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THE SENATE APPROPRIATIONS SUBCOMMITTEE
ON
FINANCIAL SERVICES AND GENERAL GOVERNMENT

PRESENTED BY

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Good morning, Chairman Durbin and Ranking Member Brownback. Consumers Union,¹(CU) publisher of *Consumer Reports*, appreciates the opportunity to testify before the Subcommittee this morning on the subject of toy safety standards and the Consumer Product Safety Commission (CPSC). Congressional oversight such as the kind the Subcommittee is doing today will be a critical factor in ensuring that the CPSC uses its resources appropriately to fulfill its mission to protect the public from current and emerging product safety hazards.

We wish to commend you, Senator Durbin, for your outstanding leadership in speaking out on behalf of American consumers – and particularly children - who have been exposed to hazardous levels of lead in their toys and to magnets that can, and have seriously harmed or killed children who have swallowed them. Your meetings with toy industry leaders, the CPSC and the field hearing you organized in Illinois have helped to steer the debate in the right direction. Finally, thank you for your efforts to steadily increase the CPSC’s budget, with an increase to \$70 million for FY 2008. This badly needed influx of funds to an agency that has been starved of resources comes at a critical time. However, we urge you to provide an even larger appropriation for this safety agency commensurate with any expanded responsibilities that might come with the passage of newly proposed legislation.

Consumer Product Safety Commission

The CPSC is charged with the mandate to reduce or eliminate unreasonable risks of injury and death to consumers from more than 15,000 types of products. The CPSC’s viability is of critical importance to the safety of children, because the Commission has jurisdiction over so many children’s toys, clothing and products like baby walkers, high chairs, and cribs.

Unfortunately, the system in place to protect consumers – especially children – from unsafe products has broken down. The recent avalanche of toy recalls, involving Chinese-made toys made with excessive lead levels in the paint, has exposed millions of children to a highly toxic substance and created a crisis of confidence among consumers who feel they can trust neither the toy industry, nor our government to keep

¹ 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.

their children safe.² Indeed, concerns about product safety extend to any country where quality control and safety standards are lacking.

Overall, the number of products made in China being recalled in the United States by the CPSC has doubled in the last five years, driving the total number of recalls in the country to 467 last year and involving millions of products.

Chinese products now account for two thirds of the products the CPSC regulates. At the same time, Chinese products represent 60 percent of all product recalls, compared with 36 percent in 2000.

Over \$22 billion worth of toys are sold in this country each year, with toys made in China making up 70 to 80 percent, according to the Toy Industry Association. Yet, despite the enormity of the industry and the surge of imports from China, the budget for the agency charged with ensuring that what enters this country meets our safety standards has been slashed by more 10% in the past two years alone.

Never in its history has the CPSC been so challenged as an agency. Acting Commissioner Nord claimed recently that, "The commission is currently doing more to protect consumers than it has at any prior time in history."³ We disagree. In fact, we believe the agency's leadership has failed to use the regulatory authority it has to fine companies that violate its rules, has refused to request more funding and resources even while admitting it cannot carry out core functions,⁴ and has opposed efforts by consumer groups to provide the Commission with the funding and tools it needs to keep consumers safe. In addition, further exacerbating the CPSC's weakened state, the current Administration has instead imposed additional cuts on the already woefully underfunded and understaffed agency.

² According to a July 2007 poll by Harris Interactive, nearly two-thirds of U.S. adults lack confidence in the safety of a variety of products produced in developing nations, including over-the-counter medications, prescription drugs, herbal remedies and nutritional supplements, and packaged or prepared foods. http://www.harrisinteractive.com/news/newsletters/wshealthnews/HI_WSJ_HealthCarePoll_2007_v06_i1_2.pdf An August Gallup Poll found 65% of Americans "saying that they are making an effort to avoid buying products made in China. Nearly the same percentage -- 64% -- indicates a willingness to pay up to twice as much for a product made in the United States as they would pay for a similar Chinese-made product." <http://www.gallupol.com/content/?ci=28552>

³ "Safety Agency Faces Scrutiny Amid Changes," *New York Times*, September 4, 07, page 1.

