2008 budget does not provide any funds for the Commission to study this issue or to consider better more effective alternatives.

### *C. Mattress Rule—Preemption*

The Commission promulgated a rule on mattress flammability on March 15, 2006 that purports to preempt state common law remedies. According to CPSC's own data, annual national fire loss estimates for 1999–2002 indicate that mattresses or mattress bedding were the first item to ignite in 15,300 residential fires resulting in property loss of \$295 million, and causing 350 deaths and 1,750 injuries. Mattress flammability poses a significant threat to lives and property and compels a Federal response to eliminate these injuries. However, insofar as the new CPSC Rule seeks to preempt a consumers' ability to hold mattress manufacturers accountable in state court, the Rule could undermine public safety and consumers' right of redress for harms caused by unreasonably dangerous products in state courts.

First, the proposed preemption of state common law remedies by a CPSC final rule is unprecedented. Second, state common law claims resulting from dangerous products compensate consumers who have been harmed by the negligence of others. Third, while CPSC rules sometimes include preemption of state safety standards, the language in the Draft Final Rule would also, for the first time, claim to preempt state common law tort claims. Finally, the preemption language was added to the rule's preamble after the notice and comment period closed, providing no opportunity for review or evaluation by the public.

The U.S. Consumer Product Safety Commission's main duty to Congress and the public is to protect the public from unreasonable risks of injury associated with consumer products. Since liability law enhances safety by providing continual incentives to improve product design, the inclusion of a preemption provision in a final rule would violate the CPSC's core mission.

### *D. Magnet Toy Recalls*

A recent emerging hazard necessitating CPSC action involves numerous toy manufacturers' use of strong, small magnets in toys. The ingestion of more than one of these magnets poses serious risks of death or injury to children. The magnets can link together and siphon off the intestines, creating a deadly blockage. According to a December 2006 Centers for Disease Control article, since 2003, CPSC staff members have identified one death resulting from ingestion of these magnets and 19 other cases of injuries requiring gastrointestinal surgery.<sup>15</sup> CPSC has conducted

<sup>15</sup> J. Midgett, Ph.D., Div of Human Factors; S. Inkster, Ph.D., Div of Health Sciences; R. Rauchschalbe, MS, M. Gillice, Office of Compliance, Consumer Product Safety Commission. J. Gilchrist, MD, Div. of Unintentional Injury Prevention, National Center for Injury Prevention

four recalls<sup>16</sup> of these products; however, given the seriousness of the consequences of the ingestion of these products, some of these recalls were questionable and unacceptably weak.

In March 2006, Rose Art Industries conducted a “Replacement Program” for their Magnetix Magnetic Building Sets. The term “replacement program” is ambiguous to consumers and fails to alert them to the seriousness of this issue. Further, it was never made clear that products put back on the shelf after the recall were substantively different from the recalled products, thus not necessarily reducing the risk. In addition, a January 18, 2007 recall of Geometix International LLC’s MagneBlocks™ Toys, included a surprisingly weak recommendation for what consumers should do. The press release stated that, “CPSC recommends children under 6 years of age not play with toys containing magnets. If a magnet comes out of one of the blocks in these sets, immediately remove the block from the set and send it to Geometix International for a free replacement block.”<sup>17</sup>

Thus, only after it is visibly clear that the harm may have occurred should action be taken to protect a child. Recalls are already a response to the knowledge of a potential risk. This recall is doubly weak because it does not give consumers the opportunity to prevent a documented likely harm. Sadly, the response by some in the toy industry has been to shift responsibility from manufacturers to parents. However, it is clear, that magnets come out so frequently from some of these toys and are so small, that no amount of parental supervision could have prevented many of these incidents. We urge this Committee to look into why some of these recalls have been so weak.

#### *E. Changes to Section 15(b) of the Consumer Product Safety Act*

On July 13, 2006, the Commission issued Final Interpretative Guidance on section 15(b) of the Consumer Product Safety Act. Section 15(b) requires that every manufacturer, distributor, or retailer must immediately inform the CPSC if it “obtains information that reasonably supports the conclusion that its product either: (1) fails to comply with an applicable consumer product safety rule or with a voluntary consumer product safety standard . . . ; (2) contains a defect which could create a substantial product hazard . . . ; or (3) creates an unreasonable risk of serious injury or death.”<sup>18</sup> The CPSC guidance purported to clarify the current law by adding factors to be considered when evaluating the duty to report: the definition of defect will be amended to include the role of consumer misuse, adequacy of warnings, and obviousness of the risk; the number of defective products on the market will be considered; and compliance with product safety standards will be evaluated. We fear that these factors could cloud the interpretation of the law and the obligation to report under this section.

We are also troubled that these proposed changes will shift the burden of weighing relevant factors in reporting under section 15(b) from the CPSC to businesses as well as create a safe harbor for non-reporting. Further we are alarmed about reliance on factors such as the number of defective products in use as well as compliance with product safety standards to determine whether hazards are reportable. We fear that this guidance may jeopardize the Commission’s ability to receive important product safety information that is critical for CPSC’s consumer protection function.

#### *F. Other Areas No Longer Addressed*

CPSC’s Performance Budget Document does not include a number of incredibly important programs or activities that it has had in the past. For example, the Commission has no plans for in-depth studies on playgrounds or ATVs. These in-depth studies provide incredibly important information about the way injuries and deaths occur. These studies are invaluable to people working on solutions to prevent these incidents.

and Control, CDC. “Gastrointestinal Injuries from Magnet Ingestion in Children—United States, 2003–2006,” MMWR, December 8, 2006/55 (48); 1296–1300, available on the web at [www.cdc.gov/mmwr/preview/mmwrhtml/mm5548a3.htm](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5548a3.htm).

<sup>16</sup> These recalls include: Rose Art Industries, Magnetix, March 31, 2006, <http://www.cpsc.gov/CPSPUB/PREREL/prhtml06/06127.html>; Mattel, Polly Pockets, November 21, 2006, <http://www.cpsc.gov/CPSPUB/PREREL/prhtml07/07039.html>; Geometix International LLC MagneBlocks™ Toys, January 18, 2007, <http://www.cpsc.gov/CPSPUB/PREREL/prhtml07/07085.html>; and Jazwares Inc., Link-N-Lites™ Magnetic Puzzles, February 15, 2007, <http://www.cpsc.gov/CPSPUB/PREREL/prhtml07/07106.html>.

<sup>17</sup> See Geometix press release at <http://www.cpsc.gov/CPSPUB/PREREL/prhtml07/07085.htm>.

<sup>18</sup> 15 U.S.C. § 2064(b)(1), (b)(2), and (b)(3).

Significantly, the Commission no longer includes reducing child drowning deaths as one of its results-oriented hazard reduction strategic goals. The Commission, in the 2008 Performance Budget document states, “We continue our work in reducing child drowning deaths at the annual project level including expanding our public information efforts. Staff, however, proposes that we no longer address this area at the level of a strategic goal because of resource limitations and the limited ability to develop further technical remedies to address the behavioral aspects of child drowning.”<sup>19</sup> Drowning continues to be the second leading cause of accidental injury-related death among children ages one to fourteen and the leading cause of accidental injury-related death among children one to four. Thus, even though a leading cause of death among children, the Commission can no longer prioritize its work on reducing child drowning as a result of reduced funding.

#### **VI. Positive Commission Activity**

While we have grave concerns about numerous issues before the Commission, there are also some activities worthy of praise. First, as I already mentioned, CFA has deep respect for CPSC staff who have continued to work effectively and diligently throughout the Commission’s budget cuts, loss of experienced senior level staff, and loss of a quorum. It is due to their commitment to product safety that the Commission is able to uphold its mission.

Second, CPSC’s National Electronic Injury Surveillance System (NEISS) is working effectively. NEISS is a national probability sample of hospitals in the United States. Patient information is collected from approximately 100 NEISS hospitals for every emergency visit involving an injury associated with consumer products. From this sample, the total number of product-related injuries treated in hospital emergency rooms nationwide can be estimated.<sup>20</sup> In this era of significant patient privacy concerns, it can be extremely difficult and expensive to recruit a hospital for participation in the NEISS sample. Yet the Directorate for Epidemiology has not only maintained the NEISS sample of hospitals but has also ensured the statistical integrity of CPSC’s estimates of product-related injuries. This is critical for CPSC to produce trends from year to year. It is the ability to produce trends that is most fragile in a political, budget-driven environment, since one party’s budget can destroy another party’s trend. NEISS must remain unaffected by the tumultuousness of the budget process, and in recent years, the Directorate for Epidemiology has successfully shielded it from that in part by entering into inter-agency agreements with other government agencies that use NEISS data, including the Centers for Disease Control, the National Institute for Occupational Safety and Health, and the Food and Drug Administration. While CPSC’s Directorate for Epidemiology has not been completely unaffected by the changes at CPSC they have managed to keep the NEISS system running.

#### **VII. Lack of a Quorum**

Section 4(d) of the Consumer Product Safety Act provides that three members serving at the Commission constitute a quorum, which is necessary for the transaction of business. If there are only two Commissioners because of a vacancy, two members shall constitute a quorum for 6 months after the vacancy was created.<sup>21</sup> Chairman Stratton left the CPSC in July and thus, the quorum expired in January. The ability of the Commission to transact business is thwarted significantly: the Commission can not conduct any business requiring a vote including voting on rulemakings or civil or criminal penalties. The Commission cannot have public hearings. While the Commission staff can continue to work on programs, even those related to rulemakings or penalties, no final action can be taken. The lack of a quorum is severely hindering the Commission’s ability to protect the public from unreasonable risks associated with consumer products and signals to all of the industries that CPSC regulates, that it does not have its full power. This must affect CPSC’s bargaining power as well as manufacturer or retailer decisions regarding CPSC compliance, rulemakings and other issues before the Commission. Significantly, this lack of a quorum as well as the limited CPSC budget indicates that the Administration does not place a high priority on product safety or the work of the Commission. CFA supports legislative efforts to extend the quorum.

<sup>19</sup> U.S. Consumer Product Safety Commission, 2008 Performance Budget Request, submitted to Congress, February 2007, page 8. On the web at <http://www.cpsc.gov/CPSCPUB/PUBS/REPORTS/2008plan.pdf>.

<sup>20</sup> <http://www.cpsc.gov/LIBRARY/neiss.html>.

<sup>21</sup> Consumer Product Safety Act, 15 U.S.C. 2051, section 4(d).

### VIII. Improvements to CPSC's Statutes

CFA believes that CPSC could be an even more effective agency if a number of changes were made to the statutes over which CPSC has jurisdiction.

First, CFA suggests that Congress eliminate the cap on the amount of civil penalties that CPSC can assess, as spelled out in section 20(a) of the Consumer Product Safety Act (CPSA), against an entity in *knowing* violation of CPSC's statutes. The current civil penalty is capped at \$7,000 for each violation up to \$1.83 million. A "knowing violation" occurs when the manufacturer, distributor or retailer has actual knowledge or is presumed to have knowledge deemed to be possessed by a reasonable person who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations. Knowing violations often involve a company's awareness of serious injury or death associated with their product. Eliminating the cap will encourage manufactures to recall products faster and comply with CPSC's statutes in a more aggressive way. Importantly, the elimination of the cap will act as a deterrent to noncompliance with CPSC's regulations. Eliminating the cap will also strengthen CPSC's bargaining power when negotiating with many companies to take a particular action.

Second, CFA urges Congress to eliminate section 6(b) of the CPSA. This section of the Act prohibits CPSC, at the insistence of industry, to withhold safety information from the public. This provision, to which no other health and safety regulatory agency must adhere, requires that CPSC must check with the relevant industry before it can disclose the information to the public. It serves to hold CPSC captive to the very industry it regulates. If the industry denies access to the information, CPSC must evaluate their response and may just drop the issue and deny access of the information to consumers. This has the effect of delaying or denying access of important information to consumers.

Third, to improve recall effectiveness, CFA recommends that section 15 of CPSA be amended to require manufacturers to provide a means of directly communicating information of recalls to consumers—either through a registration card, electronically or other means of technology. Manufacturers, retailers or importers should be required to report the existence of the recall to retailers and all commercial customers within 24 hours after issuing the recall or warning. All entities within the stream of commerce should be required to post the recall to websites, if in existence, within 24 hours of issuance of recall. We suggest that manufacturers, retailers, distributors or importers should be required to communicate notice of the recall with all known consumers. Retailers, after receiving notice of the recall, must remove the recalled product from their shelves and website within three business days and retailers must post notice of the recall in their stores for 120 days after issuance of the recall.

Fourth, CFA encourages Congress to restore CPSC's authority over fixed-site amusement parks. According to the CPSC, as of 2003, serious injuries on theme park rides have soared 96 percent in the last 5 years. Federal oversight is crucial to the prevention of any future deaths and injuries associated with fixed-site amusement parks due to the vast variation in state laws and the absence of any regulation in some states. CPSC has illustrated its ability to identify and prevent injuries from many consumer products, including mobile amusement park rides. CPSC should be granted the same scope of authority to protect against unreasonable risks of harm on fixed-site rides that it currently retains for carnival rides that are moved from site to site. However, with this additional authority, CPSC should be authorized more money to take on this important role.

Fifth, we ask Congress to require businesses selling toys on the Internet to provide on their website the same cautionary labeling that is required on toy packaging. Currently, Section 24 of the Federal Hazardous Substances Act (FHSA) requires cautionary labeling on small balls, marbles and toys that contain small parts for children 3 years of age and younger. This labeling must be apparent to consumers at the point of purchase so consumers are able to make informed decisions about potential safety hazards associated with the toys. Online retailers should be required to post the cautionary warnings on their website so that consumers could be aware of the potential safety issues before actually purchasing the product.

### IX. Conclusion

In conclusion, this Subcommittee must make sure that the Federal Government lives up to the commitment it made to protect consumers from product-related deaths and injuries when it created the Consumer Product Safety Commission. CFA urges more funds to be appropriated to the Consumer Product Safety Commission so that the Commission can grow to incorporate a changing and more complex marketplace. Sadly, this 2008 Budget Proposal fails to give the Commission's that opportunity. Thank you.

## APPENDIX 1

## CPSC Resources

Year	Budget Authority	FTEs *
1974	\$34,776,000	786
1975	\$36,954,000	890
1976	\$39,564,000	890
1977	\$39,759,000	914
1978	\$40,461,000	900
1979	\$42,940,000	881
1980	\$41,350,000	978
1981	\$42,140,000	891
1982	\$32,164,000	649
1983	\$34,038,000	636
1984	\$35,250,000	595
1985	\$36,500,000	587
1986	\$34,452,000	568
1987	\$34,600,000	527
1988	\$32,696,000	513
1989	\$34,500,000	529
1990	\$35,147,000	526
1991	\$37,109,000	514
1992	\$40,200,000	515
1993	\$48,400,000	515
1994	\$42,286,000	518
1995	\$42,431,000	487
1996	\$39,947,000	487
1997	\$42,500,000	480
1998	\$45,000,000	480
1999	\$46,949,000	480
2000	\$48,814,000	480
2001	\$52,384,000	480
2002	\$55,200,000	480
2003	\$56,767,000	471
2004	\$59,604,000	471
2005	\$62,149,000	471
2006	\$62,370,000	446
2007	\$62,370,000	420
2008 (proposed)	\$63,250,000	401

\*This column represents the staffing ceiling established for the agency in each year. The term FTE or full time employee has been used since 1980. From 1974-1979 the figures in this column represent positions or people. One FTE is equivalent to 2,080 hours per year.

Senator PRYOR. Thank you.  
Mr. Dean?

**STATEMENT OF JOHN C. DEAN, PRESIDENT, NATIONAL  
ASSOCIATION OF STATE FIRE MARSHALS**

Mr. DEAN. Mr. Chairman, Senator McCaskill, my name is John Dean. I am the current President of the National Association of State Fire Marshals, and have served as the Fire Marshal for the State of Maine since 1998. I have served as a fire chief, a fire-fighter, and an EMT for most of the past three decades.

Thank you for the opportunity to appear before the Subcommittee this morning to share the views of NASFM on the U.S. Consumer Product Safety Commission. I would like to convey a sense of urgency about the current state of the CPSC and the need for immediate action to address both short-term and long-term needs.

Many of the ills of the commission have been documented and are well known to this Committee: The budget that has not even

kept up with inflation, the attrition of long-time experienced staff, a topheavy management structure, and a lack of quorum that has contributed to paralysis on many issues. We have even heard that the commission is making plans to consolidate offices to save on rent, throwing out active records because there is no room to store them.

To use an analogy from the emergency responder community, the CPSC has been hemorrhaging to the point where it is now in critical condition. It moves slowly at best, but in most cases it is completely paralyzed. We believe the patient can be saved, but immediate and decisive action is needed by Congress to address both the short-term survival and the long-term viability of the agency.

We recommend a two-part approach. First, a short-term infusion of additional funding above the current services to get the patient's heart beating and the blood flowing. We realize that the Commerce Committee does not appropriate funds, but we believe you can influence those who are responsible to give this matter serious consideration.

How much more should the CPSC be given to do its job? We would respectfully suggest a starting point of \$75 million for the coming year, which is \$12 million above the Fiscal Year 2008 budget request, and would amount to spending only about 25 cents per person in the United States. This relatively small additional expenditure now and similar modest increases over the next few years would help the agency rebuild and train the staff, pay for office and storage space, and complete work on projects that have been languishing for years.

Second, it is time for Congress to ask the Government Accountability Office to determine how the CPSC can best continue to fulfill its mission to consumers. A GAO study might consider whether the Commission has the resources to fulfill its mission. The Commission's budget request for Fiscal Year 2008 is about \$63 million. That is \$63 million and about 400 full-time employees, to prevent \$700 billion annually in losses from incidents involving consumer products within the agency's jurisdiction.

A GAO study might compare the Commission's funding and staffing levels to those of other Federal agencies with the same mission such as the Food and Drug Administration. The CPSC has less than  $\frac{1}{20}$  the number of employees of the FDA, with a budget about  $\frac{1}{29}$  as large as FDA, to oversee products in its jurisdiction whose economic losses equal 70 percent of the retail value of the FDA products.

