



Consumer Federation of America

Testimony of

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Chairman Bono Mack, Ranking Member Butterfield, and members of the Subcommittee on Commerce, Manufacturing, and Trade. I am Rachel Weintraub, Director of Product Safety and Senior Counsel at Consumer Federation of America (CFA). The Consumer Federation of America is an association of nearly 300 nonprofit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. I offer this testimony on behalf of Consumer Federation of America as well as Consumers Union, Kids In Danger, National Research Center for Women & Families, Union of Concerned Scientists, and the U.S. Public Interest Research Group.

As organizations dedicated to working to protect consumers from unsafe products, I offer testimony today to articulate our serious concerns about the Discussion Draft that amends the Consumer Product Safety Improvement Act of 2008 (CPSIA).

I. Introduction

The bi-partisan CPSIA passed overwhelmingly in the House on July 30, 2008 by a vote of 424-1, in the Senate on July 31, 2008 by a vote of 89-3 and was signed into law by President Bush on August 14, 2008. Before this law passed, Congress undertook a year-long deliberative process to consider the implications of this act: there were approximately 15 hearings and markups in the House and Senate covering issues and products related to the CPSIA, and once each chamber passed its version of the bill, there was a conference in regular order between both Houses of Congress. This law institutes the most significant improvements to the Consumer Product Safety Commission (CPSC) since the agency was established in the 1970's.

II. CPSIA's Significance, New Requirements and Implementation

The CPSIA's passage followed a period of record numbers of recalls of hazardous products that injured, sickened, or killed children. Consumers had lost faith in the safety of consumer products, particularly children's products. The approximately 25 million toys recalled for excessive levels of lead paint, tiny powerful magnets, and other hazardous chemicals, the recalls of children's jewelry because of high lead levels, and the recalls of millions of cribs because of durability issues caused consumers to question whether our safety net was working to protect them.

The bill's passage was also in response to a weakened federal oversight agency, one without enough resources, which failed in its meager efforts to protect the public's health and safety.

In response to this dismal picture, Congress infused the CPSC with new authority and more resources. It has been almost three years since the CPSIA was passed. This law has already made products safer and when fully implemented will increase safety dramatically by requiring that toys and infant products be tested for safety before they are sold, and by banning lead and certain phthalates in toys (although implementation of the testing requirement has been delayed by the CPSC). The law also created a publicly accessible consumer complaint database and authorizes resources CPSC needs to protect the public, such as enabling it to hire additional staff.

III. CPSC and CPSIA Successes

1. Mandatory Crib Standard

There have already been important successes as a result of the CPSIA. One of the most notable examples is the mandatory crib standard that is required by section 104 of the CPSIA. Pervasive design flaws have led to the recall of more than 10 million cribs over the past three and a half

years. It was essential that the CPSC place safe sleep environments at the top of their mandatory standards-setting list.

Recalls and corrective actions for cribs have been issued for non-compliance with safety standards; strangulation hazards; risk of head entrapment when side rails, spindles, and slats in side rails become loose or break; risk of suffocation; choking hazards; risk of falling; and danger of laceration when fingers become trapped in folding drop gates.¹

While the previous voluntary crib standards effectively banned the drop-side design in new cribs, only since passage of the CPSIA has there been an effort made to strengthen the voluntary and mandatory standards and require testing and verification of new cribs. The final CPSC crib standard incorporates many provisions that consumer advocates have been supporting for years that replicate the real world use of cribs, such as durability tests, mattress support tests, and tests for the effectiveness of hardware. The resulting CPSC standard, that passed CPSC unanimously, is a strong one and is a successful outcome of the CPSIA. Section 104(c) of the CPSIA seeks to address hazards posed by older model cribs by removing them from the market. This section applies to cribs sold new and used, cribs used in child care facilities, and cribs used in public accommodations such as hotels and motels. The application of this provision means that older cribs that pose significant risks to children will be taken out of the stream of commerce. This provision is based upon laws already in existence in numerous states including Arizona, Arkansas, California, Colorado, Illinois, Louisiana, Michigan, Minnesota, Oregon, Pennsylvania, Vermont and Washington. This provision extends the protections previously offered in just these states to the entire nation to ensure that children sleep in cribs that meet the most recent and most protective crib safety standards.

