



Written Testimony of
Remington A. Gregg
For the
U.S. Consumer Product Safety Commission
Submitted on March 17, 2020

Public Citizen appreciates the opportunity to submit testimony with our recommendations for priorities that the U.S. Consumer Product Safety Commission (CPSC or Commission) should add to its Fiscal Year 2022 agenda.¹ Public Citizen is a national non-profit organization with more than 500,000 members and supporters. Now in its fiftieth year, our organization represents the public interest through legislative and administrative advocacy, litigation, research, and public education on a broad range of issues that include product safety and consumer rights in the marketplace.

I. Introduction

The CPSC, founded in 1972, was dubbed the “most powerful Federal regulatory agency ever created”² when it was established. It was designed to be a modern agency, and so “Congress wanted the agency to have strong regulatory authority, generous funding, broad participation (especially by consumers) in decision-making, widespread openness, and substantial independence from White House influence.”³ As the CPSC enters the fiscal year that represents its half century in existence, it is helpful to assess whether the CPSC has functioned as it was devised.

There is much to be done to ensure the CPSC functions as designed and lives up to its mission to robustly protect consumers as Congress envisioned. To that end, Public Citizen is eager to see the CPSC increase transparency through less reliance on Section 6(b) of the Consumer Product Safety Act, increase the use of technology to advance the agency’s mission, advocate strongly for more funding for the agency to carry out its important mission, center diversity and racial

¹ Notice of Public Hearing, Commission Agenda and Priorities, FR Doc. 2021-03888 (February 25, 2021).

² Robert S. Adler, *From “Model Agency” to Basket Case—Can the Consumer Product Safety Commission Be Redeemed?*, 41 Admin. L. Rev. 61, 62 (1989).

³ *Id.* at 68.

equity into its policymaking, and swiftly finalize rulemaking on important issues that have languished at the agency.

II. The Commission’s key priority should be transforming the agency to meet the challenges of the 21st century.

The Commission should begin documenting how Section 6(b) of the Consumer Product Safety Act contributes to the agency’s lack of transparency and places the public at risk.

Over time, the agency’s operations have become increasingly opaque to the public and Congress. One way to fix this problem is to repeal Section 6(b) of the Consumer Product Safety Act (herein 6(b)). Section 6(b) restricts the CPSC from publicly disclosing any information from which the public can readily ascertain the identity of a manufacturer or private labeler of a consumer product unless certain criteria are met. This often slows the flow of pertinent information from getting to the public. As a result, 6(b) has restrained the CPSC’s ability to proactively disclose safety hazards to the public. Section 6(b) is outdated, anti-consumer, and intended solely to protect the reputation of businesses, including those that put harmful products on the market.

When the CPSC seeks to release information about product safety hazards in which the public can readily identify the product or manufacturer, it must first notify the company and allow it to agree to release the information. If the company objects, and the agency decides to overrule the company and release the information, Section 6(b) gives the manufacturer the right to go to federal court to stop the release, which forces the agency into lengthy and expensive litigation, and further delays the release of safety information to the public. The inevitable result: the CPSC often chooses to instead issue vague warnings that fail to prevent avoidable injuries and deaths or issue little helpful information for consumers.

Section 6(b) frustratingly ties the hands of the CPSC, which has had tragic real-world consequences. Consumer Reports found that the CPSC knew that the Fisher Price Rock ‘n Play and similar products were linked to infant deaths, but failed to inform the public about the risks of these specific products.⁴ If the agency had sought to “name names,” under existing law, it could have been pulled into protracted litigation, which could have further delayed the release of safety information to parents. Rather than risk these delays, in May 2018, the CPSC issued a “consumer alert”—essentially a press release—that cautioned parents against the hazards of allowing babies to sleep unrestrained in “inclined sleep products.”⁵ Normally, such a generic name would not provide enough information to a consumer to know that a specific product may be in their home, but that is especially true for busy, sleep-deprived parents.

⁴ Rachel Rabkin Peachment, *How a Product Tied to 73 Infant Deaths Came to Market and Stayed for a Decade, As Government and Industry Knew the Risks*, CONSUMER REPORTS (December 29, 2019), <https://bit.ly/3tAMuVX>.