A GAO report might consider how the Commission and other agencies manage the same function, product recalls. The FDA, Federal Aviation Administration, National Highway Traffic Safety Administration, Department of Justice, and U.S. Environmental Protection Agency have broad powers to ensure public safety. Does the Commission have sufficient authority and resources to properly research, test, and deal with the manufacturers of products that have been designed and constructed in an inherently dangerous way?

A GAO study might address the question of whether it is time for the CPSC to be transformed from a commission structure to an agency headed by a single administrator, like all the other government agencies I mentioned in this statement.

Firefighters care deeply about public safety. Our view of the commission is that if it is to continue to exist, and we strongly believe that it should, it must have the authority and resources to protect human life and property from consumer products within its jurisdiction. It must have leadership committed to public safety and unwilling to accept constant erosion of the agency's human and physical resources. We urge the Subcommittee to ask the GAO to take a hard look, because a hard look is what is needed now.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Dean follows:]

PREPARED STATEMENT OF JOHN C. DEAN, PRESIDENT, NATIONAL ASSOCIATION OF  
STATE FIRE MARSHALS

My name is John Dean. I am the current President of the National Association of State Fire Marshals, and have served as the Fire Marshal for the State of Maine since 1998. I have served as a fire chief, a firefighter and an EMT for most of the past three decades. Thank you for the opportunity to appear before the Subcommittee this morning to share the views of NASFM on the U.S. Consumer Product Safety Commission.

With all due respect, an oversight hearing lasting a few hours is not adequate to cover this morning's topic. But I would like to convey our sense of urgency about the current state of the CPSC and the need for immediate action to address both short-term and long-term needs. We have many safety issues before the Commission, but rather than bemoaning the lack of progress in each, we think it would be more useful to approach this hearing from a broader perspective and address the Commission's basic ability to fulfill its mission.

Before there even was a United States of America, Scottish moral philosopher and political economist Adam Smith wrote, "The chief purpose of government is to preserve justice. The object of justice is security from injury."<sup>1</sup> Security from injury is the mission of the Consumer Product Safety Commission, and we believe that it is an appropriate function of good government.

However, many of the ills of the Commission have been documented and are well known to this Committee: the budget that has not even kept up with inflation, much less been increased on the basis of the work that needs to be done; the attrition of long-time experienced staff, leaving a skeleton crew of capable but junior technical employees to do most of the work without guidance, expertise, historical memory or the means to acquire these necessary resources; a management top-heavy with Senior Executive Service employees; a lack of quorum that has contributed to paralysis on many issues. We have even heard that the Commission is making plans to consolidate offices to save on rent, cramming the staff into ever-smaller spaces and, in the process, throwing out active records because there is no room to store them.

To use an analogy from the emergency responder community, the CPSC over the past several years has been hemorrhaging to the point where it is now in critical condition: The resources and leadership no longer exist to allow the Commission to fulfill its very important mission, and it is no longer functioning. It moves slowly at its best, but in most cases is completely paralyzed.

We believe the patient can be saved, but immediate and decisive action is needed by Congress to address both the short-term survival and the long-term viability of the Agency. We know that the Congress is already considering legislation to extend the Commission's quorum until such time that a new chairman is in place.

For the other concerns, we recommend a two-part approach.

First, we suggest a short-term infusion of additional funding above current services to get the patient's heart beating and the blood flowing. We realize that the Commerce Committee does not appropriate funds, but we believe that it is appropriate for you to ask that this be given serious consideration by those who are responsible. The current CPSC budget breaks out to only about 21 cents per person in the United States. This is entirely inadequate for an agency charged with assuring the safety of products in America's homes. It is certainly not a bargain for consumers.

<sup>1</sup>*Lectures on Jurisprudence*, originally delivered at the University of Glasgow in 1762-1763. <http://oll.libertyfund.org/Home3/Book.php?recordID=0141.06>.

So how much more should the CPSC be given to do its job? This could and probably should be done incrementally over the next several years. But we would respectfully suggest a starting point of \$75 million for the coming Fiscal Year—which is \$12 million above the FY08 budget request and would amount to spending only about 25 cents per person in the U.S. This relatively small additional expenditure now—and similar modest increases over the next few years—would result in several benefits: It would help the Agency get back on track to rebuilding and training the staff so that they can, in time, develop the expertise to become the product safety leaders they should be. It would allow the Agency to pay for office space for staff and storage space for working records. It would allow them to complete work on projects that have been languishing for years, and to do a proper job of the projects they are addressing.

Second, we believe it is time for the Congress to ask the Government Accountability Office (GAO) to conduct a head-to-toe examination of the Agency to determine how the CPSC can best continue to fulfill its mission to consumers and recover the viability and the relevance it had in the early days of its existence.

A GAO study must consider whether the Commission has the resources to fulfill its mission. According to the Commission, deaths, injuries and property damage from consumer product incidents cost the Nation more than \$700 billion annually. The Commission clearly lacks the authority and resources to address losses of this magnitude. The Commission's budget request for Fiscal Year 2008 is about \$63 million. Again, that's \$63 million and about 400 full-time employees to prevent \$700 billion annually in losses from incidents involving consumer products within the Agency's jurisdiction.<sup>2</sup>

A GAO study might compare the Commission's funding and staffing levels to those of other Federal agencies with the same mission. For example, the GAO might look at the Food and Drug Administration, which has 9,000 employees and a budget of over \$1.8 billion to oversee products in its jurisdiction that total about \$1 trillion a year in retail sales.<sup>3</sup> The CPSC has less than  $\frac{1}{20}$  the number of employees of FDA, with a budget about  $\frac{1}{29}$  as large as FDA's, to oversee products in its jurisdiction whose economic losses alone equal 70 percent of the retail value of FDA's products.

A GAO report might consider how well other government agencies are supporting the Commission's mission. If preventing injury is a legitimate role of government, the GAO might question why the USDA was given \$16.7 million to promote the sale of cotton—when the Commission lacks the funds to properly review its 1953 general wearing apparel flammability standard, which was recently tweaked only to update some definitions and laundering procedures. Meanwhile, we continue to see many fires, horrific burns and tragic deaths involving everyday clothing, much of it made of cotton, especially among children and the elderly. The standard is so weak, newspaper and facial tissue can pass it.

A GAO report might consider how the Commission and other agencies manage the same function: product recalls, as well as the Commission's ability to compel recalls. Again, comparisons may be useful. The FDA, Federal Aviation Administration, National Highway Traffic Safety Administration, Department of Justice and U.S. Environmental Protection Agency have broad powers to ensure public safety. Does the Commission have sufficient authority and the resources to properly research, test and deal with manufacturers of products that have been designed and constructed in an inherently dangerous way?

A GAO study could address the question of whether it is time for the CPSC to be transformed from a commission structure to an agency headed by a single administrator—like all of the other government agencies I have mentioned in this statement.

And, finally, a GAO study could answer the basic question: should there even be a U.S. Consumer Product Safety Commission, or should we rely entirely on litigation to address the \$700 billion in losses from incidents involving consumer products?

Firefighters care deeply about public safety. Our view of the Commission is that if it is to continue to exist—and we strongly believe that it should—it must have the authority and resources to protect human life and property from consumer products within its jurisdiction. It must have leadership committed to public safety and unwilling to accept constant erosion of the Agency's human and physical resources. We urge the Subcommittee to ask GAO to take a hard look, because a hard look is what is needed now.

<sup>2</sup> <http://www.cpsc.gov/about/about.html> and <http://www.cpsc.gov/cpscpub/prerel/prhtml07/07118.html>.

<sup>3</sup> <http://www.fda.gov/oc/history/historyoffda/default.htm>.

I earlier quoted Adam Smith and will conclude, with apologies to the Majority, by quoting Ronald Reagan, who said, "Don't be afraid to see what you see." Thank you, Mr. Chairman.

Senator PRYOR. Thank you.  
And last, Mr. Locker.

**STATEMENT OF FREDERICK LOCKER, ESQ., GENERAL  
COUNSEL, TOY INDUSTRY ASSOCIATION AND THE  
JUVENILE PRODUCTS MANUFACTURERS ASSOCIATION**

Mr. LOCKER. Thank you, Mr. Chairman and members of the Committee. I am Frederick Locker. I am General Counsel of the Toy Industry Association and the Juvenile Products Manufacturers Association. These are both not-for-profit trade association members of the Council of Manufacturing Associations of the National Association of Manufacturers. And I'm a member of a coalition which is a CPSC coalition and part of NAM. Thank you for providing this opportunity to testify today.

I want to be clear that our coalition represents more than 65 product manufacturers and, importantly, trade associations. We have functioned for many decades as a forum to address common issues related to the operation of the commission and policies initiated pursuant to the Consumer Product Safety Act and those related acts we call the sister acts. The mission of our coalition is to promote product safety in a fair, balanced, and effective manner.

The theme I think from today is that more is not always better; better is better. And we'll touch on that. The coalition does not involve itself in pending product-specific regulatory or adjudicative matters. Similar to every witness on this panel and the commission members that you have heard from, we support the important and essential mission of the commission.

CPSC's mission is vital. It protects children and families against unreasonable risk of injury and death from more than 15,000 types of consumer products, and it governs a wide range of hazards. Their work is vital in addressing consumer hazards through a framework of mandatory product standards, engagement in these consensus standard-setting processes that you have heard something about, compilation of important data upon which to base decisions to engage in rulemaking, issuance of safety guidelines, implementation of information and education programs in an effort to proactively avoid injuries, and product recalls and corrective actions when necessary.

The agency is operating on a relatively modest budget. We have all agreed that the \$63.25 million allocated for 2008 should certainly be granted, and in your discretion and subject to negotiation with the administration, we would favor significant increases earmarked for retention of staff, upgrades to their testing laboratory, increased coordination with other countries regarding not only the effectiveness of standards but also better inspection and enforcement coordination. We ask this Committee to act thoughtfully in its review of the regulatory structure, however, that has been in place and served the American public for more than 30 years.

These are no doubt exceedingly difficult economic times. A vibrant, healthy manufacturing sector in our Nation is necessary for our Nation's prosperity. U.S. manufacturers in the consumer prod-

uct industry presently face increasing global competition. It's more intense than it has ever been before. You know that as members of this Committee.

In such an economic environment, the U.S. manufacturer should not be disadvantaged by unnecessarily intrusive and inefficient domestic regulatory regimes. More is not always better. More efficient, leveraged use of resources is what we seek and what we aim for.

Now we have noted there has been marked improvement in the openness of the commission, and we have specific recommendations that we've come here to talk about. We support dynamic new partnerships between stakeholders and the commission to promote safety and safe practices with consumers.

Consumer information and education we understand is not a substitute for the essential responsibility that is ours as manufacturers to provide absolutely safe products, but it can help with that percentage of accidents due to improper, irresponsible conduct or lack of supervision of minors. You've touched on that today in terms of the complex issues related to ATV use. The commission is fully authorized to embark on such programs. They do not need greater authority. They can act now, and encouragement from Congress should be provided.

Next, we support, strenuously support the Commission's involvement in those private consensus standard-setting activities that people talked about. These standards are essential, whether it's UL or ASTM or ANSI or ISO or other standard-setting bodies, commission engagement is important in providing comments, proposals, and the involvement of their staff is essential. And with a process that leads to 10 times as many standards being enacted, revised, reviewed, and changed on a constant, dynamic basis in that regard as compared to mandatory standards, it is essential.

And, finally, a few other areas. We need to have them engage in outreach, and engage that portion of the population of our country that is the small manufacturer and small businesses, which comprise in many cases more than 60 or 70 percent of our manufacturing trade associations. You write the laws, but these companies and businesses need better guidance, and they need to understand what those laws mean, and they need the help of the agencies in this government to understand that so they can engage constructively in business and the economy can grow.

The CPSC has a strong role in setting and enforcing these standards. In a global economy, we note that this agency is important, and their international engagement is important not just to ensure import compliance with our safety standards, but to seek to harmonize standards globally in a global economy, to promote export opportunities for American businesses, to eliminate nontariff trade barriers which may act as a barrier of entry to U.S.-produced or designed goods.

The existing regulatory framework is clearly effective. However, as everyone has acknowledged today, more resources are needed. We agree with you in the Senate and every other panel member, that the CPSC really doesn't lack the requisite authority to implement its congressional mandate to protect the public against unreasonable risks of injury associated with consumer products. They

need greater resources to implement it effectively, and they need to leverage those resources with other agencies within the government to do so.

Thank you for providing me this opportunity.  
[The prepared statement of Mr. Locker follows:]

PREPARED STATEMENT OF FREDERICK LOCKER, ESQ., GENERAL COUNSEL, TOY INDUSTRY ASSOCIATION AND THE JUVENILE PRODUCTS MANUFACTURERS ASSOCIATION

Mr. Chairman and members of the Committee, I'm Frederick Locker, General Counsel to the Toy Industry Association and Juvenile Products Manufacturers Association, not-for-profit trade Association members of the Council of Manufacturing Associations of the National Association of Manufacturers (NAM), and a member of the NAM CPSC Coalition. Thank you for providing me the opportunity to testify on the reauthorization of the U.S. Consumer Product Safety Commission ("Commission"). Our Coalition represents approximately 65 consumer product manufacturers and manufacturing associations. It has functioned for many decades as a forum to address common issues related to the operation of the Commission and policies initiated pursuant to the Consumer Product Safety Act and related sister acts. The mission of the Coalition is to promote product safety policy in a fair, balanced and effective manner. The Coalition does not involve itself in pending product specific regulatory or adjudicative matters. Similar to the other witnesses on this panel, we support the important and essential mission of the Commission.

#### **CPSC Performs a Vital Function**

CPSC's mission is to protect children and families against an unreasonable risk of injury and death from more than 15,000 types of consumer products from a wide range of product hazards. Their work is vital in that it addresses consumer product hazards through a framework of mandatory product safety standards; engagement in the voluntary or consensus standard-setting process; compilation of consumer injury data; issuance of safety guidelines; implementation of information and education programs in an effort to proactively avoid injuries; and product recalls and corrective actions when necessary. The agency is operating on a relatively modest budget, with a request of \$63,250,000 for Fiscal Year 2008. We believe that their budget request should be granted with increases earmarked for retention of staff, upgrades to their testing laboratory and support of increased coordination with other countries regarding harmonization of standards with better inspection and enforcement coordination.

With respect to reauthorization of the Commission, we ask this Committee to act thoughtfully in any review of a regulatory structure that has served the American public well for more than 30 years. In these exceedingly difficult economic times a vibrant healthy manufacturing sector is critical to our Nation's prosperity. U.S. manufacturers in the consumer product industry presently face increasing global competition that is more intense than ever before. In such an economic environment, U.S. manufacturers should not be disadvantaged by an unnecessarily intrusive and inefficient domestic regulatory regime.<sup>1</sup>

#### **CPSC Has Effectively Marshaled Resources**

The Commission works well with and understands the needs of manufacturers, retailers and the consumers. Whenever appropriate, they have encouraged voluntary collaborative actions among stakeholders to address safety requirements. During the past decade, they have worked cooperatively with industry to conduct more than 5,000 recalls and needed to resort to litigation to compel recalls only several times. In 2006, CPSC completed 471 product recalls involving nearly 124 million product units that either violated mandatory standards or presented a potential risk of injury to the public and negotiated civil penalties of approximately \$2.3 million. In addition, the CPSC compliance staff has continued to refine its Retailer Reporting Model implemented in 2005 and used by two of the Nation's largest retailers. This provides additional trending complaint data for evaluation by the staff, which sup-

<sup>1</sup>It is interesting to note that the European Union recently announced that it wants to boost trade between EU countries by making it more difficult for member states to block imports of specific products on the basis that they do not meet a national product safety standard. The EU wants member states to bear the cost and burden of demonstrating that a product is unsafe if they wish to remove it from their market. *Procedures Relating to the Application of Certain National Technical Rules to Products Lawfully Marketed in Another Member State and Repealing Decision 3052/95/EC.*

plements manufacturer and consumer reporting. With shrinking resources, leveraged collaborative action is preferable to mandatory regulations provided it can be implemented in a timely fashion and adequately addresses an unreasonable risk of injury.<sup>2</sup>

Today's U.S. economy is consumer-driven. An enormous number and variety of consumer products are designed, manufactured, imported and sold in the United States. With that in mind, industry, standards organizations and internal safety requirements developed in cooperation with manufacturers result in some of the best hazard-based standards that ensure that American consumers may be comfortably secure in the safe use of their consumer products. Many companies also increasingly recognize the value of taking responsible corrective action to address patterns of injuries or misuse that may indicate a problem with their product. This accounts for the vast majority of product recalls conducted in cooperation with the Commission. Of course, there are still occasions where the Commission justifiably acts to remove unsafe products from the marketplace and to set standards where private standards either do not exist or are clearly inadequate. Consumer product manufacturers are committed to working with the Commission to achieve these objectives. We have consistently supported Commission efforts, along with the U.S. Customs Service, to monitor imported products to ensure that they meet mandatory Federal safety standards. We recognize that this has been an efficient leveraging of resources to enhance enforcement related to product imports. In addition, we note that the Commission has played an increasingly significant role in educating consumers about safety concerns and practices.

#### **CPSC Has Shown Marked Improvement in Its Openness**

U.S. industry has made no secret of its discomfort with certain past Commission practices, policies and procedures over the years. We have expressed concern in the past when cooperation with industry was minimized while a public-relations campaign to tarnish a company was launched in the media. We have objected in the past to proposed mandates when education, research and innovative private initiatives were not encouraged or leveraged. We have expressed concern when due process has not been accorded companies.

We have also lauded the Commission's efforts at affording public comment, of all interested parties without predisposition on important matters. We appreciate the Commission hearings and outreach workshops to improve recall efficiency. This affords experts from a variety of disciplines to share information. In particular we have noted and applauded the Commission's growing emphasis on sound hazard research and data, including its focus on more rigorous risk-benefit analyses, as the basis for regulatory action. We note that they employ capable high-level and well-experienced epidemiologists, toxicologists, physiologists, chemists, engineers, statisticians, and economists to inform their decisionmaking. They have performed well in OMB assessments of their overall regulatory policies.

