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Joan Claybrook, President

January 24, 2007

The Honorable Harry Reid, Senate Majority Leader
The Honorable Richard J. Durbin, Senate Majority Whip
The Honorable Mitch McConnell, Senate Minority Leader
The Honorable John L. Kyl, Senate Minority Whip
The Honorable Daniel K. Inouye, Chairman, Senate Committee on Commerce
The Honorable Ted Stevens, Ranking Member, Senate Committee on Commerce
The Honorable Mark Pryor, Chairman, Senate Subcommittee on Consumer Affairs
The Honorable John E. Sununu, Ranking Member, Senate Subcommittee on Consumer Affairs

Re: S. 2045 - The Consumer Product Safety Reform Act

Dear Senators:

We are pleased to enclose a memorandum comparing the major provisions of the House and Senate Consumer Product Safety Reform legislation. This comparative analysis will, we hope, be helpful to you and your staffs in your final development of this crucial legislation. In general we find the Senate bill is stronger and will be more effective in protecting the safety of children and all consumers. There are a few areas where the House bill is better for consumers, which we have noted in our memorandum.

We urge you to make passage of this legislation a priority early in this session of Congress and would be pleased to furnish further information on this legislation to you, if this would be helpful. The Senate and the members of the Senate Commerce Committee and Leadership are to be commended for their outstanding work thus far on S. 2045.

Sincerely,

David Arkush
Director, Congress Watch

Mike Lemov
Senior Legislative Counsel

cc: The Members of the Senate Commerce Committee

Auto Safety Group • Congress Watch • Energy Program • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

MEMORANDUM

To: The Senate Leadership and Senate Commerce Committee
From: Joan Claybrook
David Arkush
Mike Lemov
Graham Steele
Public Citizen
Date: January 24, 2008

Re: Consumer Product Safety Reform/Modernization Act: Comparison of Major House and Senate Provisions – S. 2045; H.R. 4040

EXECUTIVE SUMMARY

The following is a comparison of the major differences between the consumer product safety bill passed by the House of Representatives and the bill reported by the Senate Commerce Committee. The House bill contains a few provisions that are better for consumer safety than those in the Senate bill. But the Senate Committee bill is preferable in most respects. It provides stronger penalties for violations, more resources for the Consumer Product Safety Commission ("Commission" or "CPSC"), and requires pre-market testing for more children's products.

This memorandum analyzes eleven major provisions of the two bills and provides our recommendations which are summarized as follows:

- Providing the public with as much information as possible about potential safety hazards is a vital step in protecting safety. The Act should advance this goal by eliminating the threat of manufacturers' lawsuits to prevent CPSC disclosures, mandating the creation of a publicly available incident database, and permitting the Commission to disclose product safety hazards to the public immediately.

- Children should be protected by a requirement that all products intended for use by children twelve years of age or younger be tested for compliance with CPSC rules and regulations and voluntary toy safety standards (subject to upgrading by the Commission). Testing should be conducted by truly independent laboratories and before products can be placed on the market.

- The current $1.825 million limit on civil penalties for product safety violations is grossly inadequate. Manufacturers and importers must be deterred from committing product safety violations by a civil penalties provision with either no maximum civil penalty or a cap of $100 million for any related series of violations.

- Accountability for safety hazards should be promoted by removing pre-notification of violations as a condition to criminal liability and rejecting the proposed grant of criminal immunity under the Federal Hazardous Substances Act for reporting safety hazards in the House bill.

- Product safety enforcement will be improved substantially by permitting state Attorneys General to seek all available statutory remedies when bringing civil actions on behalf of states and citizens for violations of acts within the CPSC's jurisdiction.

- States should not be stripped of their powers, and private citizens their right to redress, through preemption of state law. The preemptive scope of Commission-enforced statutes should be limited to situations in which compliance with both state law and federal statutes is impossible.

- Dangerous products should be removed from the hands of consumers as quickly as possible through efficient mandatory recall procedures and the elimination of the formal trial-type hearing for Commission-ordered recalls.

- The Commission should be provided with tools to confront the current and emerging threat posed by dangerous products, including imports, which CPSC is ill-equipped to address because it was established in 1972 when the vast majority of U.S. consumer goods were made in the United States. The CPSC should be given authority to require the posting of a bond to cover the cost of certain product recalls, refer import brokers engaged in repeat offenses to Customs for license revocation, and temporarily hold potentially hazardous products at the border for inspection and testing.

- Children must be protected from serious, long-term harm caused by repeated exposure to lead. The Commission should be mandated to immediately adopt the lowest lead standard that is technologically feasible.

- Employees of private industry who provide the government with information concerning product safety violations should be shielded from retaliation through broad whistleblower protection.

- The CPSC should have adequate resources to carry out its mission of market oversight and enforcement, starting with a series of budget increases that reach would reach $152 million by the year 2014 and benchmarks for increased staff.

LEGISLATIVE PROVISIONS AND RECOMMENDATIONS

1) Public Information on Safety Hazards.

S. 2045: Section 7 of the Senate bill eliminates a manufacturer's right to bring suit in federal court to enjoin public disclosure of safety information, replacing it with an internal appeal to CPSC General Counsel and the Commission. The bill also creates exemptions from the Act's prohibition on disclosure when the Commission has reasonable cause to believe that a consumer product is in violation of CPSC regulations or CPSC-enforced statutes; when the Commission determines that the public health or safety requires immediate disclosure; or when a "substantial product safety hazard" exists. It also reduces from 30 to 15 days the mandatory delay in releasing information for review of accuracy and fairness.

H.R. 4040: Section 205 of the House bill preserves the manufacturer lawsuit provision, 15 U.S.C. § 2055(a)(6). It would modify the requirements for public disclosure of information to permit immediate disclosure of information concerning product safety hazards where the Commission determines that public health and safety requires prompt disclosure. Like the Senate bill, the House bill reduces the delay for review of information for accuracy and fairness from 30 days to 15 days. Section 206 authorizes a study by CPSC on "the volume and types of publicly available information on incidents involving consumer products that result in injury, illness, or death and the ease and manner by which consumers can access such information[,]" and requires the CPSC to submit an improvement plan containing an implementation schedule for a searchable internet database of such incidents; recommendations for any necessary legislation; and plans for a public awareness campaign regarding such database to Congress within 180 days of enactment.

Comment: The delay between a manufacturer first being notified of a potential product safety hazard and eventual public notification and recall often lasts months and can sometimes last years. See Appendix A. These delays are troubling because they expose the public to known risks of serious injury, death, and property damage. By removing the manufacturer lawsuit provision, the Senate bill eliminates one barrier to disclosing public information concerning safety risks in toys and other consumer products. This is a significant improvement over existing law. The Senate bill also provides the Commission with greater authority to disclose public safety information. The reduction in time for the review of the fairness and accuracy of information, provided for in both bills, will also help reduce unreasonable delays in releasing information to the public.

Neither bill establishes a public safety database with information on hazardous products to be made public, such as that proposed by Rep. Markey (D-MA) at the House Committee mark up. This consumer "early warning" system would be similar to the reporting requirement for incident and claim data involving automobiles in the TREAD Act, see 49 C.F.R. § 579.29. A database similar to that proposed by Rep. Markey would permit consumers to use public information to protect themselves against documented hazards. Appropriate disclaimers should be included in the database to alert the public to the preliminary nature of the data.

Finally, the House provision permitting immediate disclosure of safety hazard information from Section 15(b) reports should be applied to all safety data subject to Section 6(b) to ensure consistency between the two provisions. The legislation should also track the broader disclosure language in Section 7(b)(3) of the Senate bill, which provides for public dissemination of information concerning products which the CPSC believes violate Commission-issued rules or regulations, or any Commission-enforced Act; where the CPSC determines the public health and safety requires immediate disclosure; or where a substantial product safety hazard exists.

2) **Pre-market Testing of Toys and Children's Products.**

S. 2045: Section 10 of the Senate bill mandates pre-market testing for children's products (excluding medications, foods or drugs) that are intended for use by children under seven (7) years of age and are subject to consumer product safety rules or standards. Testing must be conducted by a "third party laboratory." However, the Commission may certify a proprietary laboratory that is owned, managed, controlled, or directed by a manufacturer or labeler to conduct testing. Sixty days after enactment, Section 30 of the bill makes mandatory the International Standard F963-07 for toy safety, developed by the American Society for Testing and Materials (ASTM).

H.R. 4040: Section 102 of the House bill requires pre-market testing for children's products intended for use by children twelve (12) years of age and younger and thus applies to more products and affects more children. Like the Senate bill, testing is limited to children's products that are subject to existing federal rules under any Commission-enforced act and testing may be conducted by a laboratory owned, managed, controlled, or directed by a manufacturer or labeler. Section 104 requires the Commission within one year of enactment to begin promulgating safety rules, in accordance with notice and comment rulemaking procedures under 5 U.S.C. § 553, concerning durable infant or toddler products. In promulgating these rules, the Commission must consider input from consumer groups, juvenile product manufacturers, and independent child product engineers and experts. Final rules must be substantially similar to existing voluntary standards, or may be more stringent so long as the Commission determines that such standards would reduce the risk of injury more effectively.

