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Office of the Secretary
Consumer Product Safety Commission
Room 502
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"Substantial Product Hazard Reports"
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**Comments of Consumers Union, Consumer Federation of America, Kids In Danger and the U.S. Public Interest Research Group to the Consumer Product Safety Commission on 16 CFR Part 1115 "Substantial Product Hazard Reports" Proposed Revision to Interpretive Rule**

## Introduction

Consumers Union (CU), publisher of *Consumer Reports* magazine, Consumer Federation of America, Kids In Danger, and the U.S. Public Interest Research Group, collectively "Consumer Groups", submit the following comments in response to the Consumer Product Safety Commission's (CPSC) "Proposed revision to interpretive rule" on "Substantial Product Hazard Reports."[1] In its notice, the CPSC indicates that these proposed revisions are "to provide further guidance, clarity and transparency to the regulated community on reporting obligations under Section 15(b) of the Consumer Product Safety Act (CPSA), 15 U.S.C. 2064(b)." See 71 Fed. Reg. 30350 (May 26, 2006), at 30350. As consumer groups long-committed to product safety and consumer protection, we fail to see the urgency or the necessity of providing industry with additional factors it can consider in deciding whether or not a product it manufactures, distributes, or sells, presents a substantial product hazard -- triggering a mandatory duty to report to the CPSC under Section 15(b). In the past, the CPSC has been clear about reporting requirements – with a stated rule of "Report if in Doubt."[2] The CPSC raised this concern with this statement, below, in 1984:

> "The Commission is concerned about the current level of reporting by firms under Section 15(b). The Commission believes that there is both a

[1] 71 Fed. Reg. 30350 (May 26, 2006).
[2] See "Statement of Enforcement Policy on Substantial Product Hazard Reports," 49 Fed. Reg.13820 (April 6, 1984). In this Statement, the CPSC the states that Section 15 reports enable the Commission to obtain information at an early stage from knowledgeable sources . . . . These reports provide a key basis for evaluating a potential hazard and the need, if any, for corrective action in the form of public notice and/or recall.

> substantial amount of underreporting of the most serious hazards as well as undue delay in filing reports."[3]

We are concerned that these proposed revisions will not only fail to achieve their desired effect of clarifying the rules, but also may result in restricting the flow of critical product safety information to the Commission.

Under the CPSA, every manufacturer, distributor, or retailer must immediately inform the CPSC if it "obtains information that reasonably supports the conclusion that its product either:

> (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) contains a defect which could create a substantial product hazard described in subsection (a)(2) of this section; or (3) creates an unreasonable risk of serious injury or death." See 15 U.S.C §§ 2064(b)(1), (b)(2), and (b)(3).[4]

The CPSC asserts that these changes will clarify the law -- we disagree. We are concerned that this proposal will, in fact, cloud the interpretation of the law, and the obligation to report under 15(b). We are also concerned that these proposed changes will shift the burden of weighing relevant factors in reporting under Section 15(b) of the CPSA (e.g., the obviousness of risk, the adequacy of warnings and instructions, consumer "misuse," and the forseeability of such misuse) from the CPSC and place it on businesses. In addition, we are concerned about reliance on factors such as the number of defective products remaining in use as well as compliance with product safety standards to determine whether product hazards are reportable). In summary, this proposal is likely to jeopardize the Commission's ability to receive important product safety information that serves as a critical tool for their consumer protection function.

## CPSC Proposal

The CPSC's proposal identifies three revisions to the interpretive rule for determining a reportable "defect."[5]

•The first revision is intended to clarify the Commission's definition of "defect" in 16 C.F.R. § 1115.4, by adding four additional criteria Commission staff use to evaluate whether a risk of injury is the type of risk that will render a product defective, thus possibly triggering a reporting obligation under section 15(b)." The rule currently states that in determining whether the risk of injury associated with a product is the type of risk

[3] See "Statement of Enforcement Policy on Substantial Product Hazard Reports," 49 Fed. Reg. 13820 (April 6, 1984).

[4] A "Substantial Product Hazard" is defined as: "(1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or (2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public." See 15 U.S.C § 2064(a).

[5] See 71 Fed. Reg. 30350 (May 26, 2006).

which will render a product defective, the Commission and staff consider, as appropriate: The utility of the product involved; the nature of the risk of injury which the product presents; the necessity for the product; the population exposed to the product and its risk of injury; the Commission's own experiences and expertise, the case law interpreting Federal and State public health and safety statutes; the case law in the area of products liability; and other factors relevant to the determination. A new section would add the following factors to Section 1115.4 for determining whether a product presents a risk of injury that may render it defective:

1. Obviousness of the risk;
2. The adequacy of warnings and instructions to mitigate the risk;
3. The role of consumer misuse of the product; and
4. The foreseeability of such misuse.

•The proposal adds Section 1115.12(g)(1)(ii) entitled "Number of Defective Products Distributed in Commerce", which will allow the Commission to consider that the risk of injury from a product may decline over time as the number of products being used by consumers decreases.

•The proposal adds Section 1115.8 "Compliance with Product Safety Standards." This proposal will allow the Commission to consider whether a product complies with voluntary consumer product safety standards as a factor to determine whether corrective action is required under the CPSA and other federal statutes.