Along those lines, we believe that there are ways to make the Commission more effective and at the same time more efficient. As I noted, in these difficult economic times complexities and confusion in the regulatory process are an unnecessary burden on consumer product companies. Allow me to share a few proposals on ways the Commission can increase its effectiveness in protecting consumers while minimizing burdens on the manufacturing sector of this country.

#### **Recommendations**

##### *Collaborative Information and Education Programs*

First, we support dynamic new partnerships between stakeholders and the Commission to promote safety and safe consumer practices. Consumer information and education does not substitute for the essential responsibility of manufacturers to provide safe products, but it can help with a large percentage of accidents due to improper or irresponsible conduct or lack of supervision of minors. The Commission is fully authorized to embark on such programs, but encouragement from Congress should be provided.<sup>3</sup>

<sup>2</sup>An excellent example is their work with industry to revise the ASTM consensus baby walker safety standard to address injuries from stair falls. New walkers with safety features are now on the market. There has been a decrease in injuries of over 84 percent since 1995, likely due in large part to the effectiveness of such standard requirements. The commission projected societal costs decreased by about \$600 million annually from this one action. Similarly, there was an 89 percent reduction in crib-related deaths from an estimated 200 in 1973 and an 82 percent reduction in poisoning deaths of children younger than 5 from drugs and household chemicals from 216 in 1972.

<sup>3</sup>CPSC has been increasingly effective at using electronic media and websites. The creation of *www.recalls.gov* and enhancements to their website has resulted in a rapid growth from

*Continued Involvement in Consensus Safety Standards and Activities*

Second, we are supportive of the Commission's involvement in private standards activities as authorized in the current statute. These standards are the bulwark of our national and even international safety system, and the Commission plays an important role in providing comments and proposals.<sup>4</sup> However, we believe the Commission needs to better manage and supervise its internal process, particularly staff input to standards organizations, to ensure an opportunity for public comment and to prevent proposals which lack technical merit or otherwise cannot be justified as Federal standards. This is why we support the Commission's stated strategic goal to improve the quality of CPSC's data collection through 2009 by improving the accuracy, consistency and completeness of the data. For an agency such as the CPSC, it is essential to maintain and use accurate data as a valuable tool to allocate staff time and resources to address emerging real world hazards.

*Continued Efforts to Engage and Educate Small Manufacturers*

Third, there is a need for better guidance and education from the Commission on the implementation of the Section 15 Substantial Product Hazard Reporting provisions. Manufacturers with defective products that could create substantial product hazards are obliged to report to the Commission and, if needed, to take corrective action including recalls. However, the law and implementing regulations are vague and ambiguous. It is difficult for manufacturers, especially small businesses, to determine when reporting and corrective action is necessary. Likewise, it is difficult for them to comprehend how the penalty for the failure to report in a timely fashion is justified by the agency. We support the Commission's efforts to clarify guidance on reporting and penalty computation by issuance of guidelines, which were subject to prior publication, comment and review prior to adoption.<sup>5</sup>

*A Strong Role in Setting and Enforcing Safety Standards in a Global Economy*

Fourth, in a global economy, we note the importance of the agency's international engagement to ensure greater import compliance with U.S. safety standards and harmonization of standards to promote export opportunities for American businesses and the elimination of non-tariff trade barriers. CPSC has entered into Memorandums of Understanding (MOU) with a number of foreign governments to provide for a greater exchange of information regarding consumer product safety. We note by the end of 2008, CPSC expects to have MOUs with 17 countries. These activities are becoming increasingly important in helping to ensure consistent hazard-based, harmonized global safety standards.

*Existing Regulatory Framework is Effective, But More Resources are Needed*

Finally, we believe that the existing authority granted to the Commission under the Consumer Product Safety Act and related Acts, together with existing implementing regulations, are sufficient for the CPSC to execute its mission in an effective manner. The CPSC does not lack the requisite authority to implement fully its congressional mandate "to protect the public against unreasonable risks of injury associated with consumer products." However, it requires greater resources to implement such authority.

Thank you for providing me the opportunity to testify. The Commission is an important agency and we fully support its mission. It can and should, have the funding and resources it needs to effectively function and we look forward to working with the Commission and the Committee to this end.

Senator PRYOR. Thank you. Now Senator McCaskill has a conflict that has developed, so she is going to ask the first questions.

Senator MCCASKILL. Thank you very much, Mr. Chairman.

200,000 visits in 1997 to what is expected to be almost 25 million visits by the end of the year. Product safety information is increasingly available in Spanish and other languages. In addition, outreach activities such as the Neighborhood Safety Network; collaborative efforts with FEMA and public information education initiatives with NGO's and industries have resulted in increasingly effective communication about fire and carbon monoxide hazards, disaster preparedness, hazards associated with recreational vehicles, proactive holiday safety messaging, poison prevention, pool drowning risks and back to school safety programs.

<sup>4</sup> CPSC has worked with stakeholders to develop effective consensus standards completing approximately 10 times as many voluntary standards as mandatory standards (CPSC assisted in completing and developing 352 voluntary safety standards while issuing 36 mandatory standards from 1990 through 2006).

<sup>5</sup> *Federal Register*, Vol. 71, No. 142, pages 42028-42031 and proposed interpretive rule, *Federal Register*, Vol. 71, No. 133, pages 39248-39249.

I would ask you first, Mr. Locker, do you support making the effectiveness of the recalls that CPSC has done public information?

Mr. LOCKER. It depends on how you define "effectiveness."

Senator MCCASKILL. Well, I'll make it simple. Would you support it being public how many of the products that have been recalled actually have been returned? Do you support making that public?

Mr. LOCKER. We have no problem with that information being publicly available. However, I think we need to talk about this in the context of what is an effective recall.

Think about it in your own terms. That toy that you may have bought for your child 10 years ago that cost \$5 and may have had a 6-month useful life is not likely to be around. We look at recall effectiveness the same way perhaps that the Food and Drug Administration does, or the National Highway Traffic Safety Administration, as getting the message out. You can bring the proverbial horse to the water trough but you cannot necessarily make it drink.

So effectiveness is getting the message out, not necessarily a body count of what you get back. Certainly we expect to see 100 percent back of any products that are on the retail shelf. In the hands of the consumer, over time, it's a complicated factor. There's no simple answer to that issue of what should be the number. We know that in studies, that average consumer return rates over 15 years among a variety of consumer products, different from automobiles, has been approximately 4.5 to 5 percent.

Senator MCCASKILL. Well, you know, I guess maybe I have shopped more garage sales than you have, for items for my children. I don't think I ever had a car seat at a certain point in time in my life that hadn't been purchased from someone else.

And so I think knowing whether or not products have been returned and to what extent they have been returned, is very important information for the public. And now, with the advent of the technology and websites, this would be something that would be easily obtainable by a mother who was trying to figure out if that high chair or if that crib—I had a lot of anxiety about crib purchase when I was purchasing for my infants.

Do you agree that the cap on civil penalties for a knowing violation is extraordinarily low in some circumstances, where you're looking at companies that have a net revenue in the hundreds of millions of dollars? Do you agree that a knowing violation with a civil penalty capped at less than \$2 million seems extraordinarily low?

Mr. LOCKER. Sure, I'd like to answer that, and I will. But with regard to your last comment, I would say one thing. We have applauded the use of technology for outreach programs on products, on heirloom and used products, on products in the thrift store milieu, products that may be put away in attics. And that's why we have welcomed, and many of our members and associations all lead to this great new concept of recalls.gov, or the concept that the Chairman talked about and how it had been implemented in Arkansas. We are clearly in favor of that.

Now, with respect to penalty caps, I want to note something in terms of knowing violation. If you look at the statute, knowledge is not actual knowledge; it can be imputed knowledge also. So I

think we need a definition and a better framework of what that really means.

Senator MCCASKILL. Well, having been in a courtroom, it's a very high burden. Whether it's imputed or whether it's actual, it is a very high burden to meet knowledge.

Mr. LOCKER. Right. Now most of these cases of course never wind up in the courtroom, and those that have, courts have actually imposed lower civil penalties, even under the limits that you have now, than the CPSC has. And in terms of the historical perspective, you have to understand that you already have a mechanism in place, and have since 1990.

So the old recalls of \$2,000 per product and up to a cap of \$500,000 that existed in 1990 have actually been subject to escalation provisions built into the enabling statutes, and you've now reached up to \$8,000 and in excess of \$1.8 million, and within 2 years those will go up.

And if we look at it in terms of historical perspective, since 1990 the maximum amount of a civil penalty collected has never exceeded the existing caps. So if you're going to create that mechanism, just put a cap, you know, just make it more, it isn't necessarily better.

If that means allocating staff resources and having this agency hire 100 lawyers to just go out and enforce penalties, I wouldn't necessarily be in favor of that. I'd like to see them go out and hire those engineers and toxicologists and epidemiologists that track that and can focus on, as we have talked about, preventing those products from ever reaching the marketplace.

Senator MCCASKILL. The last fact that I noticed in some of the testimony and some of the information we were given is, I think, fascinating. That is, two-thirds of the recalls came from imported manufacturers.

Now it seems to me that if I were manufacturing a toy in the United States of America, and I realized that two-thirds of what was recalled was coming from our competitors in other countries that don't have the kind of standards we have in the United States—and I understand it's a cost factor for exports for American manufacturers—but it seems to me right now, when we are working so hard at the trade balance issue and working so hard in terms of a global economy, it seems to me—and maybe, Ms. Greenberg, or Ms. Weintraub, or Mr. Dean, if you would want to briefly comment on this—it seems to me that starving this agency when we are, I think, at the beginning stages of a global explosion in terms of manufactured goods being produced with much lower labor costs, much less regulation, much less environmental standards, with those goods coming into our country, that the American manufacturers would want us to pump up this agency because they are doing a great job in terms of the recalls that are occurring, calling out your competitors for production of products that simply aren't safe by our standards.

Mr. LOCKER. And that's one of the reasons we're here today saying we fully, completely support the vital mission of this agency and would like to see them have more resources, so we couldn't agree more with that. But as you look to those numbers, you have to realize that the fact that two-thirds of the recalls involved im-

ported products and two-thirds of those were from China, that's more likely to be a reflection of the nature of the global economy and how many goods are coming in as imports, unfortunately, into the United States, rather than the particular issues related to manufacturers in overseas markets.

And we clearly support every effort to reach overseas. That's why, if you look at our comments on the record, we want this agency engaged with overseas governments not only to buttress the product safety standards, improve enforcement, but also to create harmonized standards that reduce nontariff trade barriers.

Senator McCASKILL. I don't have any other questions, unless any of you would like to comment on that.

Ms. WEINTRAUB. I would just like to make one comment. We agree, obviously, that the commission needs many more resources to deal with these growing and complicated problems. One issue that I just don't want to let fall through the cracks is that of the two-thirds of the two-thirds of the products that are made in China, I'm not sure what percentage of them but a sizable percentage are actually made by American manufacturers who have produced their products in China. So in addition to working very diligently to prevent products that don't meet mandatory or voluntary standards from being exported into the United States, we need to do a lot of work with our American manufacturers to make sure that they use the same standards and the same standard of care that they do in the United States when they're making their products, just as they do when they're making their products overseas.

Senator McCASKILL. Thank you, Mr. Chairman.

Senator PRYOR. Thank you.

Mr. Locker, since Senator McCaskill has you in the hot seat, I'll just keep you there for a few minutes.

Mr. LOCKER. I'm used to being there, Senator.

Senator PRYOR. Me, too, sometimes. But let me ask about recall reform. You guys are for recall reform?

Mr. LOCKER. Absolutely.

Senator PRYOR. And give me, before we get into this, give me a specific recall, that you disagree about. What product is there that should not have been recalled?

Mr. LOCKER. As I said, I don't want to get into specific—

Senator PRYOR. No, I want you to, though. I want you to give me an example so we can work on that.

Mr. LOCKER. You want an example of a product?

Senator PRYOR. That got recalled that you think should not have been recalled.

Mr. LOCKER. Let's take a step back. The fact of the matter is, as you have heard, 100 percent of the products that have been subject to corrective action were entered into on a voluntary basis with those companies, so I'm not here to second guess what companies have done. The fact that companies have decided to engage in corrective action, whether we call it a recall or something else, and done it collaboratively with the CPSC, should be approved. I am not against recalls.

The process, however, by which you get there needs to be clearer, as I have said, for manufacturers. They need to understand their obligations in terms of reporting. They need to have a balanced

consideration, and a staff in place at the agency that is familiar with the particular category of product that they're dealing with, to be able to engage in discussions about that, to be able to engage in discussions with the staff to determine whether the product itself is actually defective to begin with, or whether the recall was done proactively because of a concern that the product may be even unreasonably misused in the marketplace.

So at the end of the day it's really about putting people with knowledge and efficient capabilities together so that they can get to that end result. And I'm not so sure that that end result has always been achieved in the most efficient, effective, or fair manner. But the fact of the matter is, the recalls that have taken place, since they are 100 percent voluntary with industry, have done so with the consent of that industry.

Senator PRYOR. So, in other words, your concern is more of a process concern. In other words, in some ways you're making my argument that I was trying to make earlier with the Chairman of the Commission: the Commission needs more people and needs more resources.

Mr. LOCKER. Yes, as long as they're not lawyers, sir.

Senator PRYOR. Now, tell me why you say that?

Mr. LOCKER. That was just a joke, but actually I do think that the legal staff does a fine job at the agency. I think the resources and the types of people that this agency needs are the people that are electrical engineers, engineers, scientists, chemists that are familiar with these emerging technologies that we've all talked about that are finding their way into products, so that if there is an issue that comes up, people can engage in a dialogue. The last thing you want from a government regulator is for them to know so much—or their people dealing with issues that, as technology expands, that don't have any proficiency in that technology.

Senator PRYOR. Let me ask this question: If the recalls are 100 percent voluntary, and one of your companies decides not to recall a product that CPSC thinks is a choking hazard, your company disagrees, what happens then?

Mr. LOCKER. Then the CPSC has the option of commencing an adjudication.

Senator PRYOR. And does that happen sometimes?

Mr. LOCKER. It does happen, and it has happened rarely. It actually happened with a company from your state, in Arkansas, Daisy Manufacturing. And it does happen occasionally.

The power of the CPSC, however, is in the power of their bully pulpit. There are so many different streams of distribution and channels, that even if the agency doesn't get the manufacturer necessarily to agree to go along with the recall, they can act on their own to deal with other distributors of that product.

And no one has talked about the role of retailers in today's economy. There has been enormous consolidation in retailing. And so if a retailer, for example, engages in that recall, it almost doesn't matter today what the manufacturer wants to do.

Senator PRYOR. We can talk about that when we have more time because that's more of a philosophical question, but let me ask you, is it fair to say that from the standpoint of your industry, and your

members, you feel like there is an adversarial relationship with the CPSC?

Mr. LOCKER. Like any relationship, like any between people, there are good times and there are bad times, and for the most part I would actually not say it's adversarial. I would say it's literally a discussion over how best to leverage resources to get safety information and education out to the public and to deal with product safety issues when they arise, and that's a discussion we welcome every day.

Senator PRYOR. All right. Let me ask that, because you mentioned leveraging resources a number of times in your testimony and in your answers here. When you say "leverage resources," what do you mean by that?

Mr. LOCKER. Well, let's take the important role of the U.S. Customs Service in border protection and their interaction with the agency. Historically that has been and proved to be an extremely effective program, whether it's applied to toys or appliances or fireworks or bicycles.

It is effective because it interdicts and deals with products at the point of entry, prior to having to deal with them when the products are in the hands of consumers or on store shelves. And I think everyone favors earlier interdiction if there is a problem with products.

The way that is leveraged, those people who have the authority are Customs officers. They have the authority to detain those products and conduct those inspections, in conjunction with the expertise provided by the CPSC staff.

Senator PRYOR. Are you saying that's not being done?

Mr. LOCKER. No, I'm saying it is being done, but more of it can be done and it can be done more efficiently. And you have to realize that when I'm talking about leveraging, it is being done in an interagency manner with the staff of another agency in the government that is funded and does have border protection agents. So it's a question of allocation of those agents to this mission, and that's a difficult balancing act because they face many demands in this post-9/11 era, as well.

Senator PRYOR. OK. Let me, if I may, switch to Mr. Dean very quickly. The CPSC and I think the firefighters have been working for several years to try to get the upholstered furniture standard approved, and that is kind of at a standstill as I understand. What has been the problem in promulgating this rule?

Mr. DEAN. Well, I think the problem may be just in the willingness to move forward.

Senator PRYOR. Is it from the agency's standpoint?

Mr. DEAN. No, I think it's more from the industry itself. We know that it can be done, the technology is there. We know that California has had a standard for some time, and since they instituted theirs, they have had a 25 percent reduction in fatal fires involving upholstered furniture, so we know it can be done and is manufactured there. We also see in Great Britain similar results, and they rarely have a fatal fire from upholstered furniture.

So we know it can be done. I think it's just a willingness to agree to some of the details of how to go about doing it, and I think that's always the stickler, is in the details.

Senator PRYOR. OK. Let me ask the two consumer groups, if I may, you all heard me a few moments ago ask about the lead in the lunchboxes, and you heard Chairman Nord's explanation of that. Do you agree with what she said?

Ms. GREENBERG. Consumers Union believes that children's products shouldn't have lead in them. The problem with lead is, it builds up—it's cumulative.

So there is exposure from a variety of sources, and even though the exposure that CPSC found was very small—and the bio-availability I think is what she was referring to in terms of kids and lunchboxes—the fact is that there is lead from a number of sources that children are exposed to in their homes, at school, in various products that they use. And the cumulative effects are such that it can be very dangerous and have serious impacts on kids.

Senator PRYOR. So, in other words, you would like to see lead banned from all—

Ms. GREENBERG. We think that, yes, manufacturers and CPSC should take the steps to get lead out of the lunchboxes, because kids put their sandwiches in them, and they are just exposed to too much lead in their daily lives. So, yes, we would take issue with that position.

Senator PRYOR. Ms. Weintraub, do you have anything to add to that?