Comment: In 2007 there were over 61 CPSC safety recalls affecting over 25 million toys and children's products. Given both the magnitude of this problem and the vulnerability of children, the toy safety provisions of both bills should be strengthened. While the 12-year-old age limit for children's products contained in the House bill is preferable, both bills only require testing of children's products that are subject to Commission-enforced rules or regulations. This is insufficient because there are relatively few of these rules, and they generally do not address emerging hazards, substantial hazards not subject to any standard, or hazards addressed in ASTM and other consensus standards.[1] ASTM standards should be made

[1] For example, according to Commission figures, industry, scientists, and the CPSC (sometimes with limited consumer input) participated in the development of 352 voluntary safety standards between 1990 and 2006. CONSUMER PROD. SAFETY COMM'N, 2007 PERFORMANCE BUDGET 3 (Feb. 2007) available at http://www.cpsc.gov/cpscpub/pubs/reports/2007OperatingPlan.pdf. Over that same period, the CPSC issued a mere 36

mandatory, as the Senate bill provides. However, the Commission should be required to review and amend the standards through notice and comment rulemaking when necessary, as the House bill provides regarding durable infant product standards.

The authorization of "in-house," company-owned testing laboratories provided for in both bills undermines the goal of independent pre-market testing. Copies of laboratory safety reports should be furnished to the CPSC in order to prevent "laboratory shopping" and undue pressure on laboratories' findings.

3) Civil Penalties.

S. 2045: Section 17 of the Senate bill increases the current maximum civil fine for a related series of safety violations from the existing maximum of $1.8 million to $100 million.

H.R. 4040: Section 215 of the House bill increases the maximum civil fine to $5 million for one year after enactment and $10 million thereafter. It also requires the Commission, after a hearing under 5 U.S.C. § 553, to issue regulations within one year of enactment interpreting the statutory factors that govern the assessment of civil penalties under the CPSA, FHSA and FFA.

Comment: The $10 million cap in the House bill is grossly inadequate to induce compliance with the law. The Commission rarely seeks anything but a small fraction of the maximum civil penalty allowed by law. Also, some recalls themselves cost far more than the $10 million maximum, and profit margins on many lines of consumer products far exceed any potential penalty. When the benefits of non-compliance vastly outweigh the costs of compliance, manufacturers have little to no incentive to comply with the law. Meaningful civil penalties are one of the major enforcement tools under the Act, substituting for an understaffed federal agency by providing a strong disincentive to potential violators of any Commission rule or order. An effective bill would place no maximum on civil penalties, or at least provide a higher cap of $100 million for any related series of violations, as provided in the Senate bill.

4) Criminal Penalties.

S. 2045: Section 17 makes "knowing" violations of Section 19 of the CPSA and other Commission-enforced statutes punishable by up to one year of imprisonment and makes "knowing and willful" violations punishable by up to 5 years' imprisonment. The Senate bill also eliminates the "willful" element of the scienter requirement for violations by officers and directors, subjecting corporate officers to criminal liability for "knowing" violations of the Act. Most importantly, the Senate bill removes the provision requiring the Commission to notify an actor that a violation has occurred before a criminal prosecution may be instituted. Asset forfeiture is also included as a potential criminal penalty.

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mandatory rules. Id. Under both bills, the only children's products subject to testing would be those governed by the 36 mandatory rules, along with any rules that were already in existence or would be made mandatory by these bills, leaving products subject to the approximately 352 voluntary standards unaffected.

H.R. 4040: Section 208 grants persons filing required substantial hazard reports criminal immunity from prosecutions under the Federal Hazardous Substances Act, with the exception of offenses that include an element of intent to defraud or mislead. Under Section 216, asset forfeiture is also included as a penalty. The House bill does not change the "knowing and willful" scienter requirement and preserves the pre-notification of criminal action requirement.

Comment: Some have argued that the requirement of the CPSA that corporations report product safety violations might violate the Fifth Amendment privilege against self-incrimination, but this argument has no basis in law. Corporations have never had Fifth Amendment rights under the Constitution. See Memorandum of law, Appendix D. The provision of the House bill providing immunity from prosecution merely for providing information that the law requires to be disclosed is unprecedented and unsound. This would offer immunity from criminal charges to producers that sell hazardous products such as dangerous fireworks, toxic toys, and cancer-causing home materials in clear violation of criminal law.

Although we appreciate the desire to encourage manufacturers to disclose product safety hazards when discovered, the immunity provision in the House bill does not further this policy. Under either bill, a company must violate the law at least "knowingly" before criminal liability will attach. (Under the House bill, a violation also must be "willful.") Because of these state-of-mind requirements, liability does not attach for unknown violations. Therefore, the criminal liability provisions do not deter companies from reporting newly discovered hazards, and granting immunity to those who disclose violations does nothing but provide a means of avoiding accountability to those who knowingly or even intentionally violate the law. There is no basis for weakening the Federal Hazardous Substances Act by building into it a procedure for violating criminal law with impunity. We are unaware of any federal statute that provides an advance grant of criminal immunity merely for complying with the law.

The criminal provision of the CPSA is also gutted by the pre-notification, "free bite at the apple" provision. This provision was unprecedented when it was enacted in 1972, and remains so. Under current law, a person is subject to criminal liability for "knowingly and willfully" committing a prohibited act "after having received notice of noncompliance from the Commission[.]" 15 U.S.C. § 2070. This is not a context in which notice is required because there is a danger that someone might commit an illegal act through no fault of their own. The CPSA section concerning prohibited acts contains specific criteria for determining whether an action is unlawful, see 15 U.S.C. § 2068, and corporations have counsel with intimate knowledge of regulatory law. The requirement of prior notice essentially only hampers enforcement, creating a hurdle for CPSC enforcement and giving the violator either one free pass or many passes, depending on the number of violations that occur before the Commission becomes aware of them and notifies the manufacturer. The Senate's elimination of this provision is an important step forward in protecting consumers.

Furthermore the "knowing and willful" requirement contained in the House bill is the highest level of criminal intent. Proving "willful" conduct requires proof at trial that the actor had knowledge of the facts constituting the offense and had knowledge that his conduct was unlawful. See Dixon v. United States, 126 S. Ct. 2437, 2441 (2006). Intent is often extremely

difficult to prove because it can rarely be shown by direct evidence, but rather requires reliance on circumstantial evidence and reasonable inferences from whatever facts are available. See United States v. Wells, 766 F. 2d 12, 20 (1st Cir. 1985). This standard thus frustrates the possibility of the Commission holding wrongdoers accountable. The result has been that criminal sanctions for "knowing and willful" violations are virtually non-existent, having rarely been used in the 35 years of the Commission's existence. The Senate bill's change to a "knowing" standard would retain a high hurdle for prosecution but also make the criminal liability provision somewhat more effective, therefore creating a greater disincentive to engage in wrongful acts and improving consumer safety.

The Memorandum attached as Appendix D further discusses the issues of criminal immunity for manufacturers who file required reports, the lack of any corporate right to a legal claim of Fifth Amendment privilege against self-incrimination, and other federal statutory reporting requirements.

5) State Attorneys General enforcement.

S. 2045: Section 21 authorizes state Attorneys General to bring civil enforcement actions under any Commission-enforced statute for all penalties and relief provided by such acts. Suits are authorized in any case where there is reason to believe that the interests of the residents of the state have been, or are being, threatened or adversely affected by a manufacturer, distributor, or retailer that violates a CPSC-enforced statute.

H.R. 4040: Section 217 of the House bill permits state Attorneys General, alleging a violation that affects or may affect such state or its residents, to bring an action to enforce a consumer product safety rule or an order under Section 15, with available relief limited to injunctions.

Comment: The CPSC's resources fall far short, and will likely continue to fall short, of what are needed to ensure enforcement of its regulations and statutes. We support permitting states to bring civil actions on behalf of state residents to enforce provisions of acts under the Commission's jurisdiction because the state Attorneys General can serve a key role in protecting the public safety. This critical oversight and enforcement tool will provide consumers with additional protection from potential product safety hazards, deter the marketing of hazardous products, and help injured consumers obtain redress for harm suffered. The Senate bill is more effective in this respect because it provides state Attorneys General with all remedies available to the Commission to achieve these purposes. The Senate bill's authorization of state Attorneys General enforcement of any violation of a CPSC-enforced statute is broader than that of the House bill, which authorizes suits only for violations of CPSC-issued rules or regulations.

State Attorneys General are well-suited to enforce the provisions of this law, since they are provided enforcement authority under other federal statutes and are responsible for enforcing

their own states' consumer protection statutes, including many safety statutes.[2] Over 35 Attorneys General have voiced support for the inclusion of full enforcement powers in this legislation as provided in the Senate bill. See Appendix E.

6) Preemption.

S. 2045: Section 18(a) of the Senate bill states that the preemption sections of all of the Commission-enforced statutes may not be expanded or contracted in scope, or limited, modified or extended in application, by any CPSC rule or regulation, or by reference in a preamble, statement of policy, executive branch statement, or other matter associated with the publication of a rule or regulation. Subsection 18(b) attempts to clarify the preemption provisions of the Commission-enforced acts by providing that such acts "shall be preemptive of any State or local law, or any cause of action under State or local law, only to the extent provided in those Acts unless compliance with duties imposed by State law would make compliance with the Federal rule or regulations promulgated under those Acts impossible."

H.R. 4040: Section 218 of the House bill, like Section 18(a) of the Senate bill, prohibits the CSPC from using the issuance of a rule or regulation to expand or contract the scope; limit, modify, interpret, or extend the application of the preemption sections of any Commission-enforced statute with respect to how such act preempts, limits, or otherwise affects any other Federal, State, or local law; limits or otherwise affects any cause of action under State or local law.