⁵ Remington A. Gregg, *Delay and Secrecy: How Section 6(b) of the Consumer Product Safety Act Keeps Consumers in the Dark*, PUBLIC CITIZEN (June 24, 2019), <https://bit.ly/3rWRJyI>.

The 6(b) provision not only muzzles the CPSC from releasing specific safety information, it prevents journalists, consumer advocates, and government watchdogs from obtaining information about the agency's unfortunately all too frequent failures in getting dangerous products out of our homes in a timely manner. A Public Citizen report found that 6(b)'s restrictions are time consuming and waste money that could be better spent keeping consumers safe.⁶

While we will work with Congress to repeal or at the very least reform 6(b), the Commission can play a role in increasing transparency into how often companies invoke 6(b) to prevent the release of critical health and safety information. We urge the Commission to: better track the use of this provision through yearly detailed reports on the number of times 6(b) has been invoked by a company and if that prevented the agency from releasing information; how many times 6(b) litigation has occurred; and whether the same companies repeatedly invoke 6(b) to avoid information disclosures. We suggested in testimony from the last two priorities hearings that the Commission carry out these recommendations. No progress has been made.

The Commission must better use technology to more effectively carry out its responsibilities.

We are pleased that Congress required the Commission to create the Saferproducts.gov database. The database serves a dual purpose. It gives consumers more information to enable them to avoid buying or continuing to use dangerous products. The database also helps close the time gap between a manufacturer learning of a hazard and the information reaching consumers. While we continue to applaud the creation of the Saferproducts.gov, the website can become a more effective tool to avert death or injury to the public, as should the National Electronic Injury Surveillance System database, which collects data on consumer product-related injuries occurring in the United States. These two databases can, and should, be used in tandem to help the Commission understand which products may be more unsafe than others, where product-related injuries are occurring, and in what communities. This, however, would take more funding from Congress in order to create a more useful database.

Public Citizen has continuously urged the Commission to collaborate with technologists and innovators, including those who have experience in the private sector, to implement the recommendations that we have made to the Commission that include a non-exhaustive list of ideas we believe would make Saferproducts.gov more effective.⁷ We once again urge you to do so. Finally, we hope that Sen. Jerry Moran (R-KS) once again introduces the CPSC CIO Parity

⁶ *Id.* at 3.

⁷ Remington A. Gregg, *Comments on the Request for Information on Possible Improvements to Saferproducts.gov*, PUBLIC CITIZEN (March 5, 2020)(on file with author) (stating that we believe the CPSC's Twitter presence, for example, has shown the agency's ability to effectively reach the public).

Act,⁸ which would require the agency to hire a chief technologist who would help address the important issues discussed above—and hope that the Commission would support the legislation and its passage.

III. Commissioners should become stronger advocates for increased agency funding.

The CPSC has jurisdiction over more than 15,000 consumer products. Its staggeringly low budget—at less than \$130 million per fiscal year—makes it difficult for the agency’s dedicated staff to carry out its mission. According to Acting Chair Adler, “...every year CPSC deals with more deaths and injuries than NHTSA – or OSHA – or the Mine Safety and Health Administration (MSHA) — or almost any of the other federal health and safety regulatory agencies with bigger budgets than CPSC.”⁹ That staggering statistic should serve as a wakeup call to every commissioner to strongly advocate for more funding. Without substantially more funding, the agency will continue to struggle to meet all the statutory and regulatory demands the agency faces.

IV. The Commission should promote diversity in its ranks and in its policymaking focus.

A 2008 Government Accountability Office (GAO) report on data collection related to injuries of children of color and how to better assess how to protect them, it concluded that: “Some research suggests that there are racial and ethnic disparities in child death rates due to injuries related to particular consumer products; however, CPSC does not routinely assess whether such disparities exist, primarily because data limitations make it challenging to conduct such analyses.”¹⁰ Since that report has been released, it is unclear if the agency has accepted or implemented any of the recommended actions. Since that time, moreover, it has become even clearer that Black and Brown people have disproportionately lower health outcomes, life expectancies, incomes, and household wealth than whites¹¹—all damning indictments on how society treats Black and Brown people. The CPSC’s complicity in allowing these disparities to continue without addressing them is no better than the rest of society’s failures to do so. The Commission should

⁸ S. 1858, 116th Cong. (2019).