Ms. WEINTRAUB. We would agree. Recently CFA, along with Consumers Union, sent in comments to the CPSC on their rulemaking which the comment deadline just ended on, lead in children's jewelry. And in that comment we stated together that we see no reason for lead to be in children's products unless there is some essential use, and it still remains to be seen what an essential use would be that cannot be replaced with something that does not pose the same type of hazard in any children's product, especially one in contact with children's food, as well as toys that can be mouthed.

Senator PRYOR. And their food 5 days a week in many cases. OK. Ms. Weintraub, while I'm talking to you, what about the ATV standard? As I understand it, your organization has been critical of this proposed ATV rule because apparently it takes into consideration speed and engine size but does not recognize weight. Is that fair to say?

Ms. WEINTRAUB. Sir, what has occurred is that from sort of the beginning of time with ATVs, ATVs have been categorized by the cubic centimeters of their engine, the cc's, as it's known. And it was a 90cc threshold that has been in effect since the 1980s as determining what is an adult size ATV and what is a youth model ATV.

What the Commission rulemaking proposes, and what also industry's voluntary standards propose, is to move away from this engine size, instead going to a system based on speed. The industry standard and CPSC standard differ in the mile-per-hour limits. We are opposed to both because we fear that there has not been enough evidence, enough studies conducted to determine whether, for example, a 14-year-old child could operate a 30 mile-per-hour ATV in a safe manner.

Also, if I may, speed is entirely one-dimensional. It does not take into account the weight of the machine, and there are many serious injuries, devastating deaths which occur when very heavy ATVs

fall on children and crush them and they die. The concern is, with the speed limitation, how does that involve the weight of the ATV? As the commission rule reads now, and also as the ANSI proposed draft rule is now, there is no consideration of weight either.

Senator PRYOR. OK. Let me close with this last question for the two consumer groups. I think you both have said in your statements that you think the CPSC needs more funding. Do you have any studies or any evidence that shows that as the funding levels and as the staffing levels of the CPSC are going down, that the number of consumer products that are violating CPSC standards are growing, or that injuries or deaths are growing? Is there a correlation to the budget or the size or the effectiveness of the CPSC to the numbers going in the wrong direction, is what I'm asking.

Ms. GREENBERG. I can start out. You know, when we were talking earlier about the number of recalls, I know Chairman Nord said that they were at a record level of recalls, and when we look back over the history of recalls it appears to us to depend on the aggressiveness of the leadership of the CPSC, because if you look back in 1980, there were upwards of over 500 recalls. Chairman Nord is talking about record level recalls. I only know what the recall level was for 2006, and that was 318 products. Under Chairman Ann Brown, the recalls were in the 400s during her first year.

So it really depends on what the staff is doing and it depends on who is in charge and what their sort of level of focus is on the need to recall products. It makes it very difficult to tell if there are more dangerous products as a result of CPSC's understaffing situation right now, but certainly for our purposes we see way too many kids being exposed to recalled products. I've already talked about that.

And, Mr. Chairman, if I may just comment on one of the things that Mr. Locker has said twice now, about the issue of product misuse, and this is a perennial issue between industry and consumer groups. I think it's very important to point out that when the CPSC was created, it was established to address issues that include foreseeable misuse.

And I'm quoting here from a letter that was written by Robert Adler, a business professor in North Carolina, who worked as a lawyer for the CPSC for a number of years. His law review article, notes that "While contributory negligence may diminish the impact of a product liability suit, Congress wanted no such limitations with respect to product safety regulation. The operative test in determining whether CPSC should take action has relatively little to do with whether or not a consumer acted carelessly. Rather, the agency is supposed to look at and weigh the severity and frequency of the harm, whether the fix can be done inexpensively, and whether a product fix would interfere with the product's utility."

So I think it's very important that we understand what the mission and the charge of this commission is, and it's not about not acting when consumers have exposed children to a dangerous situation. That's a misperception that we hear over and over again, and it's something that disturbs us, and we want to make sure it is clear on the record.

So I've given you my answer on the number of products.

Senator PRYOR. You all have been very patient, and these panels have gone a little bit longer than I think we all had anticipated,

but it has been informative and helpful. We're going to keep the record open here for 2 weeks, to allow Senators to ask questions, and we're going to submit that FDA letter that we mentioned earlier for the record. There may be other Senators who want to submit items for the record. Your testimony will be made part of the record. And with that, we'll adjourn the hearing, and we'll see you soon.

Mr. LOCKER. Senator Pryor, could I just ask you to recognize that this is National Poison Prevention Week?

Senator PRYOR. Sure. This is National Poison Prevention Week. Thank you for bringing that up. Thank you.

[Whereupon, at 12:35 p.m., the hearing was adjourned.]



## A P P E N D I X

Brooklyn, NY, March 28, 2007

Hon. DANIEL K. INOUE,  
Chairman,  
Senate Committee on Commerce, Science, and Transportation,  
Washington, DC.

RE: U.S. CONSUMER PRODUCT SAFETY COMMISSION

Dear Senator Inouye:

Please consider adding my comments to the record of the March 21, 2007 oversight hearing on the U.S. Consumer Product Safety Commission.

The Commission can be one of the most effective agencies of the Federal Government. Over the past thirty years its work contributed significantly to a thirty percent decline in the rate of deaths and injuries associated with consumer products. Unfortunately its management has not always been effective. This has been especially true under the current Administration. I believe that deaths and injuries will increase if the Administration succeeds in further disabling CPSC.

While working for the U.S. Food and Drug Administration (FDA, 1968–1973) I played a key part in identifying hazards (lead paint on toys, asbestos in fabric and noise in caps). I was responsible for identifying four of the first twelve toys banned by FDA. I transferred to CPSC in 1973 and retired as a GS–12 Compliance Officer in its Eastern (New York) Regional office in 2002. In addition to my assigned work within the Commission, I played a key part in identifying the need for voluntary standards for fuel containers and window guards (as noted below). Thus, I can give you a perspective on where CPSC has failed and how it can be improved.

CPSC is charged with protecting the public from unreasonable risks of death and serious injury from fire, electrical, chemical and mechanical hazards. It regulates 15,000 types of consumer products including art materials, chemicals, cigarette lighters, cribs, electric devices, extension cords, fireworks, flammable fabrics, furniture, household gadgets, jewelry, lead paint, mattresses, pacifiers and toys. *Deaths, injuries and property damage from these regulated consumer product incidents cost the Nation more than \$700 billion.*

The Commission's budget has always been insignificant compared to the cost of the accidents it prevents. In 1975 its budget was \$36,954,000. It is now only \$62,370,000, which is a tremendous decrease when inflation is factored in. This compares with \$254 million that the Bush administration spent on public relations contracts in 4 years. (*The New York Times*, March 13, 2005, pages 1 and 34.)

CPSC's original fourteen regional offices have been reduced to two—San Francisco and Chicago. Field laboratories no longer exist, so samples have to be shipped to the headquarters laboratory which can delay analyses.

CPSC's full-time equivalent staff has decreased from 890 in 1975 to 440 in 2006. The cuts have been hardest on the field. The original (1973) New York metropolitan area staff included twenty investigators, six inspectors, six chemists and a support staff. I understand that *only one investigator is currently stationed in New York City*—and she works out of her house at the southern tip of Staten Island. Three other investigators cover northern New Jersey, Long Island and Westchester/Connecticut.

The Commission has not had an investigator stationed in Puerto Rico for about twenty-five years. Years ago I concluded that many of the products sold in Puerto Rico violate the Commission's regulations and standards.

The Administration has placed a new priority on timeliness and quantity of in-depth accident investigations. There is no way that the field staff can conduct these accident investigations and the cover even a fraction of the importers, manufacturers and distributors of the above listed products. This is especially true in New York City.

Some areas where I have personal knowledge of hazards that should be addressed are discussed below.

A few weeks ago ten people died in New York City in a fire believed to have been caused by either an electric heater or an extension cord. I worked on both hazards prior to my retirement. Initial information on oil filled heaters came to *me from the NYC Fire Department*. Cheap extension cords were a major problem that the staff had to deal with. They often bear counterfeit UL listings.

A recent news article discussed a man whose eye was knocked out by the hook of a bungee cord. I previously studied this product/hazard and accumulated incident data showing that the design is faulty and that safer devices are on the market. An American Society of Mechanical Engineering report on Portable Luggage Cart Safety (11/17/95) pointed out that "Most current designs adopt the bungee cord for rapidly securing and unfastening the load. This 'rubberband like' restraining element has been identified by the . . . (CPSC) as the primary source of luggage cart injuries because of its propensity for producing impact hazards that strike the eye. Countermeasures for controlling the impact hazard randomly appear throughout the family of luggage carts." However, since the product does not violate an existing regulation, the hazard is not caused by a defect and there were other priorities I was not able to get CPSC to take action.

*Aluminum bats.* The New York City Council recently enacted a ban on the use of aluminum bats in high school baseball games. These bats have been responsible for the deaths of a number of ball players. A *Republican* city councilman stated that "Where the overseeing bodies have failed to live up to their responsibility to protect these kids, it falls into our laps." I presume that he meant that since CPSC has failed to take action New York City will.

*Window fall accidents.* My memo to Ann Brown dated April 4, 1994 documented 227 preventable deaths from window falls. As a result CPSC initiated work to establish a "voluntary" (ASTM PS 112-98) standard for window guards. The Commission has taken no recent action to prevent such falls. *All that would be required is to issue yearly press releases reminding parents to place guards in windows that are accessible to children.*

*Gasoline containers.* Congressman Moore is sponsoring the "Children's Gasoline Burn Prevention Act." The current ASTM standards for gasoline and fuel containers and their labeling were instituted as a direct result of *my* 1978 petition (CP 78-17) to the U.S. Consumer Product Safety Commission. See the *Federal Register* (45 F.R. 59376), which lists me by name, but does not indicate that I was then an employee of the Commission. The standards (now F22234-03) should be reviewed to address Congressman Moore's concerns.

*Nose rings with hazardous magnets.* The magnets used in this jewelry are the subject of a proposed revision to the ASTM standard for children's toys (now F963-03). However, the standard does not cover the magnets when used in jewelry worn in the nose by pre-teens. This jewelry poses a similar hazard when aspirated into the lungs.

*Cigarette lighters.* This is a case where responsible industry will cooperate in enforcement. A survey that I conducted in 2001 revealed that non-complying lighters were being imported from China and openly distributed in New York City. I still see them on display. There is just no field staff to enforce this standard.

*Mattresses.* The Commission's standard has been revised twice. However, almost no inspections were conducted to enforce the standard that was effective from 1984 to 2006. With the current staff, it is not likely that the revised standard will be enforced. Reconditioned used mattresses pose a serious fire hazard that can be eliminated with appropriate manpower.

*Mercury.* The use of metallic mercury in voodoo rites threatens public health and the housing stock. It may turn out to be as great a threat as lead paint. However, CPSC has done very little in regard to regulating retail sale of metallic mercury. This was true even in the 1990s when the staff was larger. There are long term implications to this matter, which has low priority at this time.

*Chemical hazards under the Federal Hazardous Substances Act (FHSA).* The original New York staff consisted of twenty investigators who had *degrees in the sciences or engineering*. This staff was deliberately eliminated during the 1980s reduction-in-force. Over the years local management hired and promoted a number of individuals who had never even taken a college science or chemistry course. These individuals could, thus, not perform a basic part of their job (chemical inspections under the FHSA).

It is most discouraging when competent productive workers see management hire and promotes unqualified inexperienced individuals to the GS-12 level! There should be a minimum education level for CPSC investigators. Similarly the Commissioners should be individuals who "by reason of their background and expertise in areas related to consumer products and protection of the public from risks to safety

are qualified to serve as members of the Commission.” (See section 4(a) of the Consumer Product Safety Act).

The Consumer Product Safety Commission can not function without an adequate, competent, dedicated and inquisitive staff—from the Chairman down to the investigator level. Fully staffing the agency’s field with competent employees will more than pay for itself in increasing public safety and decreasing the cost of government programs such as Medicare and Medicaid.

Sincerely,

MARTIN B. BENNETT.

cc: Senator Mark Pryor, Chairman, Subcommittee on Consumer Affairs, Insurance,  
and Automotive Safety  
Mr. Alex Hoehn-Saric, Committee Counselor

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BILL NELSON TO  
HON. NANCY A. NORD

*Question 1.* The Commission’s final rule in the Portable Generator Labeling proceeding (72 *Federal Register* 1443, January 12, 2007) stated that the issue of “integrated CO monitors” would be addressed in the context of the Portable Generator Performance Standard Advance Notice of Proposed Rulemaking (71 *Federal Register* 74472, December 12, 2006) (hereinafter “Generator Performance ANPR”). The comment period for the Generator Performance ANPR ended on February 12, 2007. What is the Commission’s current timeline for issuance of a specific Notice of Proposed Rulemaking (“NPRM”) regarding interlocked carbon monoxide detection devices on new portable generators?

Answer. CPSC staff is investigating potential technical approaches to reducing the hazard of carbon monoxide (CO) poisoning from portable generators. In FY 2006, the CPSC’s staff successfully demonstrated the feasibility of shutting down a generator when elevated levels of CO are detected, using CO detectors located in the home and in the vicinity of an operating generator. Additional developmental work would be necessary to address technical and human factors issues that were identified during this concept demonstration. CPSC staff believes that protecting the consumer from the CO hazard by way of an interlocking or auto shut-off device is a complementary yet secondary approach that should be pursued if the CO emission rate cannot be sufficiently reduced. The staff is currently considering additional research on auto-shutdown techniques in conjunction with the low-CO engine contract, using the same engine control technologies that are being used in that effort. This research will be completed in FY 2008.

The staff’s current emphasis is on developing a prototype portable generator that emits significantly reduced levels of CO, using available technologies such as exhaust catalysts and electronic fuel injection. If successful, this would provide a margin of safety to help protect consumers against exposure to CO in the event they improperly operate a generator in an enclosed space or near an open window.

The Commission awarded a contract to the University of Alabama in September 2006 to develop and demonstrate a prototype low-CO emission generator with a goal of achieving reductions in the CO emission rate on the order of 90%–95%. CPSC staff predicts that this level of reduction will significantly improve survivability when a generator is operated in an improper location. This effort is ongoing and will be completed in FY 2008.

The public comment period for the advance notice of proposed rulemaking (ANPR) closed on February 12, 2007. The Commission received detailed and complex comments which CPSC staff is currently evaluating. Additionally, CPSC staff is assessing technologies and researching performance testing methods that would be required if the Commission voted to proceed to issue a notice of proposed rulemaking (which is the next step in the Commission’s mandated three-step rulemaking process) on all or part of the issues raised in the ANPR. When these steps are completed, the staff will prepare a briefing package (publicly available) and provide it to the Commission for its consideration. Since rulemaking is necessarily driven by scientific assessments and conclusions, no hard date can be set at this time for the completion of that briefing package.

*Question 2.* Last year, the Commission completed approximately 471 cooperative recalls of consumer products. It is my understanding that all of these were completely voluntary. Does the Commission have adequate resources to order a mandatory recall—if necessary?

Answer. Yes. For a number of reasons, the Commission rarely must litigate to obtain recalls. On those occasions when such litigation has been required, adequate resources have always been provided for staff to proceed.

*Question 3.* Commissioner Thomas has mentioned nanotechnology as one “emerging technology” that the Commission will have to address in the near future. Do you see any other emerging technologies that the Commission may have to deal with in the near future? If so, how should the Commission deal with them?

Answer. Addressing the safety challenges that can arise from new and emerging technologies has been an integral part of the agency’s mission since its inception. Working with stakeholders, consumers and other government agencies, CPSC staff continuously monitors new exposures, patterns, and trends in an effort to quantify risks and identify potential hazards from these evolving technologies. While the list below is by no means exhaustive, some examples are discussed.

Newer battery technologies, such as lithium-ion rechargeable cells used in cell phones and laptop computers, offer a significant increase in energy in smaller enclosures compared to older technologies. Such battery technologies provide more operating power for longer periods of time for consumer electronic devices. However, these types of batteries have been the subject of numerous recalls due to the potential thermal burn or fire hazard, and staff has worked with industry to develop new safety standards to address these hazards. CPSC staff continues to work with other government agencies and industry to develop standard and certification programs for their safe use.

In the future, CPSC staff expects that newer technologies such as fuel cells will likely provide high energy density power sources for consumer applications. The chemical energy can be derived from various fuels such as natural gas, propane or compressed hydrogen. Reductions in fuel cell production costs have made them increasingly attractive for commercialization. Potential consumer applications include stationary residential power generation, portable power generation, and replacements for battery-operated devices.

Another area is the use of sensor technologies to address consumer product hazards. Sensor technologies are applied in the automotive industry to reduce the risk of collision and theft and have been utilized in the defense, space and security industries for many years. Recent national initiatives in the research and development community promise to increase the sophistication and utility of sensor technologies. The emergence and routine application of sensor technologies raises the prospect that there may be opportunities for detecting and averting various hazard scenarios in many consumer products. While there is extensive research and development underway in sensor technologies and applications, and a few applications have been introduced into the marketplace, hazard avoidance applications have not yet been explored in depth within the consumer product manufacturing or safety assurance communities. Of particular interest to the CPSC are potential hazard scenarios that could be detected using the appropriate sensors and signal processing techniques and their application in specific consumer products that have been involved in hazards or in which hazards could be anticipated.

Addressing issues associated with emerging technologies is often resource intensive. As new technologies enter the marketplace, CPSC staff must identify the products that contain these technologies and assess the effect on consumers. CPSC staff will need to develop technical information that can be used to support new performance requirements in product standards, if necessary. Staff will need to collect and analyze data and scenarios, develop subject matter expertise needed for product testing and evaluation, become familiar with laboratory equipment to conduct product testing, and develop appropriate test methods and performance requirements.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARIA CANTWELL TO  
HON. NANCY A. NORD

*Question 1.* As you know, last December western Washington experienced a severe windstorm that knocked out power to millions of residents. It took eleven days for electric service to be restored to all customers in western Washington. Eight people died and more than 300 were treated for carbon monoxide poisoning as a result of burning charcoal or running portable generators indoors.