Comment: In view of recent Commission efforts to preempt State common law, it is important to include a provision clarifying that Congress has not granted the CPSC the authority to interpret the preemption provisions of Commission-enforced statutes or to issue opinions on whether the substance of federal law conflicts with, and therefore preempts, state law. As recently as 2006, the Commission issued a preamble to its rule concerning mattress flammability standards stating that the rule preempts inconsistent "court created requirements." The Commission took this position in spite of far more persuasive legal arguments to the contrary, exemplified by CPSC Commissioner Thomas Moore's statement concerning the flammability rule and the express language of the CPSA. He stated that agencies should stay out of the business of trying to reading more into the language a preemption statute than is there, and that agencies should not attempt to preempt civil lawsuits that often have informative value for agencies regarding whether the agency has issued sufficiently stringent regulations and is providing effective oversight. See Appendix F.

Senate subsection 18(b), addressing the Act's preemptive effect, is essential to clarify congressional intent on preemption for the courts, with a minor correction of the language to ensure that is it read properly. We recommend the following revision to simplify and clarify the provision:

[2] Federal statutes with provisions granting broad enforcement authority to state Attorneys General include the Food, Drug and Cosmetic Act (21 U.S.C. § 337), and the Safe, Accountable, Flexible, Efficient Transportation Equity Act ("SAFETEA") (49 U.S.C. § 14711), as well as the two statutes mentioned in the Attorneys General letter at Appendix E.

(b) CLARIFICATION OF PREEMPTION. – With regard to the Consumer Product Safety Act (15 U.S.C. 2074 and 2075, respectively), the Federal Hazardous Substances Act (15 U.S.C. 1261), the Poison Prevention Packaging Act (15 U.S.C. 1476) and the Flammable Fabrics Act (15 U.S.C. 1203) or any other statute administered by the Commission, any action by the Commission shall not preempt any State or local law, or any cause of action under State or local common law, unless compliance with duties imposed by State law would make compliable with any Federal rule or regulation promulgated under those acts impossible.

We support a provision similar to the Senate language with the above suggested revision included. This clarifying language will ensure that the preemption sections of Commission-enforced statutes continue to have the effect intended under existing law, as was emphasized in the House Commerce Committee report. See H.R. REP. NO. 110-501, at 43 ("Tort actions based on negligence are predicated on procedures and standards developed over hundreds of years of American and English jurisprudence. The preemption provisions of the statutes under the jurisdiction of the CPSC are clear, and State common law actions and standards are not preempted.")

7) Mandatory Recall Procedures.

S. 2045: The Senate bill currently has no provision altering the procedures provided under Section 15 of the Consumer Product Safety Act (15 U.S.C. § 2064), which require a formal, trial-type hearing under 5 U.S.C. § 554 before the Commission can order a recall.

H.R. 4040: Section 209 of the House bill authorizes the Commission halt distribution of the product and initiate an immediate recall after determining that a product is "an imminently hazardous consumer product," notifying the product's manufacturer, and filing an action in federal district court under Section 12 of the Act. The recall presumably could continue until after the district court's hearing on the imminent hazard finding.

Comment: Existing law requires a full, trial-type hearing before the Commission can order a recall. Consequently, the CSPC rarely employs this cumbersome process, choosing instead to negotiate recalls with manufacturers on a "voluntary" basis. As a result, recalls take longer and lead to greater risk of injury than they would if the Commission had a more efficient procedure for ordering recalls. Under existing law, manufacturers have little incentive to comply with Commission requests because the threat of a Commission-ordered recall is extremely remote. Consumers would be better protected from hazardous products by a law authorizing a CPSC recall after an informal hearing under 5 U.S.C. § 553, as provided in Section 5 of Rep. DeLauro's bill, H.R. 3691, which currently has 165 House co-sponsors.

8) Imported Consumer Products.

S. 2045: Section 20 of the Senate bill authorizes the Commission to require repeat offenders, manufacturers or distributors of a particular class of consumer products, or manufacturers or distributors of products regulated by the CPSC to post a bond. The amount of the bond must be sufficient to cover either the cost of a potential recall or, in the case of imports, the cost of

detention and destruction of the product. Section 15 grants the Commission permissive authority to refer a customs broker who has committed repeated offenses to the U.S. Customs and Border Protection for revocation of its broker's license.

H.R. 4040: Section 224 of the House bill requires the Commission to study and devise a strategy to enhance its ability to stop unsafe imports, and report its recommendations within nine (9) months of the date of enactment. Section 201 requires the Commission to report to Congress within 180 days with an assessment of the feasibility of mandating bonds for serious hazards and repeat offenders and certification of foreign third-party and proprietary testing facilities.

Comment: The Commission is currently ill-equipped to deal with the problem of hazardous imported consumer products, primarily because the Commission was established in 1972, when the vast majority of U.S. consumer goods were made overseas. Since then, trade agreements like WTO and NAFTA have created incentives for manufacturers to relocate production to developing country venues with inadequate safety regulatory systems. Corporations in the United States imported over $16 billion worth of toys in 2006, not including other consumer products such as appliances and bicycles. The Commission has no full-time staff working at any of the over 300 United States port of entry. Acting Commission Chair Nancy Nord has recently promised to create an Import Surveillance Division to maintain a full-time presence at some of the nation's busiest ports and assist Customs in stopping and inspecting imports. See Acting Chair Nancy Nord, Remarks Before the National Press Club 10 (Jan. 7, 2008). Notwithstanding these promised actions, providing the Commission with the bonding and revocation authorities in Sections 15 and 20 of the Senate bill would be a positive first step toward equipping the Commission with appropriate tools to combat the importation of dangerous products. Such authority is expressly endorsed by the President's own Interagency Working Group on Import Safety (IWG). See INTERAGENCY WORKING GROUP ON IMPORT SAFETY, ACTION PLAN FOR IMPORT SAFETY: A ROADMAP FOR CONTINUAL IMPROVEMENT 30-31 (Nov. 6, 2007) available at http://www.importsafety.gov/report/actionplan.pdf.

Most importantly, the Commission currently has no "hot button" authority to stop potentially dangerous products at ports of entry temporarily, as the FDA has in the case of foods, see 21 U.S.C. § 381(j), without first holding a lengthy hearing. An amendment providing such authority was proposed by Rep. Burgess (R-TX) during the markup by the Subcommittee on Commerce, Trade, and Consumer Protection. It was changed to the feasibility study now contained in the House bill. In addition to the absence of Commission authority to require bonds to cover recall costs for dangerous products, the CPSC also cannot require consent to jurisdiction in U.S. courts by foreign importers. These provisions should be added to the bill.

9) Lead levels in Children's Toys.

S. 2045: Section 23 of the Senate bill prohibits, beginning 180 days after enactment, the sale of any children's product that contains more than .04 percent lead (400 parts-per-million (ppm)) or, in the case of jewelry, contains more than .02 percent (200 ppm). The Commission may issue a regulation setting the level lower than 400 ppm and establishing a separate lead level for electronics, including batteries. The Senate bill also lowers the Commission-issued lead paint

limit from 600 ppm to 90 ppm. Section 24 mandates a study on the feasibility of establishing lead measurement standards based upon unit-of-mass-per-area in a manner statistically comparable to the parts-per-million measurement currently used in laboratory analysis.

H.R. 4040: Section 101 of the House bill prohibits, 180 days after enactment, the sale of any children's product containing more than 600 ppm of lead. Two years after the date of enactment the level becomes 300 ppm; four years after enactment the level becomes 100 ppm, unless the Commission determines, after notice and a hearing under 5 U.S.C. § 553, that 100 ppm is not feasible. In such a case, the Commission must require the lowest feasible lead level. The Commission may, by rule, revise the lead standard for any class of children's products to any level and form that it determines is more protective of human health and feasible to achieve. The Commission must periodically review the lead standard using the "best available scientific and technical information" and revise the standard to the lowest amount of lead feasible. However, the Commission may exempt certain products from the lead prohibition if it determines that the lead content of such products will not result in the absorption of lead into the body or does not have any adverse impact on public health or safety. Component parts that are part of a children's product but which are "not accessible to a child through normal and reasonably foreseeable use and abuse of such product" are exempted from the lead standard. The bill also lowers the Commission-issued lead paint limit from 600 ppm to 90 ppm, applies that standard to all children's products, and requires the Commission to issue a more protective standard within three years, if feasible. The Commission is permitted to delay, by rule, the effective date of any lead standard by no longer than an additional 180 days, but may do so only if it determines that the delay will have no impact on public health or safety and either the implementation of the standards is not feasible within the initial 180 days; the cost of implementation is excessive; or the Commission requires additional time to determine the required testing methodologies and exceptions in order to enforce the standards.

Comment: The provision in the House bill, while a step in the right direction, does not, according to medical experts, set lead levels low enough to protect children from permanent brain damage. In a letter to the House Committee, the American Academy of Pediatrics stated that there is no known safe level of lead exposure, and the damage done to a child's brain by lead is incurable and irreversible. See Appendix B. In addition to the demonstrated effects of stunting growth and damaging the brain, kidneys, hearing, and mental development, lead ingestion in infants has recently been linked to an increase in the likelihood of the onset of Alzheimer's disease. See Appendix C. As the State Attorneys General state in their letter to House and Senate Committee leadership, it is vital to the long-term safety of children that the lead levels be set as low as possible. See Appendix E.

The House bill's 180-day delay of its 600 ppm lead standard is unnecessary. In 2005, the CPSC issued advisory guidelines stating that it would seek corrective action for any children's jewelry containing more than 600 ppm of lead. Additionally, federal regulations already require that the amount of lead in paint not exceed 600 ppm. See 16 C.F.R. § 1303. Because industry has been on notice concerning the mandatory and permissive 600 ppm standards, producers should be prepared to adhere immediately to the Senate bill's 400 ppm standard.