¹ Kids in Danger, <http://www.kidsindanger.org/prodhazards/recalls/cribs.asp>

2. Consumer Incident Database

Another success of the CPSIA is the implementation of the consumer product safety information database. CPSC was required by Section 212 of the CPSIA to establish the database. As a result of the CPSC staff's leadership and commitment to the effectiveness of the database, consumers will have access to lifesaving information and the agency will more nimbly be able to identify and act upon safety hazards. CPSC staff worked hard to formulate CPSC's final rule in a manner that is consistent with Congress' intent, responsive to the public interest need for disclosure, and protective of a manufacturer's effort to protect their brand and confidential business information. The database includes more checks on the information and more opportunities for a manufacturer to comment than other similar government agency databases.

Consumers have been in the dark about the dangers of products regulated by CPSC. CPSC has collected incident data from consumers in a manner similar to how it is collected as part of the new database. However, the difference is that prior to the launch of the database, when consumers went to CPSC's web site to look for information, it was hidden. All that they could find typically related to a previous recall. If the Commission had been alerted to the dangers of a product but has yet to conduct a recall, the product's hazard might never have been known to the public.

The database changed that. Public access to information is vital to safety. Simply allowing consumers access to the safety record of products will increase safety and encourage the speedy removal or redesign of unsafe products. Making it simple for consumers to report into a single database the problems they encounter with products also helps the Commission to do its job of

protecting the public from unsafe products more efficiently, which can help save government resources. Launched on March 11, 2011, the first reports were posted last week in the database.

3. Product Registration

The CPSIA requires that infant durable products, such as cribs, strollers and high chairs, include a product registration card in their packaging and provide an opportunity to register online. This will give manufacturers information necessary to directly contact consumers in the event of a recall or other product safety issue.

The requirements for the product registration cards and an online registration program are contained in Section 104 of the CPSIA, which incorporates the Danny Keysar Child Safety Notification Act. Danny, whose parents founded Kids In Danger, died in 1998 when the portable crib he slept in at a child care center collapsed and strangled him. The crib had been recalled five years earlier, but no one at the child care center, including the mom who donated the crib, had heard of the recall. Too many consumers never hear about a recall of a product that they have in their home. In fact, only 10 to 30 percent of product recalls receive a consumer response. This leaves most consumers in contact with recalled products. Registering products is an important step that will increase the number of consumers who hear about a recall.

IV. Proposed Revisions in Discussion Draft

We understand that the Discussion Draft was written in response to requests for flexibility and exceptions from many CPSIA provisions raised by various manufacturer and retailer entities, including micro businesses, large corporations and trade associations. The CPSC itself has requested additional discretion to implement certain CPSIA provisions, particularly regarding the lead requirements. We are open to discussions about finding ways to address the precise needs of

micro-businesses while also protecting public health. However, this Discussion Draft goes well beyond additional discretion and weakens, eliminates or alters significant provisions of the CPSIA, rendering them vastly less protective of the public health and consumers. The most significant successes of the CPSIA are weakened significantly by this Discussion Draft. This Discussion Draft is not narrowly tailored but rather carves gaping loopholes in the consumer protections created by the CPSIA. I will discuss our concerns with the Discussion Draft section by section.

1. Definition of a Children’s Product- Protections Must Remain for Children 12 and Younger

We oppose an effort to weaken the scope of the protections in the CPSIA. The Discussion Draft rejects the current scope of CPSIA and instead implies that only those products for children of some younger age, we presume, should be afforded protections by the CPSIA. This approach of covering fewer children was rejected by Congress when it passed the CPSIA. Congress embraced the belief that there is a “shared toy box” in many families’ homes. We agree with this view, as it reflects the reality of what we know to be true in many homes across the United States. Children of younger ages play with the toys of their older siblings. Younger children mouth their older siblings’ toys. The implications of this change are significant. No matter how conscientious a parent, or how well educated the family is about segregating toys for each child, it is inevitable that younger children will obtain access to older children’s toys. School aged children are at risk from lead exposure and from hazards posed by powerful magnets in toys. If those toys are not required to meet any lead limit, or meet the standard for magnetic toys, the potential for harm is large and the potential for consumer concern is also considerable.