First, I want to thank the Commission for issuing its final rule on labeling requirements on portable generators this past January. I believe it is an important step to improving public safety.

The Commission has opened an Advanced Notice of Proposed Rulemaking on Portable Generators that looks into several of the issues addressed in the “Portable Generator Safety Act”, which I co-sponsored with Senator Bill Nelson in the 109th Congress. I know you cannot comment on an open proceeding, but I believe as a minimum, portable generators should be weatherized with ground fault interruption so that users are not afraid to operate them outdoors in the rain and that the Commis-

sion should establish carbon monoxide emission standards to reduce exposure risk when they are improperly used indoors. What is the status of the advanced rule-making? Can you provide me with a date when you anticipate that the advanced rulemaking will be completed?

Answer. CPSC staff was very active in delivering safety messages before, during and after the severe storms that were experienced in western Washington. CPSC staff tracked weather reports in advance of the storm and provided radio and television outlets with our safety alerts in the event of a power outage, including alerts on the proper use of portable generators and warnings against the use of gas stoves for heat. Following the storm CPSC staff continued to communicate our safety messages on the radio and in the print media. CPSC staff also reached out to Washington's Governor and state health officials with our carbon monoxide (CO) safety messages.

CPSC staff agrees that portable generator weatherization features, including ground fault protection, are an important part of enabling and encouraging consumers to safely operate their generators outdoors as a means to help reduce the CO poisoning hazard. In February 2007, Underwriters Laboratories (UL) announced its intention to develop a voluntary standard for portable generators. The preliminary draft of UL Standard 2201, Portable Engine Generator Assemblies, includes requirements for features that would permit safe use of portable generators outdoors in wet conditions, including a requirement for ground fault protection on the electrical circuits. The status of this voluntary standard effort will be taken into consideration by CPSC staff in the course of its ongoing rulemaking proceedings.

CPSC staff is investigating potential technical approaches to reducing the hazard of carbon monoxide (CO) poisoning from portable generators. In FY 2006, CPSC staff successfully demonstrated the feasibility of shutting down a generator when elevated levels of CO are detected, using CO detectors located in the home and in the vicinity of an operating generator. Additional developmental work would be necessary to address technical and human factors issues that were identified during this concept demonstration. CPSC staff believes that protecting the consumer from the CO hazard by way of an interlocking or auto shut-off device is a complementary yet secondary approach that should be pursued if the CO emission rate cannot be sufficiently reduced by available technologies. The staff is currently considering additional research on auto-shutdown techniques in conjunction with the low-CO engine contract, using the same engine control technologies that are being used in that effort. This research will be completed in FY 2008.

The staff's current emphasis is on developing a prototype portable generator that emits significantly reduced levels of CO, using available technologies such as exhaust catalysts and electronic fuel injection. If successful, this would provide a margin of safety to help protect consumers against exposure to CO in the event they improperly operate a generator in an enclosed space or near an open window.

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*Question 2.* Anecdotally, hundreds of people die in the United States each year from accidental carbon monoxide poisoning related to consumer products. My understanding is that the Commission compiles this data in a report entitled, "Non-Fire Carbon Monoxide Deaths and Injuries Associated with the Use of Consumer Products". How current is the data collected?

Answer. CPSC staff receives reports of product related incidents on a daily basis. Some of the sources for these reports are: hospitals in the CPSC's National Electronic Injury Surveillance System (NEISS); CPSC staff field investigations; and reports from consumers, hotline complaints, newspaper clippings, and medical examiner reports. Additionally, CPSC augments these incident reports by purchasing se-

lected death certificates from all states, New York City, and the District of Columbia. Death certificates are purchased according to specified external “cause of death” codes as systematized by the World Health Organization’s International Classification of Diseases. Data from all of these reports are housed in CPSC’s Epidemiological Databases which are updated on an ongoing basis.

The primary source of data for CPSC staff estimates of carbon monoxide fatalities is purchased death certificates. Because of differing reporting procedures among states, the time lag between when a death occurs and when CPSC staff receives the death certificate varies. Based on CPSC staff records from 1990 through 2003, approximately 50 percent of the death certificates were received within a year after the fatality. About 10 percent of the death certificates were not received until more than 2 years after the fatality occurred. Less than 2 percent of outstanding death certificates lag 3 years or more beyond the actual date of death.

After the October 2000 release of 1997 annual estimates of non-fire related carbon monoxide fatalities and injuries associated with consumer products, CPSC staff discontinued production of injury (non-fatal carbon monoxide incident) estimates because of concerns about the scientific soundness of these estimates. Previously, CPSC staff generated national injury estimates using NEISS data collected from a probability based sample of emergency rooms. However, after considering a scientific assessment of physiological factors and exposure scenarios, CPSC staff concluded that data in NEISS records are often insufficient to identify carbon monoxide injury incidents. The symptoms of carbon monoxide poisoning (fatigue, headache, nausea, dizziness, shortness of breath) mimic those of the flu or a cold. The short narrative associated with NEISS records makes it difficult to discern whether cold or flu has been misdiagnosed as a carbon monoxide incident or vice versa. Further information, such as carboxyhemoglobin (COHb) blood levels and description of the exposure scenarios, is necessary to distinguish carbon monoxide injury incidents from other incidents. The distinction of these incidents is integral to the production of scientifically sound and reliable national estimates on non-fire carbon monoxide injuries. CPSC staff has recently sought to enhance data quality by requesting that COHb measurements be included in NEISS records whenever possible and has implemented a detailed special follow-up survey to support better characterization of exposures.

In summary, CPSC staff collects incident data on an ongoing basis. However, product associated fatality estimates are performed periodically and yearly fatality estimates often lag due to lags in the receipt of death certificates. Current data sources—both CPSC and external sources—are insufficient to support production of non-fatal carbon monoxide injury estimates.

*Question 2a.* Has the Commission reported any of its compiled data since its 2001 estimates?

Answer. CPSC staff reported 2002 annual estimates along with updated fatality estimates for the years 1999 through 2001 in a July 2005 report entitled “Non-Fire Carbon Monoxide Deaths Associated with the Use of Consumer Products: 2002 Annual Estimates.” This report is available at <http://www.cpsc.gov/library/data.html>. Staff is preparing estimates of 2003 and 2004 fatalities for a report scheduled to be completed this fall.

*Question 2b.* If the 2001 data on carbon monoxide poisonings is the most recent data published, why has there not been more recent data on carbon monoxide poisonings published?

Answer. CPSC staff reported 2002 annual fatality estimates in July of 2005. During 2006, CPSC’s staff resources were focused on analyses supporting rulemaking activities related to portable generators. These analyses, reported as “Non-fire Carbon Monoxide Fatalities Associated with Engine-Driven Generators and Other Engine-Driven Tools in 2002 through 2005” in an August 2006 memorandum, are posted on CPSC’s website at <http://www.cpsc.gov/library/data.html>. Staff is currently preparing 2003 and 2004 annual estimates of non-fire carbon monoxide fatalities associated with consumer products. As mentioned above, the lag time between the date of non-fire carbon monoxide fatalities and when CPSC staff receives the death certificates is the most significant factor in the offset between the current year and the year of the estimates report. In order to provide meaningful estimates, CPSC staff must use as complete a database as is practical. Therefore, there is an unavoidable lag between the date the estimate report is published and the latest year covered in the report.

*Question 3.* To date, the Commission’s approach to prevention of carbon monoxide poisoning from consumer products has emphasized warning labels. The label on bags of charcoal briquettes was modified in 1997. What impact did this have on

charcoal related carbon monoxide deaths and injuries? Is there evidence that this approach is effective?

Answer. Although it is difficult to assign a direct cause and effect to any single action such as a labeling modification, CPSC staff estimates show that the average annual number of charcoal-related CO poisoning fatalities from 1990 through 1997 was about 21. From 1998 through 2002, the average was down to around 13 per year.

*Question 3a.* As you know in last December's epidemic of carbon monoxide poisoning in Washington State, the predominant source of carbon monoxide was charcoal briquettes. Anecdotally, a disproportionate number of those treated for carbon monoxide poisoning were from immigrant populations. Even if the current warning label on bags of charcoal briquettes is shown to be reducing morbidity and mortality, does the label need to be revisited for possible improvement in light of my state's recent experience?

Answer. The label currently required on bags of charcoal briquettes was developed as a result of considerable evaluation and research. The primary objective in developing and selecting the label design was to maximize the effectiveness of the prohibition to never burn charcoal inside a house, tent, or vehicle. Potential pictograms were assessed using a sample of at-risk charcoal users. The methodology used was consistent with the requirements in the nationally recognized standard, American National Standard Criteria for Safety Symbols (ANSI Z535.3). The objective of the testing was to ensure that the label communicated the hazard to the populations at the greatest risk. Fifty percent of the subjects were Hispanics who did not read English. The researchers used open-ended testing as opposed to multiple-choice, as open-ended testing is the most demanding assessment for measuring label comprehension. The results of the testing indicated that the label was correctly interpreted by a large number of the subjects, with no "critical confusions" (misinterpretations that would increase the risk).

We are continuing to investigate every product-related carbon monoxide poisoning death we become aware of to learn about the products and circumstances involved in the incidents. In addition, our Human Factors experts continue to review and evaluate studies related to warning label design and effectiveness. At this time, CPSC staff is not aware of any new information about the hazard or in the labeling literature that indicates that changes to the label would increase its effectiveness in warning consumers about the hazard.

*Question 4.* Washington State lawmakers are considering legislation to ban chemical flame retardants called polybrominated diphenyl ethers, or PBDEs. The ban focuses on the deca form of PBDEs. Production of two other forms, penta and octa, ceased voluntarily in 2004 over safety concerns. While flame retardants help save lives, they are of increasing concern to scientists and at least State regulatory agencies because of their ubiquitous presence in the environment and bioaccumulation in humans, wildlife and aquatic organisms. If the legislation becomes law, Washington State would be the first in the Nation to ban the use of PBDEs in a number of consumer items. For example, it would ban the manufacture and sale of mattresses containing deca by January 1, 2008 and would ban the manufacture and sale of TVs, computers and residential upholstered furniture containing deca by January 1, 2011, if a safer, technically feasible alternative is found.

Before making a determination that deca could be used to meet the new standards on the flammability of mattresses and mattress pad, did the Commission take into consideration the following:

- Deca breaks down into more toxic compounds (penta and octa) that have already been banned in numerous states?
- Deca, when burned, generates dioxins and furans?
- Deca has the same neurotoxic effects as the penta and octa forms of PBDE?
- The high levels of deca already found in house dust due to its use in enclosures for electronics?
- The long term effects of these PBDEs on children and the rapidly rising levels in people and the environment?

Answer. The Commission has made no determinations regarding the use of deca to meet the new standards on the flammability of mattresses. While deca can be used to meet the flammability requirements for mattresses, manufacturers have several other options to consider. Most manufacturers use flame resistant barriers made of inherently flame-resistant textiles. Few, if any, use barriers treated with deca.

The staff of the Directorate for Health Sciences (HS) assessed the potential health risks to consumers from exposure to deca and other flame retardant (FR) treatments in mattresses. The staff concluded that deca would not present a hazard to consumers during “reasonably foreseeable handling or use” of mattresses treated with this FR chemical. This analysis addressed the direct exposure to deca from mattresses. If it is found that during consumer use of mattresses, deca can break down to more toxic congeners, then this information would be evaluated.

We also note that the U.S. Environmental Protection Agency (EPA) has the authority under the Toxic Substances Control Act (TSCA) to regulate the environmental effects of FR chemicals, and so we do not typically investigate that aspect of their use.

All combustion processes from natural wildfires to automobile exhaust to residential fires produce chlorinated (and un-chlorinated) dioxins and furans. Although brominated dioxins and furans are produced in residential fires, we are not aware of any studies comparing total dioxin and furan production in the presence of brominated FRs to such production in the absence of brominated FRs.

CPSC staff reviewed the data on the possible neurotoxicity of deca but there were a number of study limitations. Thus, in 2005, CPSC staff asked the National Toxicology Program (NTP) to perform additional developmental neurotoxicity tests on deca. CPSC staff estimates direct exposure from deca in mattresses or upholstered furniture is low in comparison to the levels that cause the neurotoxic effects in animals.

The presence of deca in residential settled dust is a relatively new finding. It appears to be related to the presence of electronic equipment. The significance of these dust levels to human health has not been evaluated. CPSC staff will monitor ongoing studies or other developments in this area.

In assessing the potential health effects of deca, CPSC staff considered all of the available data. To the extent possible, the staff considered the chronic effects in children and adults. However, data on health effects in children, as compared to adults, are generally lacking.

The staff also considered the levels of PBDE’s in humans, animals, and the environment and the potential environmental impact of deca in mattresses. At the request of CPSC, the EPA has developed a draft Significant New Use Rule (SNUR) that could be used to obtain additional information of the potential risks of FR chemicals to consumers, workers, and the environment. In addition, the EPA has authority under TSCA to regulate the environmental effects of FR chemicals.

Due to the scientific complexity of these issues, the CPSC would be pleased to have one of our technical staff come to your office to brief your staff and answer your questions directly at any time that is convenient for you.

*Question 5.* What is the current status of the Commission’s efforts to develop a national flammability standard for residential upholstered furniture?

Answer. The Commission published an advance notice of proposed rulemaking (ANPR) in 2003. This ANPR expanded an existing regulatory proceeding to address ignitions of upholstered furniture by smoldering cigarettes as well as small open flame sources like lighters, matches and candles. CPSC staff developed a draft flammability performance standard for upholstery materials and presented the draft standard and regulatory alternatives to the Commission in 2006. In FY 2006 and 2007, the staff conducted additional technical work in support of a possible proposed rule and published two status reports for public review. The staff continues to work with government, industry and fire safety community stakeholders on a variety of technical issues.

*Question 5a.* What are your plans to consider the long term health and environmental impacts of the chemicals that can be used to meet these standards?

Answer. Throughout the agency’s regulatory proceeding on upholstered furniture, the CPSC staff’s major objective has been to achieve substantial fire safety benefits to consumers without imposing health or environmental risks. In addition to the 1999–2000 National Academy of Sciences’ (NAS) study, CPSC staff performed two exposure and health risk assessments related to fabric and foam filling material FRs in upholstered furniture and another related to FRs in mattress barriers that could also be used in furniture. These assessments focused primarily on long term chronic health effects. Further, the staff prepared a preliminary environmental assessment, in accordance with the National Environmental Policy Act. The NAS study and the CPSC staff’s fabric FR risk assessment and environmental assessment identified a number of chemicals that could be used without presenting health or environmental risks to consumers. Also, the staff modified its draft performance standard to minimize fabric FR usage and possible exposure. To provide additional information, CPSC staff nominated several FRs for study by the National Toxicology

Program of the Department of Health and Human Services. The CPSC staff continues to monitor ongoing FR chemical studies to inform the standards development process. We note again that the U.S. Environmental Protection Agency (EPA) has the authority under the Toxic Substances Control Act (TSCA) to regulate the environmental effects of FR chemicals, and so we do not typically investigate that aspect of their use.

*Question 5b.* What work is being done to consider non-chemical alternatives to meet the standards and is this a priority?

Answer. The staff's draft standard contains a number of compliance options for manufacturers and importers. While the standard could be met by using FR materials, it would not prescribe the use of polybrominated diphenyl ethers (PBDEs) or any other particular FR. Complying furniture could use non-hazardous FRs or could use no FR treatments, for example, by using leather or wool cover materials or inherently fire-resistive barrier materials similar to some of those used to meet the Commission's new mattress rule. Ensuring the availability of non-chemical alternatives to meet a standard has consistently been, and remains, a priority in the rulemaking process.

*Question 6.* As you know, in 2000, the National Research Council (NRC) released its study on the "Toxicological Risks of Selected Flame-Retardant Chemicals", a report that was required as part of the Commission's FY 1999 appropriations. In the report, the NRC examined the health risks posed by exposure to 16 chemicals (or chemical classes) of flame retardant that are likely to be used in residential upholstered furniture to meet a flammability standard that the Commission was considering. Much has been learned about the environmental and health impacts of certain flame retardants over the intervening years. Do you believe there would be value in having the National Research Council update its study?

Answer. Much of the more recent research activities on flame retardant (FR) chemicals since the 2000 NRC report has focused on environmental fate and environmental effects. The 2000 NRC report attempted to address potential risk to consumers exposed to FR chemicals from the use of upholstered furniture containing FR chemicals. However, many information gaps existed. Since the NRC report, CPSC staff has worked to provide data on exposure and dermal absorption, which the NRC subcommittee lacked and viewed as a significant limitation. CPSC staff is also attempting to fill these gaps through additional testing by the National Toxicology Program (NTP), administered by HHS, but this will take several years to complete.

As CPSC staff proceed in this rulemaking, any additional information, from any reliable source, on the potential human health effects of FR chemicals would be welcome.

*Question 7.* Does the Commission have national flammability standards for consumer electronics products such as television enclosures and computer enclosures? If not, should the Commission pursue such standards or are the voluntary industry standards adequate?

Answer. There are no mandatory national flammability standards for consumer electronics products such as television enclosures and computer enclosures. The industry voluntary safety standard for televisions is Underwriters Laboratories (UL) 60065, *Audio, Video and Similar Electronic Apparatus—Safety Requirements*. The industry voluntary safety standard for computer enclosures is UL 60950, *Standard for Safety for Information Technology Equipment*.

In the 1970s, CPSC staff worked with industry to improve flammability requirements in voluntary standards for television enclosures. Since 1979, these products must meet improved requirements of UL 94, *Test for Flammability of Plastic Materials for Parts in Devices and Appliances*. In 2002, CPSC staff reviewed reports of fires and near-fires involving computers and printers. The staff did not find any field data suggesting the need for special action for computer products. In addition, staff is not aware of any recalls of televisions or computers due to hazards associated with flammability of the enclosures.

With the potential exception of portable computing products, CPSC staff believes that the flammability requirements for television and computer enclosures in the voluntary standards are adequate to address the risk of fire from electrical sources within these products. The staff is considering the adequacy of flammability requirements for portable computer enclosures to protect against fire hazards associated with lithium-ion batteries as it addresses safety requirements for these batteries.