In addition to the House bill's excessive delay in implementing initial standards, the bill gives the Commission unnecessary discretion to delay longer. We believe that the Senate lead level (.04 total weight) should be adopted upon the date of enactment, with the House provision to reduce the lead levels to 100 ppm or less within a reasonable time thereafter, not to exceed four years, if technologically feasible. The criteria for feasibility should be clarified to ensure that the Commission may only consider available technology and may not take cost into consideration. Such an interpretation is entirely consistent with the intent of the House Energy and Commerce Committee. See H.R. REP. NO. 110-501, at 29 (2007) ("When assessing whether a standard is 'feasible,' the Committee intends that the CPSC focus on the scientific advances and the technical ability of manufacturers to achieve that standard . . . Increased cost to manufacturing is not a sufficient consideration to render a standard feasible.").

In addition, the House provisions attempting to permit exemptions from the lead standard where lead is unlikely to be absorbed into the body, and allowing further exemptions for product parts that are not reasonably accessible, are not supported by current medical and scientific opinion. See Appendix B. Accessibility cannot adequately be predicted by existing testing methods because we are dealing with unpredictable use and abuse by children under 12. These provisions therefore should be eliminated or revised.

10) Whistleblower Protections.

S.2045: Section 22 of the Senate bill prohibits any manufacturer, labeler, distributor, retailer, or Federal, State, or local government employing agency from discharging or otherwise discriminating against an employee for

- providing, causing to be provided, or intending to provide information to the employer, the Federal government, or a State attorney general, any information relating to a violation or alleged violation of any order, regulation, or consumer product safety standard enforced by the Commission;
- testifying in a proceeding concerning such violations;
- assisting or intending to assist in such proceedings; or
- objecting or refusing to participate in an activity that they reasonably believed to be in violation of an applicable law or a substantial and specific danger to public health or safety.

Any employee supplying information that serves as a basis for civil penalties is entitled to compensation based upon the assessed penalty. Any employee who believes that he or she has been discharged or discriminated against in violation of Section 22 may file a complaint with the Secretary of Labor in accordance with the provided hearing process. The Secretary of Labor has authority to make findings and order remedies (including compensation for attorneys' fees).

H.R. 4040: The House bill contains no whistleblower protection provision.

Comment: Statutory whistleblower protection for Federal government employees may encroach upon the jurisdiction of the House Committee on Oversight and Government Reform, but this legislation should offer protection from retaliation to private sector employees who risk their careers to advance public safety by advising or assisting the Commission regarding

product hazards. We support the Senate provision as it applies to employees of private manufacturers, private labelers, and retailers covered by the CPSA.

11) Budget and Staffing.

S. 2045: Section 3 of the Senate bill authorizes seven years of increased funding for the Commission: $80 million for fiscal year (FY) 2009, $88.5 million for FY 2010, $96.8 for FY 2011, $106.48 million for FY 2012, $117.128 million for FY 2013, $128.841 million for FY 2014, and $141.725 million for FY 2015. Section 4 of the bill requires the Commission to increase its staff to at least 500 by October 1, 2013 and to hire 50 additional personnel assigned to U.S. ports of entry, or to inspect overseas facilities, by October 1, 2010.

H.R. 4040: Section 201 of the House bill authorizes three years of funding increases: $80 million for FY 2009, $90 million for FY 2010, and $100 million for FY 2011.

Comment: One of the most basic reasons for the Commission's woeful performance is its diminishing budget and staff. Indeed, the National Association of Manufacturers' Consumer Product Safety Commission Coalition noted in its December 12, 2007 letter to the leadership of the House Committee on Energy and Commerce that it "supports the important mission of the CPSC and has advocated for increasing its budget and resources." (Emphasis added.) The Commission received a meager $63 million in 2007 to regulate over 15,000 products and over 300 ports of entry, among its many other duties. If the level of resources that the Congress gave the Commission in 1972 had been maintained at merely the rate of inflation, the CPSC would now have a budget of approximately $150 million. The legislation's budget figures should be revised to increase authorizations by roughly fifteen percent each year, bringing the agency's budget to $115 million for FY 2012, $132 million for FY 2013, and $152 million for FY 2014. The House bill does not authorize adequate funding to bring the Commission to an effective level of performance. While the House figures offer a slightly larger increase in comparison to the Senate bill over the first three years, the Senate authorization is better because it reaches a relatively adequate funding level ($152 million) after seven years while the House does not.

Unlike the Senate bill, the House bill does not require immediate increased staffing. The Commission currently has a shrinking staff of fewer than 400 employees, down from its high of approximately 1,000 in the 1980s. H.R. REP. NO. 110-501, at 18. Since 2004, the agency has lost 15 percent of its workforce and for a time employed only one full-time toy tester, who recently resigned. Benchmarks for hiring new agency staff would provide appropriate guidance to accompany the Commission's increased resources.

Conclusion: We commend both the House and Senate for their extensive efforts to develop an effective and comprehensive bill. We appreciate your consideration of our recommendations, and we would be pleased to provide you with any additional information you may require regarding the issues discussed in this memorandum.

INDEX OF APPENDICES

APPENDIX A

DELAYS IN INDUSTRY REPORTING AND AGENCY ACTION CONCERNING UNSAFE CONSUMER PRODUCTS

Selected Examples

Manufacturer/product	Defect	Report to manufacturer	Report to CPSC	Recall	Approximate delay
Honeywell humidifiers (f/k/a Duracraft)[1]	High-limit and "float" switches could fail, preventing heater from shutting down and causing unit to emit smoke or sparks or catch on fire.	As of February 1996, 68 claims had been reported in which a humidifier unit either emitted smoke or sparks or caught on fire. Nineteen of the incidents occurred in a child's room. A total of approximately 85 failures took place, with 22 incidents occurring in a child's room.	Submitted Section 15(b) report October 9, 1996. In November 1996, a 6-year-old child died during a fire that CPSC attributed to a failed humidifier.	In mid-April, 1997, CPSC requested a recall. On June 4, 1997, mfg. advised CPSC that it would voluntarily recall.	**Total: 450 days** Report: 234 days Recall: 216 days
Fisher-Price Animal Sound Farm[2]	Small nail fasteners could disengage from toy and choke children.	By November 18, 2002, Fisher-Price had become aware of nine reports of nail fasteners coming loose from the stall doors, including one report from a consumer that a nail fastener came out and that her child placed it in her mouth.	March 14, 2003	April 23, 2003	**Total: 224 days** Report: 184 days Recall: 40 days
Bilt-Safe electric blankets sold by Family Dollar Stores[3]	Electric blankets repeatedly overheated and caught fire.	Between December 2003 and June 2004, Family Dollar learned about approximately 40 reports of malfunction with the Electric Blankets. Among these incidents, there were numerous alleged instances of fire, scorching, or smoke damage to consumers' property and nine alleged personal injuries. The alleged injuries consisted mainly of minor skin burns.	September 1, 2004	November 9, 2004 (Family Dollar had instituted a partial recall in March of 2004.)	**Total: 314 days** Report: 245 days Recall: 69 days
Acuity Brands emergency lighting[4]	Lighting intended to aid in evacuation in the event of an emergency caused incidents of smoking, melting, rupturing,	From January 1996 through September 2000, Acuity received reports of 109 emergency light failures at 33 sites.	October 19, 2000	April 13, 2001	**Total: 1,899 days** Report: 1,723 days

[1] In the Matter of Honeywell Consumer Products, Inc., 2001 WL 1873133 (C.P.S.C.) (Nov. 16, 2001).
[2] In the Matter of Fisher-Price, Inc., 2007 WL 2259098 (C.P.S.C.) (Feb. 27, 2007).
[3] In the Matter of Family Dollar, Inc., 2006 WL 4085806 (C.P.S.C.) (July 7, 2006).
[4] In the Matter of Acuity Brands, Inc., 2006 WL 4085801 (C.P.S.C.) (Mar. 6, 2006).

APPENDIX A

	burning, and fire.				Recall: 176 days
Johnson Health Tech treadmills[5]	Defective electronic control panels caused the motor and walking belt to rapidly and unexpectedly accelerate. In some cases, the exercise machines also failed to stop when the safety key was activated.	Starting January of 2001, company received reports of 180 incidents of "runaway" treadmills, fifteen of which alleged injury including sprains, strains, a torn rotator cuff, bruises and serious friction burns.	January 14, 2002 (After CPSC contacted them for records inspection on Jan. 11th.)	April 23, 2002	**Total: 447 days** Report: 348 days Recall: 99 days
Murray, Inc. rear-engine riding lawn mowers[6]	Fuel tanks could crack and leak fuel, which could ignite, posing a burn or fire hazard to consumers.	By December 2000, Murray had received five reports of fuel leakage. Upon reviewing its records in December 2001 and January 2002, Murray discovered that from 1997 through 2001 it had received about 880 reports of fuel tank leakage involving its rear-engine riding lawnmower, five of which resulted in fires with one report of minor burn injuries.	January 16, 2002	March 5, 2002	**Total: 460 days** Report: 412 days Recall: 48 days

[5] In the Matter of Johnson Health Tech Co., Ltd. and Horizon Fitness, Inc., 2004 WL 3185325 (C.P.S.C.) (Oct. 4, 2004).
[6] In the Matter of Murray, Inc., 2003 WL 23064266 (C.P.S.C.) (June 10, 2003).