⁹ Robert Adler, *Keynote Address*, ICPHSO 2021 (Feb. 24, 2021), <https://bit.ly/2P5LSby>, at 2.

¹⁰ Report to Congressional Committees, U.S. GOVERNMENT ACCOUNTABILITY OFFICE (Aug. 2009), <https://bit.ly/30PH1hB>, at 21.

¹¹ See, e.g., Jamila Taylor, *Racism, Inequality, and Health Care for African Americans*, THE CENTURY FOUNDATION (Dec. 19, 2019), <https://bit.ly/30Qg911> (noting that “African Americans still experience illness and infirmity at extremely high rates and have lower life expectancy than other racial and ethnic groups. They are also one of the most economically disadvantaged demographics in this country.”), Ariel Gelrud Shiro and Richard V. Reeves, *Latinos Often Lack Access to Healthcare and Have Poor Health Outcomes. Here’s How We Can Change That*, THE BROOKINGS INSTITUTION (Sept. 25, 2020), <https://brook.gs/3vvztPf> (noting often have less healthcare and lower health outcomes than whites), and John Creamer, *Poverty Rates for Blacks and Hispanics Reach Historic Lows in 2019*, U.S. CENSUS BUREAU (Sept. 15, 2019), <https://bit.ly/3trq7Cb> (detailing that while poverty rates for Black and Hispanic people is at historic lows, “even with these gains, Blacks and Hispanics continue to be over-represented in the population in poverty relative to their representation in the overall population.”).

take heed of the Biden-Harris administration’s commitment to centering racial equity into its policymaking.

This should be done in several ways. First, the Commission should show a genuine commitment to listening to impacted communities and creating policies that address those concerns. (That includes meeting people in their communities.) Second, the agency should do more to bring greater diversity in its ranks. Policymaking is informed by lived experiences, and the lived experiences of leadership in the agency is very far removed from the lived experienced of many Black and Brown people. Third, the Commission should urge President Biden to consider diversity in nominating members to the Commission—this should include racial diversity and a commitment to nominating consumer advocates.¹²

V. **The Commission should work with standard setting bodies to finalize long-standing voluntary standards and promulgate long-delayed mandatory standards.**

The Commission is well aware of the impediments placed on the agency requiring it to work with standard-setting bodies to create voluntary standards before it may draft mandatory standards—even though consumers are injured unnecessarily as voluntary standards take years to draft and are often too weak.¹³ While the Commission cannot unilaterally change this congressional mandate, it can urge voluntary standard-setting bodies to work more quickly to complete voluntary standards. And it can urge Congress to revert the law back to its original language so that the agency may engage in “less cumbersome rulemaking.”¹⁴ In addition, Public Citizen agrees with and echoes Acting Chair Robert Adler’s call for the agency to swiftly finalize “mandatory safety standards for infant sleep products, crib mattresses, crib bumpers, clothing storage units, Carbon Monoxide hazards, high-power magnets, as well as Organohalogen Flame Retardants (OFRs), table saws, and window coverings.”¹⁵

The below rules, which have the unanimous support of the entire Commission, should be speedily finalized to protect our nation’s infants.

Inclined Sleep Products and Gates and Enclosures

Section 104 of the Consumer Product Safety Improvement Act (CPSIA) required the Commission to promulgate standards for durable infant and toddler products. Public Citizen strongly supports the Commission quickly finalizing the remaining Section 104 standards for

¹² See Appendix A.

¹³ See Voluntary Standards Activities Fiscal Year 2020 Annual Report, U.S. CONSUMER PRODUCT SAFETY COMMISSION (Nov. 25, 2020), <https://bit.ly/2NqeAUB>.

¹⁴ Adler, *supra* note 9, at 3.

¹⁵ *Id.*

infant sleep products and gates and enclosures. While the infant sleep proposed rule was strengthened to limit the incline of infant sleep products to a maximum of 10 degrees for products that are not already addressed by another safety standard, yet it has not been finalized. We are troubled that so much time has passed between the posting of the initial proposed rule and the submission date for the revised proposed rule. During that timeframe, infants have been injured or have died.¹⁶

Moreover, we noted in comments submitted by Consumer Federation of America, Consumers Union (now Consumer Reports), Public Citizen, and U.S. PIRG (Consumer Groups) in response to the 2017 notice of proposed rulemaking that “Canada only allows up to a 7-degree angle in their sleep products.”¹⁷ While we are heartened that the Commission has accepted Dr. Erin Mannen’s recommendation to prohibit infant sleep products to an incline of no more than 10 degrees, we urge you to not consider your job complete once you swiftly act to finalize that revised proposed rule. We urge the Commission to add to its priorities studying the impact and efficacy of adopting Canada’s more protective standard in order to determine whether further rulemaking is warranted.