⁴ <http://www.cpsc.gov/CPSCPUB/PUBS/REPORTS/2008plan.pdf> CPSC's 2008 Budget Performance Document states on numerous occasions that the lack of resources is cutting into the agency's ability to carry out its mandate. "While the agency's size has been reduced, the challenges facing CPSC continue to grow in both size and complexity." P. vii. "...the 2008 funding level will challenge the Commission's ability to maintain its existing level of standards development, enforcement, public information and international activities." P. vii. "In 2008, we set ambitious targets given the proposed reduction in staff. After further analysis by the Commission and based on actual funding, targets may have to be adjusted in the 2008 Operating Plan." P. 13. In addition, as the *New York Times* found in its September 4, 2007 article on CPSC, "a lone employee is charged with testing suspected defective toys from across the nation."

CU's History of Support for CPSC's Work

Consumers Union supported the creation of the CPSC and has worked closely with the agency since it opened its doors in 1974. The CPSC began operating with a staff of 786 and a budget of \$34.7 million, the equivalent of about \$125 million in today's dollars. By 1977, CPSC had a budget of \$39 million and a staff of 900. Today the CPSC is a mere shadow of its former self. Its budget is \$63.25 million this year – and the Commission's staff has plummeted to an all time low of 401 employees.

By comparison, the National Highway Traffic Safety Administration, which oversees auto and highway safety, and works to reduce the fatalities on our roadways (approximately 43,000), has a budget this year of \$833 million. The CPSC estimates that 27,000 people die each year from product hazards under its jurisdiction. If CPSC's budget were equivalent to NHTSA's relative to the fatality rates each is confronted with, the CPSC's budget would be \$523 million.

CU commends the Appropriations Committee for successfully passing an increase to CPSC's budget of about 10% for FY 2008. We also appreciate that your bill, Senator Durbin, S. 1847, provides for budget increases for the CPSC, reaching \$100 million by 2012. These steady increases are consistent with recommendations made by CPSC Commissioner Thomas Moore, giving the agency time to absorb the additional staff. However, we recommend that Congress set a goal of funding the CPSC at least to reach 700-plus employees, the agency had when its doors opened in 1974.

Toy Industry Proposal

On September 6, 2007 the Toy Industry Association (TIA) announced that its Board of Directors had approved a three-point program for toy testing and inspection programs:

- First, the industry supports the concept of a federal requirement to make safety testing and inspection mandatory.
- Second, TIA is working with the American National Standards Institute (ANSI) to develop and standardize procedures that will be used industry-wide to verify that products comply with stringent U.S. safety standards. ANSI is a private non-profit organization that administers and coordinates the U.S. standardization and conformity assessment system.
- Third, TIA is also working with ANSI to develop criteria to confirm and certify that test laboratories are independently qualified to conduct the prescribed testing.

Consumers Union commends the toy industry, including retail giants such as Toys R Us, for embracing the idea of third-party testing and inspecting, and for welcoming the federal regulatory involvement in making testing and inspection mandatory.

On July 18 of this year, Consumers Union provided a statement at a Senate Commerce Committee meeting⁵ proposing eight steps that should be taken to help safeguard the health and safety of American consumers from the onslaught of unsafe Chinese-produced consumer products and foods. That list included the following steps:

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

Although we agree with TIA about the need for government mandated third-party safety testing – and we applaud the trade association for proposing this testing – in order to be effective, it must be given real teeth. Specifically, third-party certification should include pre-qualifying any factory that makes the product, having inspectors visit the factory unannounced a set number of times each year to check for compliance of the product with the safety standards, and applying a safety certification mark similar to the UL-listed or USDA mark.

⁵ <http://www.consumersunion.org/pub/2ndcorrected071707Testimony%20of%20Donald%20Mays%20-%20Final%20-%20Chinese%20ProductsI.pdf>

Banning Lead in Children's Products

Mattel's three recalls over this past summer of millions of toys containing lead paint alarmed parents and caregivers. Consumers Union believes that children should not be exposed to lead from products intended for their use and we support legislative efforts to ban lead, above minute amounts, in any product intended for use by children. We urge all members of Congress to move promptly to clarify that the CPSC has the authority to ban lead from all children's products.