American Academy of Pediatrics
DEDICATED TO THE HEALTH OF ALL CHILDREN™

Lead in Children's Products:

Recommendations for Protecting the Most Vulnerable Consumers

There is no known "safe" level of lead for children. No study has determined a blood lead level that does not impair child cognition. Since any measurable lead level causes lasting harm, prevention of exposure is the only treatment. Lead exposure is an important, unnecessary, and preventable poisoning.

Damage done by small amounts of lead may be hard to measure and even harder to understand. Most children who accumulate lead in their body do not have any physical symptoms, but low lead levels cause a wide array of negative effects, including cognitive, motor, behavioral, and physical harm.

To protect the health of our nation's children, nonessential uses of lead, particularly in products to which children may be exposed, must be prohibited. The American Academy of Pediatrics recommends the following:

- The Consumer Product Safety Commission (CPSC) should require all products intended for use by or in connection with children to contain no more than trace amounts of lead.
- The Academy recommends defining a "trace" amount of lead as no more than 40 parts per million, which is the upper range of lead in uncontaminated soil. This standard recognizes that contamination with minute amounts of lead in the environment may occur but can be minimized through good manufacturing practices.
- "Children's product" should be defined in such a way as to ensure it will cover the wide range of products used by or for children. This standard should cover toys intended for use by or with children under the age of 12 years.
- The limit on lead content must apply to all components of the item or jewelry or other small parts that could be swallowed, not just the surface covering.
- Legislation or regulations should limit the overall lead content of an item, rather than only limiting lead content of its components. A single product may contain numerous components that could cumulatively contain a dangerous level of lead.

It is important to note that, while limiting lead is important in guaranteeing the safety of children's products, numerous other aspects of this issue should also be considered. Other children's product safety issues include choking hazards, flammability, dangerous magnets, and safe product design.

For more information, please contact Cindy Pellegrini at the American Academy of Pediatrics at 202-347-8600 or cpellegrini@aap.org.

APPENDIX C

American Academy of Pediatrics

DEDICATED TO THE HEALTH OF ALL CHILDREN™

December 14, 2007

Dear Representative:

The American Academy of Pediatrics is concerned that its position on lead in children's products may have been misunderstood during Thursday's markup of H.R. 4040, the Consumer Product Safety Modernization Act.

There is no known safe level of lead exposure. The damage done to a child's brain by lead is incurable and irreversible. As a result, it is imperative that our nation work through all means at its disposal to minimize children's exposure to lead from all sources.

In September, the AAP recommended that children's products be banned from having lead content above 40 parts per million (ppm). The AAP reached this conclusion after a thorough review of the scientific evidence, which indicates that lead exposure at even very low levels is capable of causing sufficient brain damage to result in the loss of IQ points. Specifically, AAP experts concluded that the ingestion of a single object with lead content of 75-80 ppm could result in the loss of one IQ point. Because many children are exposed to lead through multiple sources, it is critical to provide a margin of safety to ensure that cumulative exposures do not cause sufficient brain damage to cause the loss of IQ points.

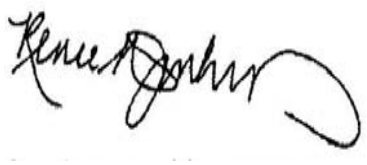
The level of 40 ppm represents the upper limit of lead found in clean, uncontaminated soil. The study from Vermont represented only one example of the range of lead found naturally in uncontaminated soil. The attached map of the United States prepared by the U.S. Geological Survey in 2001 illustrates the background lead levels across the nation, which range from approximately 10 to 30 ppm.

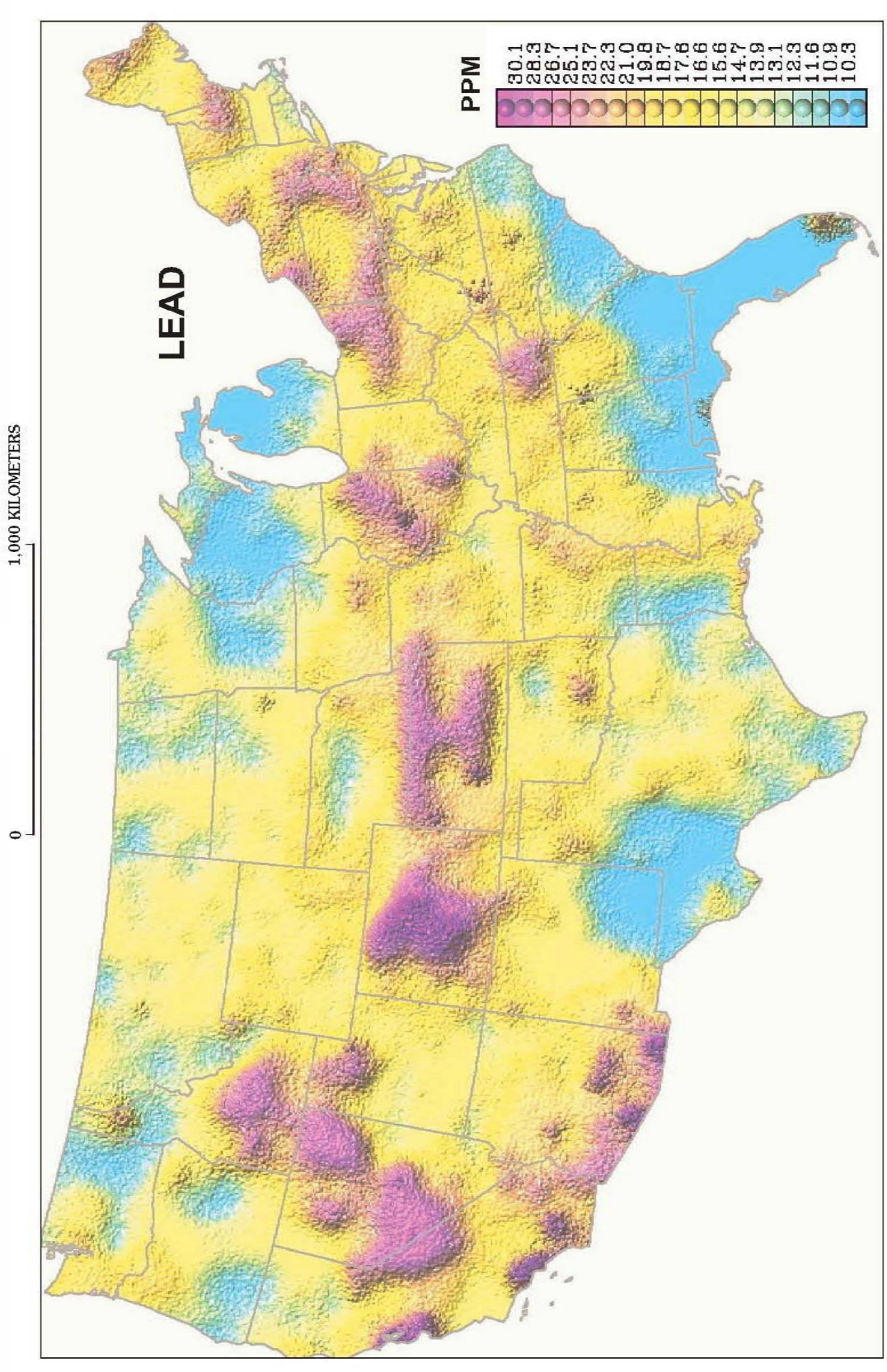
Before issuing its formal recommendation, AAP verified with numerous experts that a limit of 40 ppm lead in toys and children's products is both reasonable and eminently achievable. In fact, most of the items currently on store shelves are already well below 40 ppm, according to testing performed by consumer groups.

It is the responsibility of industry and manufacturers to ensure that they are not producing toys or children's products with potentially toxic levels of lead. Based upon the current science, the AAP has determined that levels above 40 ppm would not be protective of child health. Industry profits should not be supported at the cost of children's neurological and developmental health.

The AAP would be pleased to provide additional background on lead, its toxic effects, and our efforts to minimize children's exposure through all sources. For more information, please contact Cindy Pellegrini in our Washington, DC office at 202/347-8600.

Sincerely,

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Lead Link To Alzheimer's Disease?

Jan 2, 2008

(WebMD) Lead poisoning in infancy may make Alzheimer's disease more likely decades later, a new study shows.

Lead poisoning is a well-known danger, especially for young children. Months or years of lead poisoning can stunt children's growth and damage their brain, kidneys, hearing, and mental development.

Early lead poisoning may also tinker with genes in a way that sets the stage for Alzheimer's disease as an adult, according to the new study, which is based on monkeys, not people.

The study included two groups of baby monkeys that drank formula for the first 400 days of their life. One group of monkeys got ordinary, lead-free formula. The scientists added low levels of lead to the other group's formula.

No health problems were seen in the monkeys during the 23-year study.

The scientists checked the monkey's brains at the end of the study. The monkeys that drank the lead-laced formula as babies had higher levels of Alzheimer's-related proteins and more DNA damage than the other monkeys.

Lead poisoning in infancy may have made the monkeys' genes make more of the Alzheimer's-related proteins years later, according to the researchers, who included the University of Rhode Island's Nasser Zawia, PhD.

Their findings appear in *The Journal of Neuroscience*.