CPSC staff has been in the forefront for upgrading the flammability requirements for plastics used for enclosures of portable electrical appliances. The staff worked with Underwriters Laboratories and the electrical appliance industry to develop

new, more protective flammability requirements applicable to all portable electric appliances. These new requirements became effective in July 2004.

*Question 8.* In your testimony, you mentioned that two-thirds of product recalls in FY 2006 were of imported products. How is the Commission monitoring imported consumer products to ensure compliance with U.S. safety standards?

Answer. CPSC's Compliance staff monitors imported consumer products and enforces U.S. safety standards typically through surveillance and sampling of products both at ports of entry and at U.S. retail establishments. In recent years, Internet surveillance has played an increasingly significant role in our programs. Product samples collected at various locations are shipped to our Laboratory for testing and to CPSC Headquarters for other evaluations as appropriate. In the case of toy samples, for example, each product is age-graded by experts from CPSC's human factors staff. This process is generally necessary to determine the applicability of specific standards. Some ports have their own testing laboratories which may be capable of conducting tests for us. Additionally, CPSC works closely with U.S. Customs and Border Protection to identify and seize hazardous consumer products before they enter the American marketplace.

*Question 8a.* How does the Commission identify which imported consumer products it checks for compliance?

Answer. The Compliance staff uses a variety of different sampling methods to identify products for testing. One of the most sophisticated sampling methods applies to imported fireworks. The method takes into account such factors as whether the importer or shipper has had the fireworks tested by an independent third party; whether the importer and product are known to the staff; whether the importer has a good record of compliance with the regulations; and so on. Unlike some other products, such as cigarette lighters, fireworks tend to be used at certain times of the year and therefore have busy and slow importation seasons. As a result, sampling rates may change during different times of the year.

*Question 8b.* Currently, how many countries has the Commission signed MOUs with? Typically, what agency is the Commission's foreign counterpart (please provide a few examples)? Can you describe the contents of a typical MOU the Commission signs with foreign governments. What does "close consultation" mean from the standpoint of implementation?

Answer. CPSC currently has twelve signed and active MOUs: Canada, Chile, China, Costa Rica, India, Korea, Mexico, Israel, Taiwan, Peru, the European Commission and Japan. Also, CPSC is in current negotiations with Argentina, Brazil, Colombia, Thailand and Vietnam. We work with those foreign government agencies that have responsibility for consumer products. Some counterparts may be responsible for more than just consumer products. Additionally, in some countries there may be multiple agencies responsible for various responsibilities all encompassed in the United States within the jurisdiction of CPSC. For example, in Japan the Ministry of Economy, Trade and Industry is responsible for product safety and the National Institute of Technology and Evaluation is responsible for collecting injury data. Examples of other counterpart agencies are Health Canada, Profeco in Mexico, and Health and Consumer Protection Directorate-General (DG Sanco) of the European Commission.

All the MOUs signed to date are non-binding and have been reviewed by the U.S. Trade Representative's Office as well as the Department of State. The MOUs begin by stating those laws that govern the CPSC and those laws that govern our counterpart agency. The MOUs then proceed to outline areas of and cooperation which center around three main topics and when combined, provide a working definition of "close consultation":

1. Exchange information and documents relating to consumer product safety, consumer welfare and the awareness of consumers;
2. Develop training programs for government officials and others dealing with the subject of consumer product safety; and
3. Exchange officials, experts and professionals in the areas of consumer product safety to carry out specific programs of mutual cooperation.

For the above areas of cooperation each country is responsible for their expenses related to carrying out the MOU. Also no confidential information is ever exchanged.

*Question 8c.* What level of resources in terms of budget and FTE's is the Commission allocating for these activities on an annual basis?

Answer. The CPSC budget does not distinguish between funds spent on domestic product recalls and those spent on imported product recalls. In FY 2007, the agency

budgeted 150 FTEs and \$17 million for the Office of Compliance which obtains recalls, a significant majority of which are of imported products. Additionally, the Commission established the Office of International Programs and Intergovernmental Affairs (OIPIA) to serve as the focal point of the agency's international efforts. That Office is budgeted at six FTEs, for an additional \$642,000.

*Question 8d.* At what U.S. ports of entry are there Commission personnel monitoring imported consumer products to ensure compliance with U.S. safety standards?

Answer. CPSC investigators are not assigned to specific ports of entry as a permanent duty station. Instead, our investigators are located around the Nation and can interact with ports on an as-needed basis. During some periods, we have contingents of CPSC personnel who work at the ports on a daily basis.

*Question 8e.* Is there Commission personnel stationed at overseas ports monitoring the safety standards of consumer products intended for export to the U.S.?

Answer. No. Currently, there are no CPSC personnel stationed overseas.

*Question 8f.* Is the relationship between the Commission and the Bureau of Customs and Border Protection memorialized in a Memorandum of Understanding or Memorandum of Agreement, or is it an informal arrangement? If it is an informal arrangement, does the Commission believe that Congress should statutorily require the Commission and the Bureau of Customs and Border Protection to develop a formalized relationship?

Answer. The relationship between CPSC and the Bureau of Customs and Border Protection (CBP) is the subject of an interagency Memorandum of Understanding (MOU) that was signed on October 3, 2002. This MOU will likely be updated in the near future to reflect CPSC's participation in the International Trade Data System/Automated Commercial Environment, which is a new system for tracking imports being introduced by CBP. It would be the prerogative of Congress to direct a more formal relationship between CPSC and CBP; however, additional inspection resources and tools might also be considered.

*Question 8g.* In your testimony you noted that most of the recalls of imported products originated in China. What specific steps is the Commission taking to remedy this problem?

Answer. In Fiscal Year 2006, nearly 50 percent of CPSC recalls involved products that were manufactured in China, and CPSC recognizes the fact that the number of imported products will continue to grow in the coming years. To address this situation, CPSC staff is pursuing a multi-pronged approach.

First, the Compliance staff conducts routine and targeted inspections at U.S. ports of entry;

Second, as imports increase, it is essential that manufacturers abroad be educated about U.S. safety requirements. In recent years, the agency revised our *Handbook for Manufacturers*, which contains many valuable tips on manufacturing safe products and had it translated into Mandarin Chinese. CPSC safety experts also have conducted seminars for Chinese manufacturers on CPSC safety standards and requirements.

Third, the agency has strengthened our cooperation with foreign governments and sought to develop coordinated strategies for improving the safety of products exported to the United States, particularly from China. In May 2007, CPSC Acting Chairman Nancy Nord and staff will meet with Chinese government officials in Beijing to negotiate specific actions in preparation for the Second U.S.-Sino Consumer Product Safety Summit, to be held in Bethesda, Maryland, in September 2007.

Fourth, CPSC staff is working with U.S. Customs and Border Protection to strengthen our ability to prevent unsafe products from entering U.S. commerce. For example, the CPSC has recently become a participating agency in the International Trade Data System (ITDS) Automated Commercial Environment. This status will allow us to take advantage of the next generation of information technologies being developed by U.S. Customs.

Fifth, most imports to this nation are sold by U.S. retailers. Therefore, CPSC staff has worked with retailers to heighten their safety consciousness and to underscore the need to address safety proactively in the case of imported as well as domestic products. We have developed a new reporting model that promotes more information flow between retailers and manufacturers, as well as with the CPSC.

Sixth, when the CPSC knows the identity of the relevant manufacturer, the CPSC will provide the name of the manufacturer to AQSIQ, the Chinese government agency responsible for consumer product regulation. The CPSC will also provide AQSIQ with a copy of the public announcement or press release of the recall. The information will be transmitted and maintained under the terms of the Memorandum of Understanding and any addenda adopted by the CPSC and AQSIQ. Finally, if the

CPSC knows the name and address of the Chinese manufacturer, the CPSC will provide it with notice of the voluntary recall.

*Question 8h.* How does the Commission ensure that the steps it takes to ensure that imported consumer products meet U.S. safety standards are not viewed by foreign governments as a non-tariff barrier to trade?

Answer. CPSC staff does not single out the products of any nation for disproportionate enforcement scrutiny. To our knowledge there has never been a complaint from the Chinese or others of selective enforcement. It is worth noting that while the number of recalls of products from China has increased in recent years, the number of recalls of products from the United States has not declined over the same period.

#### **List of Attachments**

1. Statement of the Honorable Thomas H. Moore on the Proposed Reorganization, June 16, 2005
2. Guidance for lead (Pb) in consumer products, January 1, 2004
3. Guidance for hazardous liquid chemicals in children's products, January 1, 2004
4. Statement of the Honorable Thomas H. Moore on the Final Rule and Preamble for the Flammability (Open-Flame) of Mattress Sets, February 16, 2006
5. *Federal Register*, May 21, 1998, Proposed technical changes to the Children's Sleepwear Standards
6. *Federal Register*, January 19, 1999, Final technical changes to the Children's Sleepwear Standards
7. *Federal Register*, March 17, 1999, Proposed amendments to the Mattress and Mattress Pad Flammability Standard
8. *Federal Register*, March 10, 2000, Final amendments to the Mattress and Mattress Pad Flammability Standard
9. *Federal Register*, March 17, 1999, Proposed amendments to laundering provisions of the Children's Sleepwear Standard
10. *Federal Register*, March 10, 2000, Final amendments to the laundering provisions of the Children's Sleepwear Standards
11. *Federal Register*, March 17, 1999, Proposed amendments to the Small Carpet and Rug Flammability Standard
12. *Federal Register*, March 10, 2000, Final amendments to the Small Carpet and Rug Flammability Standard
13. *Federal Register*, January 13, 2005, (front page and preamble language only), of, Proposed rule for Mattress and Mattress/Foundation Set Flammability Standard (Open-Flame)
14. Vote sheet dated January 13, 2006 and attached page from public briefing package showing missing preemption language on the Final Rule for the Flammability (Open-Flame) of Mattress Sets
15. Closing remarks of Commissioner Thomas H. Moore at the public briefing on the Final Rule for the Flammability of Mattress Sets, February 1, 2006
16. *Federal Register*, November 13, 2006, Proposed technical amendment to the Carpet and Rug Flammability Standard
17. Statement of the Honorable Thomas H. Moore With Regard to the "For Official Use Only" Treatment of the Ballot on the Technical Amendment to the Flammability Standards for Carpets and Rugs, October 31, 2006
18. *Federal Register*, February 27, 2007, Proposed rule to amend the Clothing Textile Flammability Standard
19. *Federal Register*, March 15, 2006, (front page and preamble language only), Final Rule for Mattress and Mattress/Foundation Set Flammability Standard (Open-Flame)

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#### RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CLAIRE McCASKILL TO HON. NANCY A. NORD

*Question 1.* Has the General Counsel's office prepared memos in relation to other Commission proceedings that speak to the preemptibility of state standards or requirements? If so, please provide copies of these memos.

*Question 2.* In addition to the mattress flammability rulemaking the Commission commenced in 2005, are there other rulemakings pursuant to the Flammable Fabrics Act in which the Commission has commented on the preemptibility of state standards or requirements? If so, please provide a list of these rulemakings and a copy of the Commission's statement with respect to preemptibility.

Answer. Flammable Fabrics Act (FFA) Rulemakings with Executive Order 12988 or similar discussion (all attached):

- Standard for the Flammability of Children's Sleepwear: 65 Fed. Reg. 12924 (March 10, 2000).
- Standard for the Flammability of Mattresses and Mattress Pads: 65 Fed. Reg. 12935 (March 10, 2000).
- Standard for the Surface Flammability of Carpets and Rugs: 65 Fed. Reg. 12929 (March 10, 2000).
- Standard for the Flammability of Clothing Textiles: 72 Fed. Reg. 8844 (Feb. 27, 2007).
- Technical amendment to the Flammability Standards for Carpets and Rugs: 71 Fed. Reg. 66145 (Nov. 13, 2006).
- Standard for the Flammability (Open Flame) of Mattresses and Mattress/Foundation Sets, Proposed Rule: 70 Fed. Reg. 2470 (Jan. 13, 2005).

*Question 3.* In its discussion of Executive Order 12988 in the January 2005 notice of proposed rulemaking on a standard for the flammability of mattresses and mattress/foundation sets, the Commission states that pursuant to 15 U.S.C. § 1203(b), "the Federal Government, or a State or local government, may establish and continue in effect a non-identical flammability standard or other regulation for the Federal, State or local government's own use if it provides a higher degree of protection than the FFA standard" and says that this would be one exception to the preemption of non-identical state or local mattress flammability standards designed to protect against the same risk of the occurrence of fire. However, the Commission's discussion of preemptibility in the preamble of the final rule focuses on preemption of any non-identical state requirements, regardless of whether the state requirements offer a higher degree of protection than the FFA standard. 15 U.S.C. § 1203(b) is not mentioned in the Commission's preemptibility analysis in the final rule. Did the Commission consider 15 U.S.C. § 1203(b) when evaluating the preemptibility of state requirements? If not, why not? If so, why did the Commission preempt all non-identical state requirements rather than only those non-identical state requirements that do not provide a higher degree of protection from a fire risk than the Commission's standard? Why is 15 U.S.C. § 1203(b) discussed in the notice of proposed rulemaking but not in the preamble to the final rule?

*Answer.* Section 16(a) of the FFA explains when an FFA flammability standard or other regulation preempts a State or local government's flammability standard or other regulation. Section 16(b), 15 U.S.C. 1203(b), of the FFA provides an exception for certain Federal, State or local flammability standards or regulations. That section allows Federal, State or local governments to establish or continue in effect a flammability standard or other regulation if: (1) the standard or regulation is designed to protect against the same risk of fire as the FFA standard; (2) it applies to a fabric, related material, or product that is for the state's own use; and (3) the standard or regulation provides a higher degree of protection from fire than the FFA standard. Thus, the exception is only available if the non-FFA standard applies to items that are for the State, Federal or local government's own use, such as for use in correctional facilities and other state or local government owned institutions. This exception was noted in the preamble to the mattress flammability proposed rule published at 70 Fed. Reg. 2492-93. This statute is very clear and the Commission's open flame mattress flammability Final Rule was not intended to affect the application or interpretation of this authority. Because no comments were received which discussed a state standard applicable to a consumer product intended "for the state's own use," staff did not again discuss the issue in the preamble to the Final Rule.

*Question 4.* In Section H.7. of the preamble to the Commission's mattress flammability rule, the Commission states that it received several comments concerning preemption, including one comment supporting preemption of both codified state rules and state common law claims and others asking the Commission to indicate that the standard would not preempt stricter state standards. Did the Commission consider the comments opposing preemption? If so, how did it weigh these comments and why did the Commission not clarify that the standard would not preempt stricter state standards?

*Answer.* The Commission staff considered all comments received in response to the proposed rule in formulating the Final Rule text and preamble. The Commission's preamble to the Final Rule did, in fact, describe that a state may adopt a stricter standard under certain conditions: "The statute also provides an application process for an exemption from Federal preemption for non-identical State or political subdivision flammability requirements. Thus in the absence of such an exemption, the Federal standard will preempt all non-identical state requirements." See 71 Fed. Reg. 13496 (March 15, 2006). To qualify for an exemption, a state is required to show, *inter alia*, that compliance with the proposed state standard would

not be a violation of the Federal standard, that the state standard provides a significantly higher degree of protection from the risk of occurrence of fire than the Federal standard, and that the state regulations do not unduly burden interstate commerce. *See* 15 U.S.C. § 1203(c)(1). As a result, a significantly higher state standard would not be preempted only if the state applied for, and was granted, an exemption from the preemption requirement of 15 U.S.C. § 1203(a).

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BILL NELSON TO  
HON. THOMAS H. MOORE

*Question 1.* The Commission's final rule in the Portable Generator Labeling proceeding (72 *Federal Register* 1443, January 12, 2007) stated that the issue of "integrated CO monitors" would be addressed in the context of the Portable Generator Performance Standard Advance Notice of Proposed Rulemaking (71 *Federal Register* 74472, December 12, 2006) (hereinafter "Generator Performance ANPR"). The comment period for the Generator Performance ANPR ended on February 12, 2007. What is the Commission's current timeline for issuance of a specific Notice of Proposed Rulemaking ("NPRM") regarding interlocked carbon monoxide detection devices on new portable generators?

Answer. The Commission staff is investigating potential technical approaches to reducing the hazard of carbon monoxide (CO) poisoning from portable generators. In FY 2006, the Commission staff successfully demonstrated the feasibility of shutting down a generator when elevated levels of CO are detected, using CO detectors located in the home and in the vicinity of an operating generator. Additional developmental work would be necessary to address technical and human factors issues that were identified during this concept demonstration. The Commission staff believes that protecting the consumer from the CO hazard by way of an interlocking or auto shut-off device is a complementary yet secondary approach that should be pursued if the CO emission rate cannot be sufficiently reduced. The staff is currently considering additional research on auto-shutdown techniques in conjunction with the low-CO engine contract, using the same engine control technologies that are being used in that effort. This research will be completed in FY 2008.

The staff's current emphasis is on developing a prototype portable generator that emits significantly reduced levels of CO, using available technologies such as exhaust catalysts and electronic fuel injection. If successful, this would provide a margin of safety to help protect consumers against inadvertent exposure to CO in the event they improperly operate a generator in an enclosed space or near an open window.

The Commission awarded a contract to the University of Alabama in September 2006 to develop and demonstrate a prototype low-CO emission generator with a goal of achieving reductions in the CO emission rate on the order of 90–95 percent. The Commission staff predicts that this level of reduction will significantly improve survivability when a generator is inadvertently operated in an improper location. This effort is ongoing and will be completed in FY 2008.

The public comment period for the advance notice of proposed rulemaking (ANPR) closed on February 12, 2007. The Commission received detailed and complex comments which CPSC staff is currently evaluating. Additionally, CPSC staff is assessing technologies and researching performance testing methods that would be required if the Commission voted to proceed to issue a notice of proposed rulemaking (which is the next step in the Commission's mandated three-step rulemaking process) on all or part of the issues raised in the ANPR. When these steps are completed, the staff will prepare a briefing package (publicly available) and present it to the Commission for its consideration.