Further, the voluntary standard for toys – ASTM F 963 – includes an even broader scope to cover toys intended for children under 14. This means that many companies are already complying with voluntary safety standards that encompass toys intended for children under age 14. Thus, the reality that children’s toys and products are often shared by children within a family, plus the fact that many within the industry are already complying with a higher age standard, requires the scope of the CPSIA to remain as it is.

2. Application of Lead Limit

Section 2(a) of the Discussion Draft extends the limit for compliance with the 100 ppm lead limit and technological feasibility analysis for an additional year. We oppose this provision. At a recent CPSC hearing on this issue, many organizations testifying stated that testing to 100 ppm was technologically feasible and that companies were already complying with that standard. Companies have also had almost 3 years to prepare for compliance with the 100 ppm standard. There is no justifiable reason to delay this standard.

Section 2(b) of the Discussion Draft reverses the CPSIA’s requirement that all children’s products meet the new lead limits, and then requires only certain categories of products, established by CPSC at their discretion, to be subject to any lead limit. Rather than applying the lead limits to all children’s products and excluding only a select few, this provision would establish a new, less protective standard for many categories of children’s products. Except for the few categories that have to meet the current CPSIA lead limits, the rest would only have to meet a higher allowable lead limit of 600 ppm lead only if CPSC holds a hearing and makes a determination that lead in that product or class presents an unreasonable risk to children’s health.

We oppose this provision for numerous reasons. First, the lead limit of 600 ppm is too high and children’s products are already easily meeting the current 300 ppm standard; second, “unreasonable risk to children’s health” is not defined; and third, CPSC has so much discretion as to what to cover in this section that it is unclear what in fact would be covered and in what time-frame. This approach gives neither adequate protection to public health nor assurance to parents and caregivers that they can trust the products they bring into their homes – a problem that helped spur passage of the CPSIA in the first place.

Section 2(c) of the Discussion Draft changes the current language to apply the lead limits to the date of manufacture (as opposed to the date of sale). Unfortunately, because this provision modifies section 101(a), it means that manufacturers are allowed to sell their stock of products that do not even meet the 600 ppm limit if their products were manufactured before February 2009. This provision goes too far in allowing products with dangerously high lead limits to be sold to consumers. Any gains that were made in re-establishing trust in the safety of children’s products would be diminished. Consumers may have no way of knowing what lead limit a product on the shelf would meet, if any, further confusing consumers trying to protect their children from lead exposure.

a. Alternative Limit and De Minimis Exception

Section 2(d) rejects the previous bright line test for lead and eliminates section 101(b)(1) of the CPSIA by establishing new alternative limits for metal products and establishing a “de minimis” exception for all other materials.

i. Alternative Limits

The alternative limit for children's products made of steel, copper, or aluminum alloys would be some level yet to be determined that is measured in parts per million unless the product or part is a small part or can break and create a small part. For these small parts made of metal, the limit would be 100 ppm if found to be technologically feasible. Unfortunately, this language is problematic. While the 100 ppm standard is consistent with CPSIA and thus does not weaken current law, it is important to know what the lead limit is for non-small part metal products. Raising the amount of allowable lead in metal items that are not "small parts" is a concern, because children mouth larger products. In addition, this language would expose children to higher levels of lead and not seek to minimize exposure from other parts of that same product even if these products involve common hand-to-mouth interaction by children.

For all non-metal products, if the product is a small part or can break and create a small part, it would have to meet the 100 ppm standard if it is technologically feasible. This section does not change the current 100 ppm limit, but it only applies to small parts and not to other non-metal children's products such as vinyl books or bibs that are often mouthed by children.