By Miranda Hitti
Reviewed by Louise Chang

Available at: http://www.cbsnews.com/stories/2008/01/02/health/webmd/main3668022.shtml

APPENDIX D

MEMORANDUM

To: House Committee on Energy and Commerce Staff
Re: HR 4040 – Inappropriate Provisions Granting Criminal Immunity to Corporations Filing Section 15(b) Reports
From: Mike Lemov (mlemov@citizen.org) and Laura MacCleery (laura@citizen.org), Public Citizen

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Below is a brief memorandum presenting our legal research on the provisions in the subcommittee mark dealing with criminal penalties and granting immunity from criminal prosecution. In addition to our strong objection explored below to new immunity language added to the subcommittee mark, we strongly support the elimination of the "notice" provision in the Consumer Product Safety Act. The "notice" provision was intended to prevent effective criminal prosecution. The House should enact a provision similar to the fixes contained in the Senate bill to allow for appropriate prosecution of criminal activity by corporations that knowingly endanger the lives and safety of the public.

I. Criminal Immunity Portion of Subcommittee Mark Is Unprecedented and Unwarranted

H.R. 4040, section 2064(b) of Title 15 of the United States Code includes the following grant of immunity:

> Every manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports the conclusion that such product-- (1) fails to comply with an applicable consumer product safety rule or with a voluntary consumer product safety standard upon which the Commission has relied under section 2058 of this title; (2) fails to comply with any other rule affecting health and safety promulgated by the Commission under the Federal Hazardous Substances Act, the Flammable Fabrics Act, or the Poison Prevention Packaging Act; (3) contains a defect which could create a substantial product hazard described in subsection (a)(2) of this section; or (4) creates an unreasonable risk of serious injury or death, shall immediately inform the Commission of such failure to comply, of such defect, or of such risk, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect, failure to comply, or such risk. *A report provided under this paragraph (2) may not be used as the basis for criminal prosecution under section 5 of the Federal Hazardous Substances Act (15 U.S.C. 1264), except for offenses which require a showing of intent to defraud or mislead.*[1] [Emphasis added.]

This provision would be totally unprecedented in federal regulatory laws requiring a report of corporate information needed to protect the public.

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[1] This language has been amended in the Committee mark to add "under section 5 of the Federal Hazardous Substances Act, except for offenses requiring a showing of intent to defraud or mislead[,]" after the italicized portion. The Federal Hazardous Substances Act applies to producers that sell hazardous products such as dangerous fireworks, toxic toys and cancer-causing home materials.

II. Corporations Have No Fifth Amendment Rights

Courts have routinely rejected challenges to reporting requirements for corporate records on the alleged grounds that they violate the Fifth Amendment privilege against self-incrimination.

Scores of federal statutes currently require either recordkeeping or reporting as part of the regulatory framework. *E.g.*, Food, Drug and Cosmetic Act, 21 U.S.C. § 379aa (The manufacturer, packer, or distributor … shall submit to the Secretary [of Health and Human Services] any report received of a serious adverse event associated with such drug[.]"); *Id.*, 21 U.S.C. § 350f ("[I]n no case later than 24 hours after a responsible party determines that an article of food is a reportable food, the responsible party shall … submit a report to the Food and Drug Administration through the electronic portal[.]") National Highway Traffic Safety Administration Act, 49 U.S.C. § 30118(c) ("A manufacturer of a motor vehicle or replacement equipment shall notify the Secretary … [if] the vehicle or equipment contains a defect and decides in good faith that the defect is related to motor vehicle safety; or … does not comply with an applicable motor vehicle safety standard prescribed under this chapter.").

In the words of the Supreme Court, "Were the cloak of privilege to be thrown around these impersonal records and documents, effective enforcement of many state and federal laws would be impossible." *United States v. White*, 322 U.S. 694, 700 (1944).

Concerns about self-incrimination, for the framers of the Constitution, were intended to protect *individual* civil liberties. *Id.* As a result, it is a well-established principle of constitutional law that corporations have no Fifth Amendment privilege against self-incrimination. *United States v. Kordel*, 397 U.S. 1, 7 n.9 (1970) (citing cases). The Supreme Court has also long-recognized that the privilege against self-incrimination does not apply to "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established." *Shapiro v. United States*, 335 U.S. 1, 17 (1948) (citing *Wilson v. United States*, 221 U.S. 361 (1911)).[2]

These well-settled rules of constitutional law and criminal procedure have resulted in the Supreme Court repeatedly holding that the Fifth Amendment privilege against self incrimination is completely unavailable to corporations or their employees in a variety of situations. For example:

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[2] The "required records" doctrine applies to both documents kept by a corporation as well as those which must be periodically filed with the Government. *Mackey*, 401 U.S. at 708 n.8 (Brennan, J. concurring) (Citing *Marchetti v. United States*, 390 U.S. 39, 56 n.14 (1968), for the proposition that reporting requirements and compelled disclosure of required records by administrative subpoena are "constitutionally indistinguishable.").

The Supreme Court has recognized that there may be limitations, not applicable in this situation, on the government's power to require disclosure of information: "Where the essence of a statutory scheme is to forbid a given class of activities, it may not be enforced by requiring individuals to report their violations." *Mackey v. United States*, 401 U.S. 667, 708-709 (1971) (Brennan, J. concurring). It is permissible for the Government to enforce its requirements by a compulsory scheme of reporting, provided that the scheme is directed at all who engage in those activities, and not on its face designed simply to elicit incriminating information. *Id.* at 709. Congress may also achieve its goals through statutory schemes that are not designed to forbid certain acts, but merely require things to be done in a certain way. *Id.*

1. Officers may not assert their personal Fifth Amendment privilege on behalf of the corporation. *Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission*, 221 U.S. 612, 622 (1911); *Essgee Co. v. United States*, 262 U.S. 151 (1923); *Kordel*, 397 U.S. at 8.
2. Officers of a corporation may not assert their personal privilege in an attempt to prevent disclosure to the government of records that are the property of the corporation. *White*, 322 U.S. at 699; *Shapiro*, 335 U.S. at 17; *George Campbell Painting Corp. v. Reid*, 392 U.S. 286, 289 (1968).
3. Officers may not assert their privilege against self-incrimination while acting in their professional capacity, even if they are in possession of company records which implicate them personally. *Shapiro*, 335 U.S. at 17; *White*, 322 U.S. at 699.

III. Immunity Should Not Be Made Available to Corporations that Report, As Required by Law, Consumer Protection Violations

It is unprecedented that immunity is being granted in the subcommittee mark, where there has previously been no testimony or objection to the reporting requirement administered by the CPSC, 16 C.F.R. § 1115.10(b). *See* Revision to Interpretive Rule Governing Substantial Hazard Reporting, 57 FR 34222, 34227 (Aug. 4, 1992) (Summary of commentary on revisions to Substantial Hazard Reports, noting that some commenters suggested minor changes to sections 1115.10-1115.14, but the Commission saw no need for changes in those provisions.).

The general federal use immunity statute authorizes the government to grant immunity where a person has invoked a Fifth Amendment privilege. 18 U.S.C. § 6002; *also* 18 U.S.C. § 6004 (Granting immunity at administrative proceedings). The situations in which so-called "use immunity" is granted typically require the invocation of the privilege against self-incrimination by an individual called to testify. *E.g.* 15 U.S.C. § 57b-1(c)(14)(D) (If an individual compelled to appear under a civil investigative demand for oral testimony refuses to answer any question on grounds of the privilege against self-incrimination, "the testimony of such person may be compelled in accordance with the provisions of section 6004 of Title 18."). A grant of immunity in a situation where the privilege is not available to the corporation, the records subject to the reporting requirement, or any corporate employee in their professional capacity, is unheard of and unwarranted under the circumstances.

Indeed, the law mainly flows in the opposite direction. Some federal statutes preemptively require organizations and employees to waive any objection that they may have to complying with government investigations. For example, the Sarbanes-Oxley Act of 2002 requires public accounting firms to consent to cooperation in and compliance with any request for testimony, or the production of documents, made by the Public Accounting Oversight Board in the furtherance of its authority and responsibilities. 15 U.S.C. § 7212(b)(3). Firms seeking certification by the Board must also agree to secure and enforce similar consents from each of the associated persons of the public accounting firm as a condition of their continued employment by or other association with such firm. *Id.* Such documents may be turned over to the Attorney General, any federal agency, or a state attorney general for investigation. 15 U.S.C. § 7215(b)(4)(B).

Several federal statutes require the reporting of events which potentially constitute violations. For example, the Food, Drug and Cosmetic Act makes it a prohibited act to introduce or deliver for introduction into interstate commerce any food or drug that has been adulterated, 21 U.S.C. §§ 331,

while also requiring a responsible party to report dangerous food and investigate the cause of its adulteration or report any adverse event associated with a drug. 21 U.S.C. §§ 350f, 379aa. By engaging in such a prohibited act, a party may be subjected to criminal penalties under the FDCA, 21 U.S.C. § 333, yet the FDCA does not grant reporting parties any type of immunity from criminal liability.

Likewise, none of the statutes administered by the CPSC (The CPSA, Federal Hazardous Substances Act, Flammable Fabrics Act and Poison Prevention Packaging Act) currently grant immunity to corporations for reporting violations of those acts. To our knowledge, neither these statutes, nor their implementing regulations, have been challenged on the grounds that they violate the Fifth Amendment privilege against self-incrimination. Were the Committee to adopt the immunity provision contained in the H.R. 4040 subcommittee bill, these statutes would be swept up into the broad grant of immunity. While it may be argued that the inclusion of these statutes creates a problem because, unlike the CPSA, 15 U.S.C. § 2070, they contain no advance criminal notice provision. However, no comparable grant of immunity is found in any similar statute of which we are aware.