The proposed rule for gates and enclosures was primarily developed by ASTM International with input from consumer advocates, industry, and the public. This noncontroversial rule should be immediately finalized.

Crib Bumpers

In 2016, the Commission directed staff to initiate rulemaking for crib bumpers, which was not included in the definition of what is considered a durable infant or toddler product in the CPSIA. In March 2020, the Commission unanimously agreed to advance rulemaking for a final crib bumper safety standard. Public Citizen urges the Commission to quickly finalize this rule.

VI. Conclusion

In the mid-1960’s through the 1970’s, Congress passed monumental consumer protection laws including the Fair Credit Reporting Act, Occupational Safety and Health Act, and Consumer Product Safety Act (which established the Consumer Product Safety Commission). It is no surprise, then, that the era was dubbed the “consumer decade.” Over the past half century, Public Citizen has stood for the public interest in the face of well-resourced corporate opponents and are highly concerned that the ability of companies to stymie the work of the Commission—through

¹⁶ Rachel Rabkin Peachman, *Inclined Sleeper Deaths Rise to 50 as Industry Continues to Sell the Products*, CONSUMER REPORTS (June 20, 2019), <https://bit.ly/2QheHTd> (according to Consumer Reports, four families “filed a joint lawsuit, alleging that their infants suffocated while in the Rock ‘n Play Sleeper, with three of those deaths occurring between January and March 2019, just before Fisher-Price recalled the product.”).

¹⁷ Consumer Groups Comments, June 21, 2017, <https://bit.ly/30U8fU4>.

processes like voluntary industry-set standards or 6(b)'s secrecy requirements—have kept the agency from fully fulfilling its mission.

The Commission's work is very challenging at the best of times. Now, however, as the country fights a global pandemic that has kept so many of us home 24/7, keeping consumers safe has become an even more difficult task for the CPSC. While the Commission's staff work tirelessly to fulfill the agency's mission, unfortunately partisan politics, personality differences, anemic funding, and the occasional lack of interest from Congress or the executive branch about the agency's work makes all of the staff's work even more difficult. The Commission, however, can and must meet the moment by promulgating robust rules and standards to protect consumers, proactively working to get ahead of product safety hazards, and engaging with consumer advocates early and often on issues that they are seeing are problematic.

As Public Citizen—and soon the CPSC itself—mark five decades of work on behalf of keeping consumers safe, we urge the agency to truly assess what it will take for the CPSC to fulfil its mandate, protect consumers and their families from unsafe products, and be a visionary leader at home and abroad for product safety enforcement. We look forward to being a true partner in providing the Commission the tools it needs to more effectively carry out its mission.

Thank you for the opportunity to provide comments and we look forward to continuing to work together to improve consumer safety.

APPENDIXES

A. Letter to President Biden on Nominating Consumer
Advocates to High-Ranking Positions.....8

B. Product Safety Memorandum to the Biden Transition.....9

APPENDIX A

January 20, 2020

Honorable Joseph R. Biden, Jr.
President of the United States
The White House
Washington, DC 20500

Dear Mr. President:

Congratulations on your Inauguration. We look forward to working with you on a broad range of issues.

As organizations working on behalf of consumers, we urge you to choose consumer voices for high-ranking positions in federal agencies that impact consumers. The administration will tackle a range of pressing consumer issues, such as COVID-related price gouging, product safety, and discriminatory and predatory lending. Too often, however, agencies with a consumer focus are staffed with senior leadership from industry, defense-side firms, and corporate America. Robustly enforcing consumer and product safety laws means having people in key positions who have spent time fighting on behalf of consumers.