*Question 2.* Last year, the Commission completed approximately 471 cooperative recalls of consumer products. It is my understanding that all of these were completely voluntary. Does the Commission have adequate resources to order a mandatory recall—if necessary?

Answer. For a number of reasons, the Commission has rarely litigated to obtain recalls. On those occasions when such litigation has been required, resources have been provided for staff to proceed. I anticipate that with respect to a future action to order a mandatory recall, such an action would be a priority and the necessary resources would also be provided even if it would mean shifting resources from other Commission activities.

*Question 3.* Commissioner Thomas Moore has mentioned nanotechnology as one "emerging technology" that the Commission will have to address in the near future. Do you see any other emerging technologies that the Commission may have to deal with in the near future? If so, how should the Commission deal with them?

Answer. As I indicated in my statement to the Subcommittee submitted for the March 21st hearing, the American consumer wants everything electronic to be smaller, faster, longer-lasting and more powerful. Nowhere is this more evident than in energy storage devices for cell phones, laptops, PDAs and other portable electronic devices. Newer battery technologies, such as lithium-ion rechargeable cells used in cell phones and laptop computers, offer a significant increase in energy in smaller enclosures compared to older technologies. Such battery technologies provide more operating power for longer periods of time for consumer electronic devices. However, these types of batteries have been the subject of numerous recalls due to the potential thermal burn or fire hazard, and staff has worked with industry to develop new safety standards to address these hazards. Commission staff continues to work with other government agencies and industry to develop standard and certification programs for their safe use.

In the future, Commission staff expects that newer technologies such as fuel cells will likely provide high energy density power sources for consumer applications. The chemical energy can be derived from various fuels such as natural gas, propane or compressed hydrogen. Reductions in fuel cell production costs have made them increasingly attractive for commercialization. Potential consumer applications include stationary residential power generation, portable power generation, and replacements for battery-operated devices.

Another area is the use of sensor technologies to address consumer product hazards. Sensor technologies are applied in the automotive industry to reduce the risk of collision and theft, and have been utilized in the defense, space and security industries for many years. Recent national initiatives in the research and development community promise to increase the sophistication and utility of sensor technologies. The emergence and routine application of sensor technologies raises the prospect that there may be opportunities for detecting and averting various hazard scenarios in many consumer products. While there is extensive research and development underway in sensor technologies and applications, and a few applications have been introduced into the marketplace, hazard avoidance applications have not yet been explored in depth within the consumer product manufacturing or safety assurance communities. Of particular interest to the CPSC staff are potential hazard scenarios that could be detected using the appropriate sensors and signal processing techniques, and their application in specific consumer products that have been involved in hazards or in which hazards could be anticipated.

Addressing issues associated with emerging technologies is often resource intensive. As new technologies enter the marketplace, Commission staff must identify the products that contain these technologies and assess the effect on the consumers. Commission staff will need to develop technical information that can be used to support new performance requirements in product standards, if necessary. Staff will need to collect and analyze data and scenarios, develop subject matter expertise needed for product testing and evaluation, become familiar with laboratory equipment to conduct product testing, and develop appropriate test methods and performance requirements.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK PRYOR TO  
HON. THOMAS H. MOORE

*Question 1.* The Commission has been operating without a quorum since January 15. In anticipation of the inability to perform certain functions, the Commission provided certain delegations and completed a number of actions prior to the loss of the quorum. Now that 3 months have passed without a quorum, is the Commission coming to a critical period where its ability to function is now going to be severely curtailed or will actions taken in January continue to provide the Commission with the ability to carry out its duties?

Answer. The agency functions normally during the first 6 months after one Commissioner departs, as two commissioners constitute a quorum during that period (whether it is the Chairman that leaves or another Commissioner). Once the quorum lapses, however, the agency loses much of its ability to act as a regulatory agency. Anything that requires a Commission vote, such as moving a rulemaking proceeding forward (from Advance Notice of Proposed Rulemaking, to Notice of Proposed Rulemaking and to the Final Rule stage), accepting negotiated civil penalties, issuing subpoenas and approving our budget, cannot be done. Even though it might be very tempting to ignore the fact that there is no quorum and continue to operate as normal, we cannot because that would be in violation of the laws that govern operations at the Commission. We did delegate certain limited functions to the staff

before the quorum lapsed but it would have been inappropriate and, in the case of subpoenas impossible, to delegate to staff the basic powers of the Commission.

The longer we are without a quorum, the more items will begin to accumulate that need Commission attention and which will have to be set aside until the Commission regains its quorum. We are close to signing certain Memoranda of Understanding with several foreign countries and these cannot be signed until the quorum is restored; there are a few rulemakings that will soon require Commission action that will have to wait. It is unclear what authority the "Commission" has to negotiate with foreign governments, such as China, during this period. Certainly no new Commission positions can be put forward. Companies who may be negotiating civil penalties know that even if they agree to a civil penalty amount it may be months before the Commission is able to vote on it and, therefore, months before they will have to pay the amount to the Federal Government. If a company refused to do a voluntary recall we would be powerless to act. This may make staff reluctant to press for an aggressive recall for fear the company will not take voluntary action. We are not a toothless tiger during this period, but that we should lose *any* of our powers when a majority of the Commission (as presently constituted) is still sitting, makes little sense to me.

*Question 2.* Due to anticipated staff reductions, the Commission went through reorganization in 2005. What has been the overall affect of the reorganization on the Commission's ability to perform its mission?

Answer. We were forced to go through a "reorganization" in order to get Voluntary Early Retirement Authority (VERA) and Voluntary Separation Incentive Payment (VSIP) authority from OPM. We needed these authorities to be able to provide buy-outs and early outs due to budget constraints that forced us to reduce our staff. We did not want to have to do a reduction in force (RIF) to accomplish the staff reductions and, having a number of older employees, we felt it was likely we would have enough employees willing to take advantage of VERA or VSIP to be able to avoid a RIF, which was in fact the case.

From my own personal observations, little in the way of efficiency was gained by the reorganization. Additional layers of vertical management were added in several organizations actually resulting in less efficiency. The statement that I issued at the time of the reorganization, when I voted against it, can be found through the following link: <http://search.cpsc.gov/query.html?col=pubweb&qt=reorganization&x=7&y=11>. The reorganization was a tool to achieve a necessary, if unpleasant goal. But employee input could have resulted in a smoother transition and in perhaps a somewhat different organizational structure. A major concern that I had with the reorganization, and this is a continuing problem at the agency, is the reluctance of CPSC management to include the employees in agency decisions that directly affect them. I think this is one reason why there is an expressed lack of confidence in the agency leadership as shown in the latest OPM Human Capital Survey. When the small agencies' scores in that survey were compared recently by the Partnership for Public Service and American University's Institute for the Study of Public Policy Implementation, the Commission ranked very near the bottom, 29th out of 31 small agencies, in terms of how the employees believed leadership at the agency generates motivation and commitment, encourages integrity, and manages people fairly. The 2007 score represented a nearly 9 percent decline from the 2005 score in which the agency ranked fifth from the bottom out of 26 agencies surveyed. I should note that responses to both surveys were provided by our employees prior to Commissioner Nord assuming the Acting Chairmanship role. While I have no executive or administrative powers, I am still part of the leadership and, to the extent our staff feels frustration about my lack of control over these kinds of agency decisions, this may be reflected in the survey results as well.

The reorganization represented a consolidation, a collapsing of agency functions. We have fewer people because of budget cuts and we, of necessity, do less. We lost a lot of valuable people through the VERA and VSIP process whose knowledge will take years, if ever, to replicate. The staff reductions have severely wounded us. The reorganization did not, could not, salvage what has been lost.

*Question 3.* The Commission's laboratory testing facilities are essential to its ability to make determinations about the safety of consumer products in our marketplace—and to its ability to develop safety standards. Some have expressed concern about the age of your equipment and the overall condition of your lab site. What is your assessment of your laboratory testing facilities with respect to the Commission's ability to adequately evaluate safety issues associated with emerging product technologies?

Answer. We have been trying to obtain funds to modernize our lab since before I arrived at CPSC in 1995 yet we have never received any significant funding for

that goal. We've been working with GSA on a modernization plan since at least 1999. There certainly has been a level of frustration associated with the process. We have been forced to accept a band-aid approach to fixing the lab, when what we really need is a major modernization commitment.

I have seen other testing labs, such as those at Underwriters Laboratories, which are much more sophisticated, spacious and up-to-date than our lab. Given that we are the Federal agency designated to protect consumers from product hazards and that our laboratory testing plays a key role in making hazard determinations, I think the state of our lab should concern everyone. However, whenever I go to our lab I am constantly amazed at the ingenuity of our lab staff in overcoming space and resource limitations. We often talk about the agency making do with what it has and nowhere can that be seen more strikingly than at the lab. I would like to see a real investment made in upgrading our lab so that we can do more testing in our own facility rather than having to contract the work out and so that tests don't stack up because of a lack of adequate space or other resources, which prevent us from doing simultaneous testing on various products.

We are currently looking at different real estate solutions with GSA that would give us a better physical plant. However, these solutions may or may not allow us to function at the same capability we currently have and they would not include any modernization of equipment. The cost to *truly* modernize our lab, if we were to stay on the current site, would be somewhere around thirty million dollars. This would expand our capabilities, give us new equipment and a physical plant that is both energy efficient and an effective use of space. A modern facility would also put us in a better position to deal with emerging technologies, such as nanotechnology. It is difficult for us to even contemplate how we would assess potential product-related nanotechnology hazards when we struggle to provide the basic lab capabilities to meet our current needs.

*Question 4.* In light of the Commission's continuing budgetary constraints, does the Commission have the necessary resources to police and monitor contemporary marketplaces such as the Internet for unsafe products?

Answer. I believe that, in order to carry out our mission, we will certainly need to have additional resources to devote to monitoring Internet marketplaces. In recent years, our Compliance staff has devoted an increasing share of its resources to the Internet. We now routinely look for regulated products, such as pacifiers, on the Internet and sample them as part of our general market surveillance effort. We also look for unregulated products that may pose a risk to consumers, such as hooded sweatshirts with drawstrings. Virtually all business enterprises have a website; accordingly, when a firm conducts a recall in cooperation with the CPSC, we work with the firm to post an appropriate notice on the Internet. We also monitor the secondary (aftermarket) sites and third-party auctionsites to prevent sales of new or used products that have been recalled. Our staff anticipates that the Internet will continue to grow in importance for us over time. Therefore, the resources devoted to monitoring these marketplaces will also need to increase.

*Question 5.* We have recently seen a number of issues arising out of the possibility that certain children's products contain high lead levels. Are there limitations in the Federal Hazardous Substances Act provisions with respect to the Commission's authority to fully address the hazards of children's products containing lead and other toxic substances?

Answer. I wish the Commission had the authority to find it unacceptable for *any* amount of lead (or any other toxic substance) to be in children's product. However, our statute requires us to assess the accessibility of the lead (or other toxic substance) and that is the key measure under the Federal Hazardous Substances Act (FHSA) of whether or not a product can be deemed to contain a banned hazardous substance. The Commission did issue a guidance document back in January 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 a similar one the Commission issued dealing with hazardous liquid chemicals in children's products. [http://a257.g.akamaitech.net/7/257/2422/12feb20041500/edocket.access.gpo.gov/cfr\\_2004/janqtr/16cfr1500.230.htm](http://a257.g.akamaitech.net/7/257/2422/12feb20041500/edocket.access.gpo.gov/cfr_2004/janqtr/16cfr1500.230.htm); [http://a257.g.akamaitech.net/7/257/2422/12feb20041500/edocket.access.gpo.gov/cfr\\_2004/janqtr/16cfr1500.231.htm](http://a257.g.akamaitech.net/7/257/2422/12feb20041500/edocket.access.gpo.gov/cfr_2004/janqtr/16cfr1500.231.htm).

Given the provisions of the FHSA, the Commission does not have the authority to enforce the total elimination of lead or other toxic substances from children's products, and the Commission went as far as it could in expressing its views on the subject. I would welcome congressional attention to this important issue.

*Question 6.* With the recent reductions in Commission staff, the ability of the Commission to sufficiently address the mounting number of possibly unsafe imported products under the Commission's jurisdiction is a concern. Given your cur-

rent budgetary picture what is the status of the Commission's ability to adequately address the concerns raised by the growing number of imported products?

Answer. In Fiscal Year 2006, fully 75 percent of our recalls involved imported products. Nearly 50 percent of all recalls involved products of Chinese manufacture. To deal with the escalating number of unsafe consumer products being imported, we are devoting an ever increasing share of staff resources to the problem and we are trying to leverage those resources through other entities.

First, CPSC staff is working with U.S. Customs and Border Protection to strengthen our ability to prevent unsafe consumer products from entering U.S. commerce. For example, the CPSC has recently become a participating agency in the International Trade Data System (ITDS) Automated Commercial Environment. This status will allow us to take advantage of the next generation of technologies being developed by U.S. Customs to identify and track incoming product shipments.

Second, the agency has strengthened our cooperation with foreign governments and sought to develop coordinated strategies for improving the safety of products exported to the United States, particularly from China.

Third, as imports increase, it is essential that manufacturers abroad be educated about U.S. safety requirements. In recent years, the agency revised our *Handbook for Manufacturers*, which contains many valuable tips on manufacturing safe products, and had it translated into Mandarin Chinese. CPSC safety experts also have conducted seminars for Chinese manufacturers on CPSC safety standards and requirements.

Fourth, most imports to this Nation are sold by U.S. retailers. Therefore, CPSC staff has worked with retailers to heighten their safety consciousness and to underscore the need to address safety proactively in the case of imported as well as domestic products. Our staff has developed a new reporting model that promotes more information flow between certain major retailers and manufacturers, as well as with the CPSC.

While these efforts can be successful, the dimensions of the problem are large and have continued to grow over the last several years. To keep pace, staff efforts and related resources will also have to significantly increase. This will be a major challenge.

*Question 7.* Now that you have had the opportunity to deliberate, what is your reaction to a reinstatement of five Commissioners on the Commission? Would that eliminate the loss of quorum problem? What would be the cost to restore the two Commissioners' offices?

Answer. Congress, in its wisdom, originally established a five-member Commission. A five-member Commission provides for diversity of views and allows different combinations of alliances to be formed on various issues. In such an atmosphere, ideological views may become more important than political affiliations. Larger Commissions also make it more likely that an Independent could become a Commissioner, giving a less partisan flavor to decisions.

The current three-member structure usually only allows for one alliance to be formed—by the majority political party at the Commission. The change voted by the Commission in January of 2006, which altered the Commission's former policy of annually rotating the Vice Chairmanship among all of the Commissioners, to one that can always give control of both the Chairmanship and the Vice Chairmanship to the same party, has further politicized the Commission. This is precisely how independent agencies are *not* supposed to work. With only three Commissioners, the Chair assumes greater significance than our statute contemplates. The "executive and administrative functions," which should be the only authority that sets the Chair apart from his colleagues has morphed into control over policy matters. Now the Chair only has to secure one vote—that of his fellow party member—to control the Commission. If the Chair had to secure two votes, his ability to have unchecked say over policy matters would be lessened.

Having two additional Commissioners might put more of a burden on staff in terms of private briefings, but the result might also be more public briefings, which have been exceedingly rare these last few years. The tendency has become for the majority in power to pre-negotiate decisions that are then presented to the public as staff recommendations requiring Commission consideration.

In 1976, the "Government in the Sunshine Act" was signed into law. Its purpose was to ensure that government agency decisions were made in the open, not behind closed doors. The Congress wanted the public to understand and see the decision-making process. Thus whenever a majority of the decisionmakers in an agency get together to discuss significant matters which are pending before their agency, that meeting must be announced a week in advance and must be open to the public (with a few exceptions). When you have an agency with seven or five members, the Sunshine Act does not hamper the normal dialogue that should go on in an agency be-

cause any member can still talk to any other member about agency business. But where you have only three Commissioners, the result is that no Commissioner should ever talk to another Commissioner about any matter of substance before the Commission except in an open meeting after public notice because two members constitute a quorum. Consequently, no thoughtful give and take can take place on issues except through intermediaries. Of course, much can get lost in the translation in those discussions.

The inability of Commissioners to talk to each other about agency business can have other consequences. I believe it undermines the collegiality that should be the hallmark of an independent agency's way of doing business. Having to be constantly vigilant about not straying into areas of common concern at the agency makes the Commissioners hesitant to explore ideas with each other and makes it difficult to understand the reasoning behind a fellow Commissioner's decisions. We can read each others written decisions, but nothing takes the place of a conversation where questions can be asked and ideas are challenged. That breakdown in the collegial system can give the Chairman of the agency greater control of agency policy than would likely be the case if the Chairman was subject to having to justify or explain his actions privately to the other Commissioners.

I estimate adding two additional Commissioners would cost about \$1,000,000. The actual amount would depend upon what salary grade and step their staffs members were brought in at. This does not include the cost of recapturing the two Commissioners' office suites, which are currently occupied by offices of the Executive Director and Human Resources, and moving those employees to other offices.

The Commission never should have lost two Commissioners, especially through the Appropriations process. As part of a comprehensive package to restore the staff and resources we have lost and to begin the process of rebuilding the agency, the restoration of the two unfunded Commissioners would send a strong signal that the Congress still believes in the agency's mission and in the importance of the agency being insulated as much as possible from political pressures. However, if such a comprehensive rebuilding were not contemplated then, because of the reductions in staff the Commission has suffered in recent years, if I had to choose between using a million dollars to restore the two Commissioners or putting that money toward hiring more statisticians, engineers and other scientists to help us do the work of protecting the American public, then I would choose the latter. Some of the anomalies, like the loss of quorum, that result from having only three Commissioners could be dealt with by changes to our statute.

*Question 8.* One of the members of the second panel at the March 21 hearing suggested that the Commission should be changed to a single Administrator. What are your views on that?

Answer. I believe the public is better served when regulatory agencies are headed by multi-member Commissions that have some insulation from political pressure and where divergent philosophical views must temper each other to reach a consensus. The give-and-take, the checks and balances of a collegial body of independent Commissioners is a much more effective means of securing and maintaining a reasonable balance in the effective yet controlled use of Commission authority in the interest of reasonable public safety. You may not always get the strongest decision in such an environment, but there are built-in checks and balances that tend to keep the most extreme views of either side from prevailing.