The Discussion Draft also makes an unsupportable distinction between choking hazards and non-choking hazards. Under long-standing law, all products intended for babies, toddlers and young children cannot contain small parts, a provision that was not altered by this Discussion Draft. Thus, products designed to be mouthed by babies such as teething rings, baby spoons and sippy cups would fall outside of the 100 ppm test and fall under the "de minimis" standard unless they contained metal, which could expose children to higher lead levels. To protect children from

lead in such non-small-part containing products, the Discussion Draft requires CPSC to undertake extensive review—all for a well known, well documented neuro-toxin.

ii. De Minimis Standard

The definition of “de minimis” is not defined other than being measured in micrograms per day and requires a rulemaking by the CPSC to be revised. This would require a complex risk assessment to determine the exposure level and would require many assumptions to be made that could be incorrect. The testing for this type of exposure limit is time consuming, expensive and subject to inaccuracies, poor repeatability and reproducibility making compliance a challenge unwelcome by the CPSC, retailers, and industry alike. It puts CPSC in the position it was in before CPSIA passed—unable to direct its resources to protect consumers from known and significant hazards. The current requirement for measuring total lead content is a clearer, less expensive, and quicker method for determining compliance with lead limits.

Section 2 of the Discussion Draft also requires the CPSC, by rule, to establish a methodology for estimating lead ingestion. We see at least two problems with this approach: CPSC is not required to do this in a certain time period, which leaves rulemaking open to long-term delays; and CPSC is directed only to distinguish between parts that can be placed in the mouth and parts that cannot be placed in the mouth. In the absence of a methodology promulgated by CPSC, any reasonable methodology that is documented is acceptable to estimate lead ingestion. As a result, unless and until the CPSC establishes a new lead-ingestion limit, a manufacturer can use almost any test, no matter how weak, to assess the danger posed to a child who ingests lead in a component part. The lack of a time frame and the lack of a standard provided to estimate lead ingestion is not protective of the public health.

Finally, the “de minimis” provision also reverses the presumption for the safety of products and allows products to be sold and be exempt from testing for lead unless the CPSC finds otherwise. This would mean that the CPSC would not have to act until a child had been harmed by a lead-laden product or until an entity tested the product and brought it to the attention of the CPSC. This is a profoundly misguided approach because almost all lead exposure except for acute lead toxicity silently impacts victims - decreasing IQ points and affecting behavior. As we witnessed in the years before the CPSIA, the record number of lead-laden products that were sold and later recalled from the market proves that this approach resulted in an unreasonable risk of injury to consumers. The approach to lead-laden children’s products proposed in this Discussion Draft will amount to a waste of Commission resources, has been rejected by Congress previously as not being sufficiently protective of public health, creates uncertainty for consumers and for manufacturers, and far exceeds the flexibility that the CPSC requested.

b. Lead Limit Application to Used Children’s Products

This provision further weakens the lead standard by establishing that the lead limits do not apply to certain used children’s products. While this provision is based upon language in the Consumer Product Safety Enhancement Act, (CPSEA) a bill introduced last year by Representative Waxman to narrowly address concerns raised by certain product safety stakeholders, it limits the consumer protections in the original language that exempted vinyl products from this provision and removes CPSC’s discretion to add other products to this list.

3. Section 3- Application of Third Party Testing Requirements

The third party testing provision of the CPSIA will be eliminated almost entirely by the Discussion Draft. The Discussion Draft does preserve third party testing for lead in paint; full

size cribs; non full size cribs; pacifiers; small parts; and children’s metal jewelry.² This provision makes it very difficult for CPSC to require third party testing for other products beyond this limited list of products. CPSC is permitted to issue a rule to require third party testing for a product, but that rule can only move forward if CPSC has completed an accreditation of conformity assessment bodies and determined the adequacy of the testing capacity of the accreditation bodies. Further, the rulemaking must consider the costs of the regulation and be limited by imposing the “least possible burden” of the costs of regulations while ignoring the benefits of lives saved, injuries avoided or health care costs reduced as a result of the testing requirement. Further, no time-frame is established for these rulemakings.