Few consumer advocates have served in high-ranking government position. Joan Claybrook served as administrator of the National Highway Transportation Safety Board (NHTSA) during the Carter administration. David Friedman served as acting NHTSA administrator for nine months during the Obama administration. Now is the time to fill your administration with diverse, independent consumer advocates who have spent their careers in the public interest. Several agencies that have a consumer focus include the Consumer Financial Protection Bureau (CFPB), Federal Trade Commission, Consumer Product Safety Commission, and the Department of Justice's Consumer Protection Branch. We urge you to fill those political positions with individuals who have the knowledge and experience working on behalf of consumers. We are heartened by the news that you intend to nominate Rohit Chopra to lead the CFPB, and hope that this is the first of many appointments of consumer advocates to top slots. If requested, we would be happy to provide a list of candidates whom we believe would be ideal for positions in these agencies.

Sincerely,
Consumer Federation of America
Kids In Danger
National Consumers League
Public Citizen

APPENDIX B



Product Safety Memorandum to the Biden Transition November 11, 2020

When Congress created the U.S. Consumer Product Safety Commission (CPSC or Commission) in 1972, it was dubbed the “most powerful Federal regulatory agency ever created.”¹⁸ The CPSC was envisioned to be a modern agency. “In order to make the CPSC a model of regulatory reform, Congress wanted the agency to have strong regulatory authority, generous funding, broad participation (especially by consumers) in decision-making, widespread openness, and substantial independence from White House influence.”¹⁹

In the intervening years, however, actions by Congress and by the CPSC itself have dramatically weakened the agency. As a result, corporations are often free from accountability for wrongdoing; the creation of mandatory safety standards has been replaced by voluntary standards that take years to draft; civil penalties are rare; some recalls are not sufficient to protect the public from hazardous products; and the agency’s operations have become increasingly opaque to the public and Congress.

It is time to articulate an agenda that prioritizes consumers by correcting laws and court decisions that have weakened product safety in America. Our organizations—members of a close-knit coalition dedicated to improving product safety—have varied priorities in our work, but we are unified in our belief that the following CPSC-related issues should be tackled immediately by the Biden Administration and Congress.

¹⁸ Robert S. Adler, *From “Model Agency” to Basket Case—Can the Consumer Product Safety Commission Be Redeemed?*, 41 Admin. L. Rev. 61, 62 (1989).

¹⁹ *Id.* at 68.

Administrative Actions

Greater Use of Compliance and Enforcement Authority

The Consumer Product Safety Act provides the CPSC with a number of compliance and enforcement tools to help keep consumers safe and hold companies accountable, including mandatory recalls and civil penalties. In general, however, the CPSC relies most heavily on negotiated voluntary recalls and rarely uses other compliance and enforcement tools. While Congress should take key steps to help the agency alert the public to hazardous products and force needed recalls more quickly—such as by increasing the agency’s funding and passing measures to make it easier for the CPSC to determine that a product presents an imminent hazard, a substantial product hazard, or an unreasonable risk to safety—it is also incumbent on the CPSC to make greater use of the tools it has today.

For example, the agency has broad authorities in its organic statute to hold wrongdoers accountable. It can make a preliminary determination that a product presents a substantial product hazard. It can sue companies that fail to conduct a needed recall. And it can use its market surveillance capabilities to take appropriate enforcement actions. Despite the fact that the CPSC possesses ample authorities to hold wrongdoers accountable, the agency rarely uses these powers.

In addition, even when Congress has given the CPSC authority in specific statutes to hold wrongdoers accountable, such as in the Congress in the Child Nicotine Poisoning Prevention Act of 2015 (CNPPA) the CPSC has been slow to use its enforcement authority to remove dangerous products that do not meet the law’s clear requirement for flow restrictors on liquid nicotine containers.

Action: The Biden Administration should prioritize the CPSC making greater use of its authority to identify hazardous products and hold companies accountable for their obligations under the law by:

- **Among other things:**
 - **Making more frequent public, preliminary determinations that corrective action will be required;**
 - **Filing formal administrative or legal complaints to seek needed recalls;**
 - **Carrying out market surveillance with an emphasis on getting recalled, for-sale products off the market and deterring wrongdoing in the future.**

- **Where specific product safety laws already exist—such as the Child Nicotine Poisoning Prevention Act—the CPSC should place a significant emphasis on enforcing these laws to prevent injuries and deaths.**

Continue Using Authority to Impose Meaningful Penalties on Violations of Consumer Product Safety Law