IV. The Pre-Notification Provision Should be Eliminated

The criminal pre-notification requirement of the CPSA, 15 U.S.C. § 2070, is unprecedented and should be removed from that provision. The provision effectively allows a "free" violation of a federal law.

The ineffectiveness of the pre-notification section is demonstrated by the fact that criminal sanctions were never levied by the Commission for over twenty years following the CPSA's enactment in 1972. Note, *Products Liability Litigation and Third-Party Harm: The Ethics of Nondisclosure*, 5 Geo. J. Legal Ethics 435, 439 (Fall 1991). The criminal notification section should be removed from the CPSA, as the Senate bill does.

Conclusion

Long-established statutory requirements and Supreme Court case law conclusively demonstrate that a reporting requirement created expressly by federal law, or an agency under authority granted by federal law, does not violate the privilege against self-incrimination. Where such regulations are directed at corporate reporting requirements, the potential for such a self-incrimination issue arising is virtually non-existent. In addition, there is no need for a grant of immunity where a statute imposes a reporting requirement upon a party not holding any Fifth Amendment privilege, particularly where the reporting requirement is entirely consistent with other provisions of federal law and provides important consumer safety information to the government.

Moreover, the notice requirement should be eliminated.

APPENDIX E

WILLIAM H. SORRELL
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JANET C. MURNANE
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WILLIAM E. GRIFFIN
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STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT
05609-1001

December 3, 2007

Hon. John D. Dingell, Chairman
United States House of Representatives
House Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Hon. Daniel K. Inouye, Chairman
United States Senate
Senate Committee on Commerce, Science and Transportation
508 Dirksen Senate Office Building
Washington, DC 20510-6125

Dear Representative Dingell and Senator Inouye:

The undersigned Attorneys General of the States of Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Vermont, Washington, West Virginia and Wyoming respectfully submit this letter in connection with two pending bills - S. 2045 (the CPSC Reform Act of 2007) and H.R. 4040 (the Consumer Product Safety Modernization Act). We commend Congress for moving to ensure the safety of consumer products, particularly children's products, sold in the United States. The recent, numerous and continuing series of children's product recalls—including recalls due to the presence of lead, hazardous magnets, and even a chemical that, when swallowed, turns into a "date rape" drug—has understandably alarmed parents throughout the country, leading to widespread calls for reform of the Consumer Product Safety Commission and the laws that the Commission enforces.

Yet, as state enforcement actions, media investigations and community testing events have revealed, many products containing toxic substances reach and remain on store shelves despite the provisions of existing law. Federal agencies have not been successful in preventing these products from reaching retail stores and consumers' homes. It is clear that additional resources, both federal and state, are needed to address this serious problem.

As the chief law enforcement officers of our respective States, we have a strong and abiding interest in protecting our citizens from dangerous consumer products, especially the most vulnerable of our citizens—infants and young children. That interest extends to working as partners with the federal government to enforce consumer safety laws. Therefore, we believe it is imperative that any new legislation provide the authority for our Offices to enforce federally prescribed standards, and that those standards be rigorous. It is equally important that this legislation allow enforcement of our own consumer protection laws as long as those are not clearly inconsistent with federal law.

To that end, we wish to comment on three aspects of S. 2045 and H.R. 4040—preemption, Attorney General enforcement authority, and the proposed statutory cap on lead.

1. Preemption of state law. Section 18 of S. 2045 (but not H.R. 4040) provides that preemption is to be determined by the language of federal product safety statutes, not through a rule, statement of policy, or other pronouncement of an administrative agency. These statutes[1] already ensure that there will not be competing product safety standards to which manufacturers or retailers must comply. However, where certain products or hazards are not subject to an articulated federal standard, where State law provides an action for non-compliance with a federal standard, or where enforcement of State law augments but is not inconsistent with federal law, [2] preemption is inappropriate.

Thus, we urge Congress to incorporate the language of S. 2045, sec. 18 (a) and (b), in any final enactment.

2. State authority to enforce federal law. Section 21 of S. 2045 and section 215 of H.R. 4040 as marked up permit enforcement by state Attorneys General of federal product safety standards. These provisions have similar counterparts in other federal laws. *See, e.g.,* 15 U.S.C. § 6103 (enforcement of federal Telemarketing Sales Rule); 15 U.S.C. § 6504 (children's online privacy protection). They also recognize the interest of the States in enforcement of those laws, and the States' ability to augment the enforcement of applicable product safety standards.

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[1] The Consumer Product Safety Act, 15 U.S.C. §§ 2074 and 2075; the federal Hazardous Substances Act, 15 U.S.C. § 1261; the Flammable Fabrics Act, 15 U.S.C. § 1203; and the Poison Prevention Act, 15 U.S.C. § 1476.

[2] For instance, under the Consumer Product Safety Act, compliance with federal product safety standards does not relieve any person from liability at common law or under state statutory law, 15 U.S.C. § 2074(a); and state product safety standards are preempted, in the absence of a waiver from the CPSC, only to the extent that they are not identical to an enunciated federal standard, 15 U.S.C. § 2075(a).

S. 2045 and H.R. 4040 as presently written provide safeguards against the slim potential for State law enforcement action at odds with national objectives. First, as a predicate to filing suit, the enforcing State Attorney General must be able to allege that federal law has been violated, affecting the residents of his or her State. Second, the State must notify the Commission of the suit; and the Commission may intervene in the action, be heard on the case, and appeal any court decision. Finally, during the pendency of any civil or administrative action by the Commission for violation of federal law, no State Attorney General may bring a separate action.

With uniform federal statutory standards, supplemented by state consumer protection laws that have been in existence for decades, State Attorney General enforcement authority will add much-needed resources to address the crisis in children's product safety without risking disparate or inconsistent results.

3. The proposed cap on lead in consumer products. Both S. 2045 and H.R. 4040 revise and expand the federal caps on lead in consumer products. Section 23 of the Senate bill bans children's products containing more than "trace amounts" of lead, defined as 200 parts per million (ppm) for children's jewelry, 400 ppm for children's products other than jewelry, and 90 ppm for paint on children's products; the CPSC must also initiate rulemaking immediately to determine whether the 400 ppm and 200 ppm caps should be lowered.

Section 101 of the House bill as marked up also bans children's products containing more than specified amounts of lead, but the caps are different: 600 ppm for any part of a children's product, lowered to 300 ppm in two years and 100 ppm in four years (unless the CPSC determines that this last standard is not feasible), The CPSC may lower these standards by rule. The cap for total lead in paint on all consumer products is set at 90 ppm.

We applaud Congress for working to lower the amount of lead in children's products. At the same time, we urge that that the caps on lead be set *as low as possible*. Lead is highly toxic and in very small doses can affect young children's neurological systems; according to both the CDC and the EPA,[3] there is no safe level of lead in the body. The American Academy of Pediatrics has recently recommended a standard of *40* ppm. We believe it is prudent, and in the interests of protecting our children, to choose the lowest standard.[4]

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[3] *See* CDC, *Lead: Questions & Answers*, http://www.cdc.gov/lead/qanda.htm, and EPA, *Measure S2: Lead-contaminated Soil Near California's Public Elementary Schools*, http://www.epa.gov/opeedweb/children/features/s2-background.htm.

[4] We also note that a recent amendment to the House bill, section 101(b)(3), introduces a new standard for lead in paint and surface coatings on children's products based on "milligrams per centimeter squared" of lead. This is not a substitute for capping the total concentration of lead in a material, the measurement used throughout the rest of the House bill and in the Senate bill.

We strongly recommend that the new legislation on children's product safety incorporate the principles described above and thank you for your consideration.

Sincerely,

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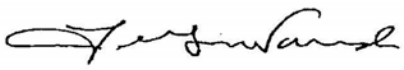

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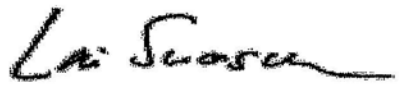

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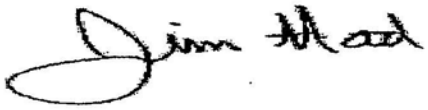

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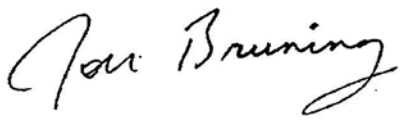

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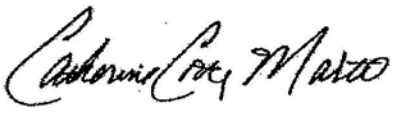

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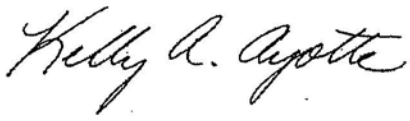

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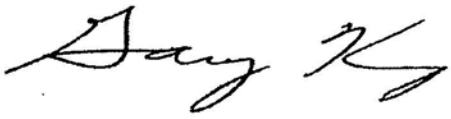

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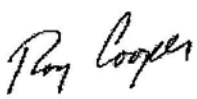

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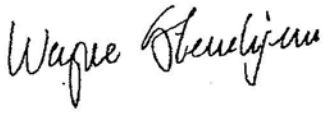

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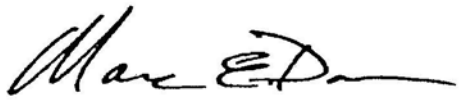

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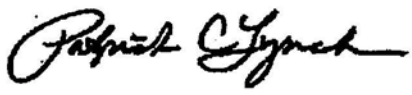

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Cc: Hon. Diana DeGette, Vice Chair, House Committee on Energy and Commerce
Hon. Ted Stevens, Vice Chair, Senate Committee on Commerce, Science and Transportation
Hon. Joe Barton, Ranking Member, House Committee on Energy and Commerce
Members of the U.S. House Committee on Energy and Commerce
Members of the U.S. Senate Committee on Commerce, Science and Transportation

APPENDIX F

EXCERPT FROM:

STATEMENT OF THE HONORABLE THOMAS H. MOORE, CPSC COMMISSIONER, ON THE FINAL RULE AND PREAMBLE FOR THE FLAMMABILITY (OPEN-FLAME) OF MATTRESS SETS

February 16, 2006

The new open flame mattress flammability standard represents a significant improvement in fire protection for consumers. It is anticipated that between 240 and 270 deaths will be prevented and that another 1150 to 1330 people will escape injury each year from fires due to mattress ignition once this standard is implemented . . .

