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Product Safety Memorandum to the Biden Transition

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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.”¹ 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.”²

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result, corporations are often free from accountability for wrongdoing; the creation of mandatory safety standards has been replaced by voluntary standards that take years to draft; civil penalties are rare; some recalls are not sufficient to protect the public from hazardous products; and the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.

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

¹ Robert S. Adler, *From “Model Agency” to Basket Case—Can the Consumer Product Safety Commission Be Redeemed?*, 41 Admin. L. Rev. 61, 62 (1989).

² *Id.* at 68.

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”³—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.

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

³ PUBLIC CITIZEN, CORPORATE IMPUNITY (2018), <https://www.citizen.org/wp-content/uploads/corporate-enforcement-public-citizen-report-july-2018.pdf>.

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.⁴ 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.⁵

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 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.

⁴ 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/>.

⁵ 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>.

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.⁶ 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

⁶ Adler, *supra* note 1, at 74.

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 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.*,⁷ 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.

⁷ 447 U.S. 102 (1980).

- **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.”⁸ 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.⁹

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.

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

⁸ 15 U.S.C. §§ 2056(b)(1) (1990).

⁹ 15 U.S.C. § 2058 (2012).

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.¹⁰

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.

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¹⁰ DEP'T OF HHS, JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES, 26 (2020).