When Congress passed the original Consumer Product Safety Act in 1972, that law not only created the CPSC, but also gave the agency authority to impose monetary penalties against product manufacturers for placing unsafe products into the marketplace. Civil penalties serve as an important tool to discourage companies from cutting corners when manufacturing products that could result in injury or death. They also create an incentive to ensure that manufacturers quickly report product defects. While the Consumer Product Safety Improvement Act (CPSIA) gave the CPSC discretion to increase penalties in the judgments imposed on companies, and for several years the agency had been making use of the higher penalty possibilities, that trend has slowed since 2017. According to a Public Citizen report, in President Trump’s first year in office, the CPSC “[i]mposed about \$21.4 million in penalties with an average penalty of \$5.3 million. That was down from \$37.3 million a year earlier”²⁰—President Obama’s last year in office. For additional context, in 2019 and 2020, the CPSC has not issued any civil penalties.

In addition, the CPSC has the power to seek criminal penalties for knowing and willful violations of consumer product safety law. The agency has used this authority only rarely and has not used it at all since 2013.

Action: Civil penalties are a tool that should be used robustly, both to protect consumers against harm and to carry out Congress’s intent when it increased the CPSC’s civil penalties authority a decade ago. The agency should reverse the current trend and go back to imposing meaningful civil penalties on corporate violations of consumer product safety law in furtherance of its important mission to ensure that only safe products make into the marketplace.

Additionally, for the CPSC to properly incentivize product safety and hold executives accountable for knowing and willful wrongdoing, it must retain the credible use of criminal penalties and work with the Department of Justice to prosecute those who break the law.

²⁰ PUBLIC CITIZEN, CORPORATE IMPUNITY (2018), <https://www.citizen.org/wp-content/uploads/corporate-enforcement-public-citizen-report-july-2018.pdf>.

Promulgate Rules for Infant Sleep Products and Furniture Safety Without Delay

Infant Sleep Products

The substantial progress on reducing infant sleep-related deaths that began in the 1990s has plateaued, leaving significant need for public health interventions to protect infants from products that are incompatible with a safe sleep environment. Section 104 of the Consumer Product Safety Improvement Act (CPSIA) requires the Commission to promulgate standards for durable infant and toddler products. The proposed safety standard for infant sleep products would take significant action to protect against sleep-related infant deaths by ensuring that all such products meet a protective safety standard. Such a rule would have protected against the proliferation of dangerous inclined sleep products, such as the now-recalled Fisher-Price Rock ‘n Play Sleeper, as well as emerging hazards from other types of novel infant sleep products. Importantly, the proposed rule limits the back incline of infant sleep products to a maximum of 10 degrees because studies have shown that an incline greater than that increases the likelihood of death from suffocation, positional asphyxia, or entanglement. At least 92 infant deaths have been connected to inclined sleep products.²¹ Organizations including the American Academy of Pediatrics, Consumer Federation of America, Consumer Reports, Kids In Danger, Public Citizen, and U.S. PIRG submitted comments supporting the 2019 supplemental notice of proposed rulemaking for infant sleep products.²²

Action: While we are heartened that the Commission has proposed limiting infant sleep products to an incline of no more than ten degrees, we urge the agency to quickly finalize the strongest possible rule. In addition, we encourage the agency to work collaboratively with experts on infant sleep safety and biomechanics to learn more about the science behind Canada’s more stringent limit of a 7-degree back incline, to see whether further strengthening of CPSC’s Infant Sleep Product standard is warranted. In the meantime, this examination should not stop progress on this long overdue rule.

Crib Bumpers

Crib bumpers are dangerous products that have no place in a safe sleep environment. They are inconsistent with expert safe sleep recommendations, which advise placing babies alone, on their back, and on a flat, firm surface with no restraints or loose fabric nearby. Given current safety standards for crib slat distance, crib bumper products are not necessary to prevent head entrapment, and they can lead to suffocation when an infant’s face is pressed against the side of

²¹ Rachel Peachman, *New Evidence Shows More Infant Deaths Tied to Inclined Sleepers Than Previously Reported*, (Consumer Reports 2020), <https://www.consumerreports.org/child-safety/new-evidence-shows-more-infant-deaths-tied-to-inclined-sleepers-than-previously-reported/>.