This section also enumerates those products that can never be required to undergo third party testing: works of art and one of a kind products; specialty products for the disabled (all are not defined); and products that are produced in such small quantities that the cost of testing by an independent third party is not “economically practicable.” The definition of a small quantity is yet to be determined. This provision no longer requires CPSC to promulgate the “15 Month Rule.” This so-called “15-month rule” is important because it ensures that manufacturers are continually testing their products to the most up-to-date standards, and that safety is not slipping through the cracks in later batches of product runs.

Independent third party testing is proactive, and is better for both consumers and manufacturers: it builds safety into the supply chain early on, with the intent of avoiding the need for expensive recalls *after* children have been injured or killed. We understand that a narrowly targeted exception to the third party testing provision may be the only solution for small batch

² Unfortunately, even within this small list there is ambiguity: for cribs, a robust standard was promulgated by CPSC in December 2010—a significant success of the CPSIA. This Discussion draft, however, at the end of this section, prohibits CPSC from enforcing standards that became effective after August 14th 2009 and further references a portion of the Code of Federal Regulations that has since been moved, rendering the status of the standard to which cribs would be tested in question.

manufacturers who make few products and cannot absorb costs of testing, and we are willing to have a discussion about this issue. However, with the definition of small batch manufacturer still undefined it is impossible to determine the appropriateness of this relief for truly small manufacturers. Further, it is unreasonable to provide exemptions for an undefined class of products, called “specialty products for the disabled.” Children in the disability community are more likely to mouth products at older ages. Products for this community should be tested to prove compliance.

Further, this provision overreaches by eliminating third party testing for all but a few product categories. In particular, the fact that all infant durable products other than cribs will not be subject to third party testing is untenable.

Finally, third party testing is not a new concept. Many retailers rely upon third party testing results before stocking their store shelves. Some toy manufacturers have used third party conformity assessment laboratories for compliance testing for many years. The CPSIA appropriately applied a testing requirement to all children’s products subject to mandatory standards, and created minimum testing criteria.

4. Section 4- Application of and Process for Updating Durable Nursery Products

Standards

This provision requires cribs in licensed child care facilities to comply with the new crib standard but does not require these child care facilities to comply with revisions to this standard in the future. While we understand that the cost of replacing cribs can be a significant challenge, CPSC has already recognized this and has given child care facilities until late 2012 to comply

with this standard. CPSC should be given discretion to require compliance with future revisions to the crib standard in case there are significant changes that address emerging hazards.

Even more critical is the concern that fixed-side cribs in child care facilities will not be required to meet the new crib standard if certain state or local laws are in place. These laws that are purported to make up for crib dangers include: that a child cannot be in crib for substantial periods if awake; a child over 12 months of age cannot be in the crib; and a requirement that adults are present when an infant is in the crib. Unfortunately, the supervision required by state laws cannot prevent the often silent deaths and injuries when babies are in hazardous cribs. In addition, these state laws frequently vary for center-based versus family-based child care. Further, focusing solely on removing drop-side cribs misses many other hazards that the new crib rule addressed such as hardware failures, material integrity problems, mattress support failures, slat distance hazards and corner posts. This provision drastically weakens the consumer protections in the CPSIA and will put babies at risk.

The Discussion Draft includes a provision for updating infant durable safety standards. While it relies on the text of the CPSEA, it differs by eliminating a provision allowing CPSC to issue a standard that is more stringent and more protective of the public health than the revised voluntary crib standard. CPSC must be able to revise a standard in a way that best protects the public health. Tying the agency's hands in this way is not in the public interest.