Much will be said about the benefits of this new federal flammability standard. I would prefer to devote my entire statement to those benefits, but unfortunately there are other issues in this rulemaking proceeding that require comment. Since the issuance of Executive Order 12988 in 1996, the Commission has routinely inserted into the Preamble of any new regulation, the specific preemption provisions that apply to that regulation as stated in the authorizing statute. No commentary has accompanied the statement of the preemption provisions and, with one exception, the Commission has never expressed a view about their scope in a Preamble.[1] The proposed Preamble language in this Final Rule is a departure from Commission precedent and, in my opinion, errs on several important points. It errs when it makes the sweeping statement that in the absence of an exemption, "the federal standard will preempt all non-identical state requirements." It errs when it concludes that the preemption provisions preempt inconsistent "court created requirements." And it errs when it implies that the Executive Order requires the Commission to draw any such conclusions **. . .**

Non-identical State Court Rulings

The next issue is the statement in the Preamble that the preemption provisions in the Flammable Fabrics Act encompass non-identical state court rulings. The starting point of any analysis must be the statutory preemption language itself. Subsection (a) of section 16 lays out the basic preemption provision:

> "(a) Except as provided in subsections (b) and (c), whenever a **flammability standard or other regulation** for a fabric, related material, or product is in effect under this Act, no State or political subdivision of a State may establish or continue in effect a **flammability standard or other regulation** for such fabric, related material, or product if the same **standard or other regulation** is designed to protect against the same risk of occurrence of fire with respect to which the **standard or other regulation** under this Act is in effect unless the State or political

[1] There is a discussion about preemption of a California Bureau of Home Furnishings standard in the Preamble to the Notice of Proposed Rulemaking to this regulation, which is discussed later in this statement.

> subdivision **standard or other regulation** is identical to the Federal standard or other regulation."[2] [Emphasis added.]

This language is plain on its face. That the phrase "standard or other regulation" is used to describe action by this agency and the State actions that are preempted is strong evidence that the same type of actions are being referenced in both instances.

The Commission has addressed the issue of whether the phrase "standard or other regulation" included judicial decisions, when it gave guidance to the public on the exemption provisions in subsection (c) of section 16, which allows States or their political subdivisions to apply to the Commission to exempt a flammability standard or other regulation of such State or subdivision from the preemptive effect of the Act. The Commission concluded that this phrase did not include court actions.[3] Indeed it would be very odd for a court, or any other State entity, to petition the agency for an exemption to the federal standard because of a ruling in a particular court. As the Commission noted, "Generally, courts do not establish prospective standards or regulations applicable to a category of persons, but instead deal with the specific parties before them." The agency's interpretation of that subsection is not out of date, as some have stated. It was then, as it is now, a commonsense reading of the statutory language. That finding was tied directly to the exemption subsection. However, as has been noted above, Congress did not vary its choice of language in the three subsections of the preemption section. It seems unlikely that this phrase would mean one thing in subsection (c) but, without explanation, something else in the other two subsections **. . .**

When a preemption provision plainly does not preempt state court remedies, there is no need for a savings clause. Thus the absence of one in the FFA is not remarkable.

As the statutory preemption language is clear, looking beyond it to the legislative history of that language does not seem necessary. However, since the proposed preemption interpretive language in the Preamble attempts to rewrite the phrase "standard or other regulation" as if the wording in the statute was "requirements," and then use that potentially broader term to justify preemption of state common law, a few words must be said on the legislative history of section 16. While it is true that the 1976 House Conference Committee Report uses the word "requirements" to describe both this agency's regulatory actions and the State and local actions that are preempted, there is absolutely no indication that this shorthand for the longer and unwieldy phrase "standard or other regulation," was meant as anything more than that. In fact, the examples that are given in the report refer to state administrative standards, not court rulings. Nothing in the legislative history indicates Congress intended this language to preempt common law remedies and without a clear statement by Congress that this was intended, no preemption of court common law remedies can be assumed. There is similarly no legislative history to support that the language which the 1976 preemption section replaced ("any law of any State or political subdivision") was intended to encompass state common law.

As stated in section 4, the purpose of Commission action under the FFA is to "…protect the public against unreasonable risk of the occurrence of fire leading to death or personal injury, or

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[2] Subsection (b) was described in the preceding paragraph; subsection (c) is the provision by which States can apply for exemption for the preemption provisions for higher State standards.
[3] *See* Fed. Reg. 3414 (January 30, 1991).

significant property damage…." That is the Commission's primary responsibility. Obviously, because federal regulations are meant to have national effect, we want them to replace any non-identical state regulations which provide less protection for consumers. After the adoption of a federal regulation, no State should go through a duplicative standard-setting process (with the attendant costs that this entails for industry) when that State had the opportunity to present information to the Commission in the federal proceeding, unless of course such information was simply not available at the time of the Commission's rulemaking proceeding, or the State feels a stricter standard is essential to protect its citizens. The longer our standards are in effect, the more likely it is that new information or new technology may make stricter standards desirable. The FFA provides both a blanket exclusion from preemption for stricter State standards and regulations and an opportunity to apply to the Commission for an exemption. Thus Congress did not intend for CPSC regulations to occupy the field in fire protection related to consumer products covered by the FFA and contemplated that States might come up with better solutions **. . .**

[I]t makes no sense to risk eliminating sources of new information that might come from private litigation. Just as litigation informs our compliance activities, so should we allow it to inform our regulatory process.

I do not think any state court cases should be foreclosed by the preemption language in the FFA. The Commission has always, wisely to my way of thinking, stayed out of the business of trying to read anything more into the language of the preemption statute than is there.[4] It is always possible that some state court cases will be preempted by other principles the courts may apply. But that is for the courts to decide, not the Commission. It is the courts, with specific fact patterns in front of them that are best equipped to decide whether a case should go forward or not. If we have gotten this standard right, then law suits against manufacturers should be a rarity and prevailing ones even less common. But if we have gotten it wrong, the fastest way we will find out is through people bringing lawsuits that challenge our conclusions. That people bring lawsuits in which they do not prevail is not an indication that our judicial system is broken. It is an indication that it is working.

Absent a clear mandate from Congress, the Commission should not put its thumb on the scale of justice to tip it one way or the other. We all have the same objective: keeping consumers safe from unreasonable risks of fire. Federal regulation is not the only way of achieving that goal …

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[4] It is worth noting that Conference Committee Report 94-1022, which described the change in the preemption language in the FFA, contains language that has been construed by the agency's Office of General Counsel to mean that our current cigarette ignition mattress standard would preempt State standards dealing with open-flame ignition of mattresses. To date, the Commission has treated cigarette ignition and open flame ignition of complex products as very different fire scenarios requiring different types of standards. I believe the Report language was focusing on different testing methods for determining compliance with the same fire scenario. It used the flammability of a simple piece of fabric as the example of when a standard that used a match to test a fabric's flammability did not differ from a standard that used a lit cigarette. And for a single piece of fabric stretched in a holder, these test methods probably would result in no significant difference in fire protection. But the Commission has found, when dealing with complex structures such as upholstered furniture and mattresses, which contain multiple materials all of which may react differently to a smoldering or to a flaming ignition, that there are differences in the way the fires are started and in the way in which the fires progress and that different product construction methods are needed to address each type of fire situation. That we started an open-flame mattress proceeding when we already had a cigarette ignition mattress standard is proof of that. Technology may eventually overcome the need to have separate standards in these situations but they certainly had not done so at the time the Conference Committee Report was written.

I do want to thank my colleagues for responding to my request and releasing the new proposed preemption language to the public, although I still do not understand why it was withheld in the first place **. . .**

I am voting today to approve the text of the mattress (open-flame) rule because it is an important and needed improvement in fire safety for this country. However, I cannot support the preemption language in the Preamble which purports to expand the scope of the preemption provision in the FFA. To some, this new preemption language may not seem of much consequence in the mattress context, but it (or something very like it) will be inserted in every new regulation the Commission issues. The consumer's right to sue a manufacturer, potentially any manufacturer of a regulated consumer product, for injuries from that product, may be seriously curtailed. That surely is not without consequence. The courts will eventually decide how much deference to give the agency's interpretation of the preemption provision. Perhaps they will heed the opinion of Supreme Court Justice Sandra Day O'Connor when she said, "It is not certain that an agency regulation determining the pre-emptive effect of any federal statute is entitled to deference…."[6]

If we were the ones having to sit in judgment of whether a potential lawsuit should be preempted, then we would *have* to make such a determination. But we are not, and we should not.

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(ALL EMPHASIS ADDED)

[6] *Medtronic, Inc. v. Lohr*, 518 U.S. 470 at 512, 116 S.Ct. 2240 (1996).