²² Public Submission, Safety Standard for Infant Inclined Sleep Products, *available at* <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=CPSC-2017-0020>.

the crib. Padded crib bumpers have led to dozens of infant suffocation deaths and do not offer protection to babies. Several states and localities have taken action to ban these products in their jurisdictions.

Action: We urge the CPSC to finalize a strong mandatory standard that removes all padded crib bumpers from the market. The CPSC should conduct more research to determine whether infant safety concerns also warrant further action on mesh crib liners and other related products. Due to the unique vulnerabilities of infants, the CPSC has a crucial role in protecting families from the risk of an infant sleep-related fatality in dangerous products.

Furniture Tip-Overs

According to the CPSC, a child is sent to the emergency room because of tipping furniture or televisions every 42 minutes, and one child dies every two weeks from being crushed by falling furniture or TVs even though these sorts of tip-overs are entirely preventable. While a voluntary standard has been under development for years, time is wasted and lives are lost because of the time it takes to finalize voluntary standards. The Stop Tip-overs of Unstable, Risky Dressers on Youth Act of 2018 (STURDY Act) would require the CPSC to establish a strong mandatory safety standard to improve the stability of dressers and similar clothing storage furniture – which have been the most deadly to children – and help prevent deaths and injuries that result when they tip over onto children.

Action: We strongly support the CPSC quickly finalizing its mandatory furniture tip-over safety standard. In addition, we urge the next Administration to endorse Congress passing, and urge Congress to pass, the Stop Tip-overs of Unstable, Risky Dressers on Youth (STURDY) Act.

Filling Leadership Positions with Experts Dedicated to Consumer Safety

Too often, the CPSC is staffed with industry leaders, corporate lawyers, and anti-regulatory ideologues. Robustly enforcing product safety laws means having people in key positions who are committed to strong product safety laws, government transparency, and accountability.

Action: Senior leadership positions (including the chair and commissioners) should be filled by advocates who have worked on behalf of consumers or others who have spent the bulk of their careers in the public interest.

Legislative Actions

Pass a CPSC Reform Bill

Almost immediately upon taking office, officials in the Reagan Administration “sought to abolish the [CPSC]” or, at the very least, “dramatically” cut[] the agency’s budget and staff.²³ In 1981, Congress significantly amended Section 6(b) of the Consumer Product Safety Act to give manufacturers an effective veto over the CPSC’s release of company-related information to the public. The amended Section 6(b) delays the release of critical safety information in a variety of ways. At times, rather than undergo laborious negotiations with companies in order to release *any* information in which the company is mentioned or its identity could be readily ascertained, the agency instead releases no information at all – or, in some cases, releases generic information that can be confusing to consumers.

For example, when CPSC issued warnings about “inclined infant sleep products,” most consumers did not understand that these warnings were in fact primarily about the ubiquitous and dangerous Fisher-Price Rock ‘n Play Sleeper. Making the information released about a generic product diminishes the efficacy of the notification. In addition, it delays getting critical health and safety information to the public. Section 6(b) also hinders the release of information that should be accessible to the public consistent with the Freedom of Information Act (FOIA) and the agency’s other information disclosure requirements.

Congress also added requirements that force the CPSC to rely on voluntary standards to regulate products. For most types of products, the agency can develop a mandatory standard only if it can demonstrate that a voluntary standard is not adequate in addressing a hazard or there is not substantial industry compliance. In practice, this provision has frequently deterred the agency from developing mandatory standards even when such a standard would save lives.

Actions: Though there are many pieces of important product safety legislation that Congress should pass, Congress should prioritize passing a comprehensive reform bill that restores crucial original powers that the CPSC has lost and brings greater accountability and transparency back to the agency. This should be done by:

- **Repealing the provisions of Section 6(b) of the Consumer Product Safety Act (CPSA) that curb the CPSC’s ability to inform consumers about hazardous products they may be using in their homes.** On its face, Section 6(b)’s purpose is to ensure that information disclosed to the public about hazardous products is accurate, and to provide companies with the opportunity to inform the CPSC about potentially unsafe products without that information immediately becoming public. But in

²³ Adler, *supra* note 1, at 74.

practice, the provision slows the flow of vital information to consumers because it is used to insulate companies from scrutiny.