Consumers Union's safety blog includes, "Five Things Parents Can Do to Avoid Lead Poisoning."⁶ We include within that description tips for parents to prevent not only lead exposure from toys but also from lunchboxes, bibs, metal jewelry, and other kids' products.

We support extending CPSC's regulations for lead in toys to cover lead in other children's products, including in jewelry and in vinyl products. We note that CPSC Commissioner Thomas Moore has also called for giving the CPSC the authority to enforce the total elimination of lead or other toxic substances from children's products.

Currently, CPSC's has regulations restricting the use of "lead-containing" paint and other similar surface coatings on toys and on other children's products. "Lead-containing paint" is defined as a "paint or other similar surface coating materials containing lead or lead compounds and in which the lead content (calculated as lead metal) is in excess of 0.06 percent by weight..." 16 C.F.R. 1303.2(b)(2). CPSC regulations also ban similar amounts of lead in household paint. Today, any toy that has a surface coating that exceeds these limits is considered a hazardous product and is subject to recall.

While CU urged CPSC to set strict standards back in the 1970s, these limits - mandated by Congress in 1974 - were based on the scientific understanding at the time of the hazards of lead paint, as well as what was achievable for paint products over 30 years ago. We think that 33 years later, it is time for the CPSC to conduct a scientific review and revise downward the current 0.06 percent limit for lead. Since the ingestion of lead at any level is hazardous, we urge Congress to direct the CPSC to review current lead limits based on today's scientific knowledge and reduce the allowable limit to the lowest possible threshold.

In addition, CU believes the presence of lead in imported toys raises once again the urgency of screening children at highest risk for lead exposure. In 1999, the U.S. Government Accounting Office (now called the Government Accountability Office) issued a report entitled "Lead Poisoning, Federal Health Care Programs are Not Effectively Reaching At-Risk Children [GAO/HEHS-99-18]. That report found that only about 20% of the children at greatest risk are ever screened or treated for excessive lead levels, despite the fact that this is a covered benefit under Medicaid. We urge

⁶ The five steps include 1) Take Inventory 2) Clean Up 3) Buy Smart 4) Find Substitutes 5) Get Tested
The full story can be found at: <http://blogs.consumerreports.org/safety/2007/08/five-things-par.html>

Congress to dedicate hearings to the problem of ensuring lead screening and treatment for uninsured and Medicaid/SCHIP children.

Finally, we commend the CPSC for issuing an advance Notice of Proposed Rulemaking on January 9, 2007, in response to a petition filed by the Sierra Club, to ban the sale of metal jewelry intended for children with lead content above 600 ppm. Consumers Union is on record supporting this proposed ban, although we urged that it be expanded and include other products. We also opposed regulatory action to preempt stronger state regulations. Indeed, California will set a standard for 200 ppm for lead in jewelry in August, 2009. We urge prompt action by the CPSC in response to comments the agency has received.

Hazards From Magnets

While much of the concern over toy recalls in the past few months has focused on lead paint, recalls of toys with magnets have also raised serious concerns. A 20-month old boy died and at least 12 children have been seriously injured after ingesting magnets in toys.

Millions of toys made by Mattel containing powerful small magnets were recalled in August 2007. In April of this year, a recall of Magnetix toys was expanded to cover nearly 8 million products. Last year, 2.4 million toys with dangerous magnets were recalled.

We commend you, Senator Durbin, for holding a joint hearing with House members on this issue on June 18, 2007 in Illinois and for bringing needed attention to the dangers from magnets in toys. You and Senator Amy Klobuchar of Minnesota have together highlighted the CPSC's slow response to the hazards magnets could pose to children if swallowed.

CU shares your dismay at the CPSC's foot-dragging in 2005, after it first received a report about a serious injury to a child from ingesting a magnet. The agency took no immediate steps to warn the public and recall the product. Indeed, it took two years for the CPSC to launch a full blown joint voluntary recall with Rose Art/Mega Brands of these toys with magnets.

CPSC finally is now appropriately warning parents that:

"Small magnets can kill children if two or more are swallowed. If two or more magnets or magnetic components or a magnet and another metal object (such as a small metal ball) are swallowed separately, they can attract one another through intestinal walls. This traps the magnets in place and can cause holes (perforations), twisting and/or blockage of the intestines, infection, blood poisoning (sepsis), and death. When multiple magnets are ingested surgery is required to remove the magnets and sometimes sections of the intestines need to be removed."