5. Section 6-Application of Phthalate Standard

Section 6 amends the CPSIA's phthalate provision in a variety of ways. Most significantly, it creates large exemptions where, by rule, CPSC can carve out toys or child care articles from both the prohibition and interim bans where the Commission finds "compliance with the prohibition is

not necessary to protect children’s health,” and makes the provision prospective, allowing manufacturers to sell their non-compliant products. In contrast to every other rulemaking this Discussion Draft requires, this provision includes a very tight timeline, including a time by which a rulemaking must be started that makes a rule almost impossible to complete.

The phthalate provision in CPSIA protects our children from the cumulative risks of hormonal chemicals that affect genital development and have been associated with testicular cancer and other fatal diseases and serious conditions. Narrowing the definition of the scope of the products covered by the phthalate provision, creating large opportunities to exempt products from coverage and making a rulemaking difficult to accomplish successfully will undermine the health protection of the original phthalate provision of the CPSIA.

6. Section 7- Exemption Authority for Tracking Labels Requirement

Section 7 gives CPSC the ability to exclude products or classes of products from tracking label requirements if CPSC determines that it is not “economically practicable” to have tracking labels, and allows CPSC to establish alternatives for those products exempted. When a product poses a hazard to a consumer, a consumer needs information to notify CPSC and the manufacturer of the hazard and CPSC must be able to identify products. In fact, it is this type of information that manufacturers argue is necessary for filing “complete” reports to the database. When Liam Johns died in 2005, his crib, made by Simplicity, but labeled “Graco” went uninvestigated for two years because of confusion resulting from a lack of information on the product. At least two other babies died during this time. Especially because of the high rate of licensing in children’s products, tracking labels are imperative, both to adequately identify a product involved in a hazard and to accurately report to the database or manufacturers. Tracking

labels provide critical information and this Discussion Draft creates a mechanism through which manufacturers may not have to comply with this provision.

7. Section 8- Database

The consumer incident database is a significant success of the CPSC. Yet this Discussion Draft goes far in limiting the utility and the benefit of the database. The flaws in this section are many: it limits who can report, unnecessarily increases the types of information consumers must report before their complaint can be considered for posting, requires consumers to unwittingly engage in a dialogue with the manufacturer about the reported harm rather than simply reporting the incident to the CPSC; stays the reporting of information until final decisions about the sufficiency and accuracy of the information are made; and will substantially increase the time it will take for information to be posted publicly. This goes much too far and will act to discourage reporting by consumers to the database.

Like other efforts to minimize the effectiveness of the database, this Discussion Draft narrows the definition of who can successfully report to the database, permitting essentially only those related to the person who suffered harm or else requiring authorization by that person, as well as changing the definition of a public safety entity to exclude consumer groups, among others. Among many other new confounding requirements, the provision now allows for another claim of “insufficiency of information,” that is not defined and not necessary. This claim of “insufficiency” is ripe for abuse by manufacturers seeking to suppress information about their product. This provision fails to take into account a consumer’s limited time to report such harm and a consumer’s desire, especially one who suffered a loss as a result of a product hazard, to not want to engage in a conversation, which may or may not be respectful, with a manufacturer.

Finally, this provision makes it a prohibited act for a consumer to misrepresent information submitted in the database. This provision is unnecessary, given that the database already requires verification of the accuracy report by the submitter. This Discussion Draft clearly rejects the need for transparency and seeks to maintain the status quo by rendering the database imbalanced in favor of maintaining the secrecy of harms resulting from use of consumer products.

8. Section 11- Effective Date

The final provision of the Discussion Draft makes this entire bill retroactive to August 2008. We oppose this provision due to its vitiation of critical consumer protections that have already taken effect and rules already promulgated.

V. Conclusion

This Discussion Draft is a broad attack on the most important provisions of the CPSIA: it narrows the scope of products covered by the CPSIA; weakens the lead standard; drastically limits third party testing requirements; allows unsafe cribs to be used in child care facilities, limits the phthalate provision; preserves the secrecy of harms caused by consumer products by making the database less useful and more difficult for consumers; requires rulemakings while not requiring timelines except in one instance that makes compliance untenable and renders the entire Discussion Draft retroactive. Unfortunately, this moves back the clock on safety and puts children at risk.