- **Clarifying that Section 6(b) of the CPSA does not extend to records released under the Freedom of Information Act (FOIA).** In *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*,²⁴ the U.S. Supreme Court held that Section 6(b) extends CPSC's responses to FOIA requests. As a result, so little product-specific information is released that it is difficult for journalists, watchdog groups, or the public to determine if the agency is effectively carrying out its mission of safeguarding the public against product safety hazards.
- **Repealing Section 7(b) of the Consumer Product Safety Act.** The law requires the agency to "rely" on voluntary standards "whenever compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards."²⁵ Unfortunately, voluntary standards processes often progress slowly, if at all; are deferential to manufacturers and other regulated-industry interests to the detriment of public health and safety considerations; and rarely provide the level of product safety protection necessary to keep families safe. CPSC should instead have broad authority to regulate hazardous products without first waiting for a voluntary process while injuries and deaths continue to occur.
- **Streamlining regulatory process (and cost/benefit analysis).** At the same time Congress amended Section 6(b), it amended the statute to require the CPSC to engage in extensive cost-benefit analysis that makes CPSC rulemaking particularly onerous and rare. In relying on Sections 7 and 9 of the CPSA for rulemaking, the agency is required to, among other things, find that the rule it is promulgating "imposes the least burdensome requirement which prevents or adequately reduces the risk of injury for which the rule is being promulgated," as opposed to the rule maximizing net benefits to the public.²⁶

Changing the CPSC's rulemaking to be consistent with the Administrative Procedure Act would enable the agency to better protect consumers through the issuance of mandatory regulations. Recognizing the significant limitations that its current requirements impose on the CPSC's ability to address product hazards, Congress has repeatedly included language in bills that directed rulemaking to require the use of APA rulemaking to ensure that the rule can be finalized in a reasonable time period.

²⁴ 447 U.S. 102 (1980).

²⁵ 15 U.S.C. §§ 2056(b)(1) (1990).

²⁶ 15 U.S.C. § 2058 (2012).

Increase Funding for the CPSC

The CPSC has jurisdiction over more than 15,000 types of consumer products. Its statutes give the agency the authority to: set mandatory safety standards, participate in the development of voluntary safety standards, require safety labeling, remove defective products from the shelves and order product recalls and other corrective actions when necessary, collect injury, death, and incident data, and educate the public about consumer product safety.

However, the CPSC's staggeringly low budget—at approximately \$130 million, providing for 539 full-time equivalent (FTE) staff—makes it difficult for the agency's dedicated experts to carry out its mission. In comparison, the Food and Drug Administration's Center for Veterinary Medicine's FY 2020 budget provided by federal appropriations is more than \$190 million.²⁷

Today's budget woes at the CPSC are not what Congress intended when it created the agency. In 1974, the first full year that the CPSC was operating, Congress appropriated the equivalent of more than \$180 million in today's dollars, accounting for inflation, and 786 FTEs. CPSC's staffing levels rose to a high of 978 employees in 1980 before facing severe and repeated cuts during the 1980s.

The consumer product marketplace has changed dramatically in the last forty years, and continues to change rapidly, and the CPSC must be able to keep pace. If the CPSC continues to be inadequately funded, it will be unable to protect consumers from either longstanding, well understood hazards, or new or emerging threats. Simply put, without substantially more funding, the CPSC will continue to struggle to meet all the demands that statutory requirements and the public place on it.

Action: Congress should at least double the current appropriations for the CPSC so that the agency can adequately fulfill its critical mandate.

In the nearly fifty years that the agency has been in existence, the CPSC has been largely unable to carry out its mission to its full potential. We look forward to working with the Biden Administration and Congress to unleash a modern consumer product safety agency that truly protects consumers through robust safety standards and enforcement of our laws.

American Academy of Pediatrics, Zach Laris, zlaris@aap.org

Consumer Federation of America, Rachel Weintraub, rweintraub@consumerfed.org

Consumer Reports, William Wallace, William.Wallace@consumer.org

²⁷ DEP'T OF HHS, JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES, 26 (2020).

Cuneo Gilbert & LaDuca, Pamela Gilbert, pamelag@cuneolaw.com
Kids In Danger, Nancy Cowles, nancy@kidsindanger.org
Public Citizen, Remington A. Gregg, rgregg@citizen.org
U.S. PIRG, Grace Brombach, grace@pirg.org