In addition, we have posted on CU's safety blog recommendations to parents about what to do if they suspect their child has swallowed a magnet or magnets.⁷

CPSC's Ability to Deter Company's Violating the Law is Hindered by Cap on Fines

Mr. Chairman, last week, the *Wall Street Journal* (WSJ)⁸ reported that the Chairman of Mattel stated that the company discloses problems on its own timetable because it believes both the law and the commission's enforcement practices are unreasonable. We, like many others, found this disturbing.

CPSC's statute requires companies to report if they believe their product creates a "substantial product hazard." Failure to report can lead to a fine of up to \$1.83 million.

Yet according to the article, Mattel said it should be able to evaluate hazards internally before alerting any outsiders, regardless of what the law says.

The same article also reported that Mattel, "in at least three major cases since the late 1990s -- including last month's recall of nearly 18 million (*sic*) playsets studded with potentially dangerous magnets -- took months to gather information. In two of the cases, it collected scores of complaints for months before disclosing them to the agency."

CU believes that this statement by the head of the leading toy company is telling. Moreover, Mattel conflicts with the CPSC go back nearly a decade. Mattel was previously fined \$1.1 million for failing to promptly report a fire hazard involving its Power Wheels line of motorized minicars, designed to be ridden by children as young as 2 years old. Ten million of the cars were recalled in 1998.

Ann Brown, the CPSC Chairman at the time, said after announcing the penalty in 2001 that Mattel knew about hundreds of problems with the toy's electrical systems, "yet did nothing for years." There were reports of 150 fires involving the minicars and more than 10 times as many reports of electrical components overheating, melting, short-circuiting or failing.

A year later, Mattel again failed to file required reports under the Commission's rules. In the fall of 2002, Mattel began receiving reports involving the safety of screws in its Little People Animal Sounds Farm, which presented a choking hazard to children if swallowed. In one report, a screw punctured the lung of a 14-month-old baby who had inhaled it, sending the child into emergency surgery.

⁷ <http://blogs.consumerreports.org/safety/2007/08/latest-toy-reca.html>

⁸ *Wall Street Journal*, September 4, 2007, p. A1.

http://online.wsj.com/article/SB118886996338816516.html?mod=hpp_us_whats_news

"It was not until March 2003 that the company reported the safety hazard" to the commission, according to an agency investigation. According to the *WSJ*⁹, CPSC learned that Mattel had collected 32 earlier reports of loose screws before approaching regulators. While denying any wrongdoing, the company signed a settlement in March, agreeing to pay \$975,000.

Pamela Gilbert, former Executive Director of the CPSC, told the *WSJ*, "The agency has a real problem in finding out about dangerous products. They know after [company] lawyers might know -- that's after a death or injury."

This unfortunate history of just one company's interactions with the CPSC suggests to us that companies simply do not regard the CPSC's regulatory powers as a deterrent to flouting the law. Consumers Union and other consumer groups have consistently pressed for lifting the cap on the fines CPSC can impose for violations of the agency's reporting rules – most notably Section 15(b) of the Consumer Product Safety Act (CPSA)¹⁰ – which requires that companies "immediately inform the Commission" if a product fails to comply with a safety standard, contains a defect which could create a substantial product hazard, or creates an unreasonable risk of serious injury or death. Senator Durbin, the bill you and Senator Bill Nelson of Florida introduced this summer, S. 1848, *The Consumer Product Safety Modernization Act*, calls for lifting the cap to \$20 million. While we think such an increase would be a great improvement over today's cap, we also agree with CPSC Commissioner Thomas Moore, who argued for lifting the cap entirely, when he told attendees at a conference in Florida in 2002 that "[p]erhaps 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."

The evidence indicates that Mattel is not alone in failing to report to the CPSC upon learning that its products violate the CPSA.¹¹ Year in and year out, the CPSC imposes fines on companies for failing to report, but the practice of failing to report continues. The cap on fines CPSC is authorized to impose – and the fines that CPSC does in fact impose – are low enough that they have become a cost of doing business for a company. Several years ago CPSC assessed a \$750,000 fine on Wal-Mart for failure to report a safety problem with fitness machines selling in its stores. For Wal-Mart, the fine was equivalent to sales rung up in only 1 minute and 33 seconds.