A single administrator is, in most cases, going to follow the lead of the Administration that appointed him. That one person's abilities, integrity and leadership skills will determine whether the agency fulfills its mission or fails the American public. A Commission is more likely to consider all sides of an issue, listen to the opinions of colleagues where each vote has the same weight, and think creatively to resolve differences.

Commissions also provide a certain amount of continuity. We have been fortunate in the last 10 years or so to have Commissioners who, for the most part, wanted to serve on the Commission and sought reappointment to continue their work. This has been particularly important at a time when so much of the Commission's historical knowledge is being lost as seasoned employees leave either through retirements or transfers.

When a new Chairman of an agency comes onboard, there is a period of adjustment and, depending on the makeup of the rest of the Commission, there can be changes in approach, but significant policy shifts usually only happen over a period of time. However, when a single administrator is replaced, there can be dramatic and immediate changes in agency policy. Consumers and businesses alike expect consistency from agencies that set national product safety standards and exercise broad enforcement powers.

*Question 9.* One of the ways you are trying to address your budgetary constraints for Fiscal Year 2008 is surrendering office space. Can you provide us with a detailed account of what is being done in this regard and what avenues the Commission has to expand its space once again, if additional funds are provided for staff? Would additional space in the same building have to be rented at higher rates than the current rental agreement? Provide a detailed cost breakdown of what the office consolidation will cost in the current fiscal year, including disruption in staff productivity, man-hours spent moving/packing/unpacking and any space reconfigurations that have or will have to be done.

Answer. The last three budget cycles have forced the Commission to make some very difficult decisions with regard to reducing funding for the agency's operations. Because so much of our budget is devoted to salaries and space rental, when our budget is reduced significantly (and given our small budget, significant to us is anything over half a million dollars) salaries and rent are where we are forced to make cuts. For the fiscal 2008 budget we had to make a number of tradeoffs to accommodate the OMB pass-back figure which did not provide us with enough funds to maintain current services, given the cost increases we had to sustain for salaries, rent and other annual contractual obligations. As we had been forced to reduce our staff over the two preceding years, and were going to have to reduce staff again under the proposed 2008 budget, it made sense to see if we could consolidate office space in our headquarters building and return some space to GSA in return for reduced rent. We thus proposed a rent reduction of \$500,000 which would allow us to retain four or five FTEs that we would otherwise have to lose (on top of the 19 we were already resigned to losing for that fiscal year).

The challenge was to find a large enough block of contiguous space that would be acceptable to be returned under GSA requirements, and which would result in the needed savings. The space was found but at a cost in loss of morale, less desirable working conditions for some employees and short-term financial costs to the agency that have to be absorbed. The latter will be recouped through the rental savings, but the other two may take longer to recover from.

To many employees, this reduction in our office space is just another indication of how little value is placed on our agency. We are shrinking at a time when our responsibilities are increasing. Some offices that had their own space were consolidated with employees from other offices. For example, we had to consolidate our Equal Opportunity Office with our Inspector General's Office. These are both offices where employees expect privacy in pursuing matters they may not want management (or certain other employees) to be aware of. Combining them was the best solution we could find, but we certainly would rather not have done anything that would risk reducing our employees' comfort level at pursuing their rights or reporting wrongdoing.

We currently have 270 employees at headquarters. After the space consolidation is complete and we give back the space we are vacating, we could accommodate up to another 20 people, but given the nature of where pockets of office space would still exist, the likelihood of new employees being able to be situated in the office that hired them and being with their colleagues to be acclimated and mentored is small and, in some instances, we already know it will be impossible. There will be a cubicle here and there scattered throughout our space where we could put new hires but there will be no sizable contiguous space available. We can accommodate new hires in the Field without limit (as to office space) as they all telecommute.

If we were to get funding for additional employees, and additional funding to increase our headquarters space, we would be able to rent any available space in our current building at our then current lease rates, through GSA. We would not be paying any more for the space than we would under our current lease. The longer we wait, though, the more likely it is that the space we give back will be rented by other entities and then we will have the additional security costs related to placing employees on floors other than those already occupied and secured by the Commission.

I am told that we are trying to keep the cost of the consolidation to the amount of the cost savings that we will realize by giving the space back by June 30th of this year. This amounts to the approximately \$120,000 in rent savings that will accrue for July through September. This amount does not allow for a number of build-outs that would make the reconfigured space much more comfortable and workable for the offices that were forced to move into new space. It is estimated that if all of the work was done that would provide the staff with the optimal space and configuration that we are able to accommodate in our reduced square footage, that the cost would be approximately \$500,000, or one full year's rent savings. In addition to the materials and labor costs of moving, each office involved in a move (11) lost approximately 2 days of productive work in packing and unpacking their offices,

which equate to almost a month of lost productivity. The moves have been staged to reduce the disruption as much as possible, but it is a disconcerting process nonetheless.

This space consolidation is predicated on the assumption that we will have to yet again reduce our FTEs by 19 in 2008. If we do not, or if we get funding for even more FTEs, then in addition to funding for that personnel, we may need additional funding to restore some or all of the space that is being given up this year.

*Question 10.* Acting Chairman Nord indicated that the Commission's action with regard to adding new preemption language in the preamble of the Final Mattress Rule was dictated by a memo from your agency's Office of General Counsel. What is your position on that preemption language?

Answer. I have attached and provided a link to my statement on the preemption language which provides my analysis of the Commission actions with respect to the language added to the preamble of the Final Mattress Rule. <http://www.cpsc.gov/CPSC/PUB/PREREL/prhtml06/06091.html>.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CLAIRE McCASKILL TO  
HON. THOMAS H. MOORE

*Question 1.* In addition to the mattress flammability rulemaking the Commission commenced in 2005, are there other rulemakings pursuant to the Flammable Fabrics Act in which the Commission has commented on the preemptibility of state standards or requirements? If so, please provide a list of these rulemakings and a copy of the Commission's statement with respect to preemptibility.

Answer. The first instance under the Flammable Fabrics Act (FFA) in which the Commission spelled out the preemption language, pursuant to the 1996 Executive Order, was in proposed technical amendments to the Children's Sleepwear Standard, Sizes 7 through 14, published in the *Federal Register* on May 21, 1998. The Commission gave a brief summary of the statutory language and mentioned both subsections (b) and (c) of Section 16 of the FFA, which describe situations in which preemption might not apply to a non-identical Federal, State or local government standard or regulation. <http://www.cpsc.gov/businfo/frnotices/fr98/sleeptech.html> The next action under the FFA is the finalization of those technical amendments, which appeared in the *Federal Register* on January 19, 1999. <http://www.cpsc.gov/businfo/frnotices/fr99/tech.html> While it again seeks to merely summarize the statutory language, for some reason, it only mentions subsection (c) of Section 16 and omits any reference to subsection (b). It may be that it was thought that a State or other government entity would be unlikely to adopt a children's sleepwear standard "for its own use" and, for that reason, the reference to subsection (b) of Section 16 was omitted. This was a change that was never brought to my attention. While the Commission cannot change the statutory provisions through language in the preamble to a regulation, the omission of any reference to subsection (b) of Section 16, after having referenced it in the proposed rule could lead to confusion and it should have been retained, however unlikely its use would be. This is an issue you raise in your second question with regard to the Mattress Flammability (Open Flame) Rule.

The next time the preemption language appears is in proposed amendments to revise the laundering standards for mattress pads, published in the *Federal Register* on March 17, 1999. <http://www.cpsc.gov/businfo/frnotices/fr99/mattress.html>. In an apparent attempt to shorten the preemption discussion, subsections (b) and (c) of Section 16 of the FFA are dispensed with in the language: "With certain exceptions which are not applicable here. . . ." Again, I have to assume that staff did not foresee higher Federal, State or local standards for mattress pads for the use of those entities, nor did they expect to receive any applications for exemption in that area. These were technical amendments to an existing standard, most of which remained unchanged, and that may also explain why a description of subsection (b) and (c) were omitted. These amendments were finalized on March 10, 2000, and the final preemption language is identical to the language in the proposal. <http://www.cpsc.gov/businfo/frnotices/fr00/matt.html>.

The next appearance of the preemption language is in proposed revisions to the laundering provisions to the children's sleepwear standards, also published in the *Federal Register* on March 17, 1999. <http://www.cpsc.gov/businfo/frnotices/fr99/flammstd.html>. It is identical to the language used in the mattress pad proposal. The language remains the same in the final amendments to these standards, which were published in the *Federal Register* on March 10, 2000. <http://www.cpsc.gov/businfo/frnotices/fr00/sleepwr.html>.

Also on March 17, 1999, the Commission published proposed amendments to the laundering procedures in the small carpet and rug standard. <http://www.cpsc.gov/businfo/frnotices/fr99/carpet.html>. The language is the same as the other proposed rules issued the same day. The final amendments, with the same language, were issued on March 10, 2000. <http://www.cpsc.gov/businfo/frnotices/fr00/rugs.html>.

It should be noted that in all of these recitations of the statutory preemption language the phrase “standard or other regulation” is used. This is taken directly from Section 16 where that language is used repeatedly—no less than 25 times in this fairly short provision. The word “requirement” is used only once, and then it is clearly referring back to one of the many “standard or other regulation” references. The word “requirement” is given new and unexpected meaning in the preamble to the Mattress Final Rule.

On January 13, 2005, the proposed rule for the Flammability (Open Flame) of Mattresses and Mattress/Foundation Sets was published. <http://www.cpsc.gov/businfo/frnotices/fr05/openflame.html>. The language tracks the language that had been used in rulemakings under the FFA since the issuance of the Executive Order and does reference the specific exception in subsection (b). The discussion then goes on to make specific reference to an existing California mattress flammability standard and an Advisory Opinion issued by our General Counsel on the preemptive effect of any new Federal standard on that California *standard*. It is this discussion that supposedly put the public on notice that the Commission was about to stake out new territory with regard to the preemptive effect Section 16 had on state *court actions*. This Advisory Opinion did not deal with a state court action and is merely advisory in nature, never having been adopted by the Commission. (See footnote 4 of my statement on the Final Mattress Rule for a discussion of this Advisory Opinion.) A year later in January of 2006, the Commission released the draft final rule to the public. Specifically omitted from the public document was the preemption language in the preamble. All that appears in the public document is the title of the section “N. Executive Order 12988 (Preemption)” and the words “[TO BE INSERTED].” <http://www.cpsc.gov/businfo/frnotices/fr05/openflame.html>. This was actually the first public notice from the Commission that something different was about to be put forth with regard to the preemption language. The proposed preemption language was circulated to the Commissioners’ offices, but not released to the public. On February 1, 2006, I publicly asked my colleagues to release the proposed preemption language so that the public would have an opportunity to comment on it. My statement of that date follows:

CLOSING REMARKS OF COMMISSIONER THOMAS HILL MOORE AT THE BRIEFING ON THE FINAL RULE FOR THE FLAMMABILITY OF MATTRESS SETS—February 1, 2006

I will very shortly be submitting a few additional questions to the staff on the package, including some related to the new proposed language on the preemption effect that this regulation has on state common law remedies. Unfortunately our General Counsel’s memo on this issue is not available to the public. It has an excellent analysis of this issue, which would be extremely helpful to the public in understanding the reasoning behind the proposed language.

There *is* an analysis of the preemption issue in Comment Number 523, filed in this proceeding by representatives of the mattress industry. It can be found on our website at [www.cpsc.gov](http://www.cpsc.gov) under Library-Freedom of Information Act, 2005 FOIA Information, Public Comments. The preemption discussion in Comment 523 begins at page 79 of Part 14 and continues into Part 15 of those comments.

It will be difficult for the public to properly analyze this issue without seeing the proposed preemption language, which was omitted from the draft Final Rule when that was made public. I think the *entire* rule should be made public before the Commission votes on it. There should be some time, however brief, for interested parties to comment on the preemption issue. I know it would be very beneficial to me to hear from all sides on this issue. I would like to ask my colleagues to join with me in directing the staff to make that language promptly and prominently available on the CPSC website.

My colleagues agreed and the proposed preamble language was put on our website, but not, as I had requested, prominently, so my office had to make sure that groups that would normally want to comment on such matters were notified about the availability of the language in time to do so. The public had 2 weeks to comment on this language before the Commission voted. My request to make the General Counsel’s memo, which was the underpinning for this new interpretation, public was not agreed to, so the rationale of the new interpretation was not available for public comment, other than what could be gleaned from the actual preemption language in the preamble.

On November 13, 2006, technical amendments were proposed to the ignition source in the test methodology of the Flammability Standard for Carpets and Rugs. <http://www.cpsc.gov/businfo/frnotices/fr07/flammability.html>. The preemption language is the same language that had been used prior to the Mattress Flammability Final Rule. In other words, no interpretation with regard to the preemptive effect on state court actions is described. When asked why, my staff was told there had been a mistake, that the interpretive language should have been included. Due to a new policy of not disclosing the draft proposed or final rule language to the public until after the Commission has voted to adopt it, and assuming the preemption language is changed in the final rule to reflect the new interpretive style of the mattress standard, there will be no public notice that such preemption language will appear in the Final Rule prior to its being voted upon by the Commission. I do not support this change in policy and am unclear how it can be ordered by one Commissioner without the support of the other. (See my statement of October 31, 2006, which accompanied my vote on this rulemaking. <http://search.cpsc.gov/query.html?col=pubweb&qt=carpet+and+rug&x=12&y=12>).

The final matter voted on by the Commission under the Flammable Fabrics Act is a proposed amendment to the Standard for the Flammability of Clothing Textiles. It was published in the *Federal Register* on February 27, 2007, although it was voted on by the Commission prior to the expiration of the quorum. <http://www.cpsc.gov/businfo/frnotices/fr07/clothingflammstd.html>. When this proposal was before the Commission, we were down to just two Commissioners, and I was able to secure the agreement of Acting Chairman Nord to not include the interpretive language in the preamble at that time and to revert to the traditional Commission language which merely summarizes the statutory provisions.

*Question 2.* In its discussion of Executive Order 12988 in the January 2005 notice of proposed rulemaking on a standard for the flammability of mattresses and mattress/foundation sets, the Commission states that pursuant to 15 U.S.C. § 1203(b), “the Federal Government, or a State or local government, may establish and continue in effect a non-identical flammability standard or other regulation for the Federal, State or local government’s own use if it provides a higher degree of protection than the FFA standard” and says that this would be one exception to the preemption of non-identical state or local mattress flammability standards designed to protect against the same risk of the occurrence of fire. However, the Commission’s discussion of preemptibility in the preamble of the final rule focuses on preemption of any non-identical state requirements, regardless of whether the state requirements offer a higher degree of protection than the FFA standard. 15 U.S.C. § 1203(b) is not mentioned in the Commission’s preemptibility analysis in the final rule. Did the Commission consider 15 U.S.C. § 1203(b) when evaluating the preemptibility of state requirements? If not, why not? If so, why did the Commission preempt all non-identical state requirements rather than only those non-identical state requirements that do not provide a higher degree of protection from a fire risk than the Commission’s standard? Why is 15 U.S.C. § 1203(b) discussed in the notice of proposed rulemaking but not in the preamble to the final rule?

*Answer.* The Commission cannot change the statutory language in the Flammable Fabrics Act with regard to preemption, which, as you know, does *not* preempt non-identical standards issued by Federal, State or local governments meant for their own use that provide a higher degree of protection than the Federal standard. While I did vote for the Mattress Flammability Final Rule—because I thought the mattress flammability standard was too important to vote against—I did not agree with the preemption language used in the preamble to the regulation and most of the statement that I issued with my vote was devoted to that issue. I discussed the point you raise on the first and second pages of my statement. <http://www.cpsc.gov/businfo/frnotices/fr07/clothingflammstd.html>. I wanted to make it clear that the regulation did not (indeed could not) preempt such existing or future standards that applied to facilities such as state-run prisons or hospitals.

I do not know why this was omitted from the preemption discussion in the preamble to the Final Rule, particularly as mattress flammability is an area where we know some states do have more stringent standards for certain state-run facilities. This rule is the first time that there had been any attempt to interpret the statutory preemption language in any of our statutes, as opposed to merely quoting or summarizing the statutory language. It may be that because the focus was more on staking out new ground with regard to the potential preemption of state civil court actions than in stating the statutory language, that this point was inadvertently omitted. I know from talking to the technical staff that they agree with my assessment that such standards are *not* preempted.

*Question 3.* In Section H.7. of the preamble to the Commission's mattress flammability rule, the Commission states that it received several comments concerning preemption, including one comment supporting preemption of both codified state rules and state common law claims and others asking the Commission to indicate that the standard would not preempt stricter state standards. Did the Commission consider the comments opposing preemption? If so, how did it weigh these comments and why did the Commission not clarify that the standard would not preempt stricter state standards?

Answer. I certainly considered the comments on preemption, both pro and con. I can understand why any industry would want to try to shield themselves from civil liability for injuries from a product which complies with a Federal standard. However, I saw no evidence that this was what Congress had intended and saw absolutely no reason to attempt to make a strained argument that this is what Congress *had* intended after 10 years of silence by the Commission on this point. My statement on the preemption issue is attached. As to why the preemption language did not give proper notice of the exception in the statute to higher standards issued by other government entities for their own use, please see my answer above.

May I just add that it will be said that the preamble is not part of the regulation and will not appear in the *Code of Federal Regulations* and thus has no force or effect. A preamble is in the nature of legislative history. It explains, often in great detail, why the Commission took the action it did in any particular instance. The Commissioners pay as much attention to what is expressed in the preamble as they do to the actual language of the regulation itself. The preamble is the foundation upon which the regulation rests and a bad foundation can undermine the validity of the regulation. The preamble is referenced by stakeholders, and I often go back to look at earlier Commission precedents as expressed in the preamble of a regulation to find the basis for a Commission action. Clearly if the majority did not feel the preamble carried any weight they would not have used it to put interpretive gloss on the language of our statute.