CU believes the cap on fines is just one way in which the CPSC's power to keep the marketplace safe is undercut and one that Congress should work to change.

⁹ Id.

¹⁰ <http://www.cpsc.gov/businfo/cpsatext.html#sec15>

¹¹ In 2001, The U.S. Consumer Product Safety Commission fined Cosco Inc and Safety 1st Inc., of Canton, Mass a total of \$1.75 million in civil penalties to settle CPSC charges that they failed to report product defects that caused serious injuries and deaths to children. In 2002, the Consumer Product Safety Commission (CPSC) fined General Electric Co. (GE) \$1 million to settle allegations that GE knowingly failed to report to CPSC in a timely manner a defect with certain models of dishwashers. Under the Consumer Product Safety Act (CPSA), manufacturers, importers, distributors, and retailers must immediately report information about potentially hazardous products to the Commission. <http://www.cpsc.gov/CPSC/PUB/PREREL/prhtml01/01119.html>

Public Disclosure About Products Reported to the Agency

Another way in which the CPSC's power to keep the marketplace safe is undermined is Section 6(b) of the Consumer Product Safety Act.

We believe a federal agency has an obligation to disclose to the public when it opens an investigation on potentially hazardous products. Currently, NHTSA makes much of this information public; the CPSC, however, cannot disclose this information due to limits imposed on the agency by Section 6(b). Public disclosure can help warn consumers of potential hazards while an investigation is on-going.

We appreciate your addressing the problem of 6(b) in S. 1848. While you are not calling for the repeal of 6(b), as we have urged, your bill would allow the CPSC to make public information if it determines that a manufacturer is not cooperating and that disclosure is necessary to prevent an "unreasonable risk to health and safety." That provision would be a vast improvement over the CPSC's inability today to provide critical safety information to the public under 6(b).

The Problem With Recalls

CU is concerned about the recall of so many millions of toys over the past year alone. While the term "recalled product" suggests that a product has been or will be successfully returned, repaired or replaced, that is rarely the case. Author Marla Felcher, in her book *"It's No Accident – How Corporations Sell Dangerous Baby Products,"*¹² quotes a CPSC study estimating that manufacturers cannot account for 70-90% of sold infant products after they have been recalled.

Recall notices rarely reach the very people who most need it – parents and caregivers. 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 – toys with lead paint and magnets, high chairs, cribs, strollers, infant swings and carriers often continue to be used for months or years after they have been recalled.

In an effort to improve recall effectiveness, consumer groups petitioned the CPSC,¹³ asking that the Commission require simple registration cards on products intended for use by children. While not a panacea, registration cards are one way to facilitate recalls. The Commission denied the petition on April 28, 2003, citing concerns about the effectiveness of registration cards, despite evidence that such cards – required by federal regulations to accompany the sale of a car seat - have improved registration of those car seats substantially. In a 2003 National Highway Traffic Safety Administration survey, the federal highway safety agency found that almost three-

¹² Common Courage Press, 2001.

¹³ **Federal Register**, Vol. 66, No. 148, Wednesday, August 1, 2001.

quarters (73%) of parents/caregivers who said they obtained the car seat new also said that a registration card came with the seat. Of these, 53% mailed back the card.¹⁴

In addition to the problems with getting the notice out to consumers about recalled products, once a product is recalled by CPSC, the Commission, for reasons that escape us, will not release information on the number of units that have been successfully recalled so that the public can accurately estimate how many remain at large, the extent of the remaining risk, and whether the recall outreach used for a particular product was successful. We recommend that you add a provision to S. 1847 requiring CPSC to publish quarterly reports on the success of a recall and post these reports on the Internet.

Conclusion

Consumers Union appreciates this Subcommittee's attention to toy safety and extends our thanks to its determination to press the toy industry and the CPSC toward a far better system of ensuring the safety of toys.

¹⁴ Motor Vehicle Occupant Safety Survey,
<http://www.nhtsa.dot.gov/people/injury/research/2003MVOSSVol5/pages/ExecSumm.htm>