## Discussion

### The Failure of Regulated Industry to Report

There has been a long history non-compliance by companies who fail to report unreasonably dangerous products as required by Section 15(b) reporting requirements. The CPSC has often levied civil penalties against these companies for failing to comply with these reporting rules. Adding additional factors to consider is sure to add ambiguity. Some examples are highlighted below:

- In 1991, Graco, a children's products manufacturer, paid a $100,000 civil penalty for failing to report stroller injuries to CPSC in a timely fashion. Again in 2005, Graco, which is now owned by Newell Rubbermaid, was fined for the same violation – failure to report safety issues including deaths and serious injuries associated with 16 juvenile products sold under the Graco and Century brands. From 1991 through 2002, the company engaged in "systematic violations" of the law. This time, the fine was largest civil penalty ever levied by the CPSC -- $4 million.
- In April of 2001, Cosco/Safety 1st agreed to pay CPSC a total $1.75 million in civil penalties for failing over a four year period to report to CPSC defects in cribs, strollers and a toy walker that caused the deaths of two babies and countless other injuries. Both companies had previously been fined for failing to report

under Section15(b); in 1996 Cosco paid a $725,000 civil penalty and in 1998 Safety 1st paid a $175,000 penalty.

- In August of 2002, GE paid the CPSC a $1 million penalty for failing to report defects in dishwashers that it first became aware of 10 years earlier.
- In March 2001, West Bend Co. paid CPSC a $225,000 fine for failing to report fire hazards caused by a defect in its water distillers it had learned about three years earlier. Again, in May 2006, West Bend paid CPSC $100,000 for failing to report 169 incidents of failed coffeemaker carafes.

**Additional Factors Proposed by CPSC to be Considered by Industry are Inappropriate**

The factors CPSC is proposing to add to a manufacturer's assessment of whether its product has a defect and should be reported will likely reduce critical reporting to the Commission, and provide a "safe harbor" for companies reluctant to report possible substantial product hazards associated with the product.

Consideration of Consumer "Misuse" of Products

We believe that products should be safe if used in a manner which is reasonably foreseeable. The term "product misuse" is employed too often by industry as an excuse to deny responsibility when a product is associated with inflicting harm. Information about product hazards – even if a company believes the product has been "misused" -- must be forwarded to the Commission because reports about such hazards help to generate data to support further action by the CPSC to alert consumers, or to improve the products, – including through the development of standards to minimize the hazards involved. Allowing a company to avoid reporting an injury because it claims there has been "consumer misuse" is a terrible approach. Companies should not decide this, the Commission should. This change may very well diminish the safety of products in the marketplace by removing manufacturers' incentives to anticipate possible uses of their products. For example:

> A child recently died and a number of other life-threatening injuries occurred when children ingested small, powerful magnets from Rose Art's Magnetix construction sets (see CPSC press release #06-127, "Child's Death Prompts Replacement Program of Magnetic Building Sets.") Rose Art continues to claim that the injuries are caused by consumer misuse: parents are not supervising their children, which is leading to children younger than 3 having access to these toys, ingesting the magnets, and becoming gravely ill or dying. Under the proposed rules, Rose Art, by employing the proposed "consumer misuse" factor, could decide that its products do not contain a defect, and that the company is excused from the requirement to report these incidents. The unfortunate result would be that: (i) there would be no triggering of an investigation by the CPSC; (ii) no gathering of data regarding this hazard to children; and (iii) a delay of warnings to the public; and/or (iv) no product recall (even if not by the manufacturer, by retailers who do not want to sell products posing such risks to small children).

Inadequacy of Voluntary and Mandatory Standards

Consumer Groups have a longstanding concern about the reliance of CPSC on compliance with voluntary safety standards, and the potential inadequacy of these minimum standards, developed by a "consensus" among standard-setting groups dominated by industry representatives. When manufacturers are confronted with evidence that a product may present safety hazards, the undersigned Consumer Groups believe the Commission should urge manufacturers to evaluate potentially hazardous products on a case-by-case basis, based upon the latest advances in product safety, including a safety assessment under foreseeable use conditions. We oppose this proposal to encourage regulated industry to base reporting requirements simply on compliance with voluntary standards.

We are concerned about how a company may use compliance with a voluntary safety standard to shield themselves from the obligation to report information to CPSC. In addition, it is likely that a product could comply with existing standards or mandatory rules but that a defect may exist beyond the scope of the standard. Reporting illustrates important gaps and weaknesses in standards that need to be addressed. This critical function could be eliminated by these proposed new rules.

Even if a product complies with a voluntary or mandatory standard, too often mere compliance is insufficient to protect the public from safety hazards. Typically, the industry standards-setting process begins once deaths and injuries associated with the product become significant. Standards development is a protracted process requiring typically two to five years before consensus is reached and the standard is published, all while deaths and injuries may continue to mount. Once standards are published, neither the standards-setting organizations nor the CPSC have a systematic method for determining market compliance with the standard or the effectiveness of the standard at reducing injuries.

This proposal may also weaken the incentive for manufacturers to support the development of strong safety standard since they may want to write standards that are narrow in scope so that it will "occupy the field" while creating as weak a substantive standard as possible.

Example:

> As one of example of how reliance on industry standards is a misplaced practice of ensuring product safety, the March 2006 issue of *Consumer Reports* features an article on furniture tipover, a problem that results in 8,000 to 10,000 serious injuries and an average of 9 deaths each year, mostly to young children. Although ASTM-International publishes a safety standard to prevent furniture tipover injuries, many of the products CU has tested do not comply. Some products that do comply were inherently unsafe – some dressers could dangerously tip over simply by opening all of their empty drawers. In fact, since the CPSC requested that ASTM develop an industry safety standard, the numbers of annual fatalities associated with falling furniture have actually <u>increased</u> by 50 percent. In today's

highly competitive marketplace, there is often little incentive for manufacturers to work toward developing or complying with strong voluntary safety standards.

Consideration of Age and/or Prevalence of Product in Market

The CPSA Substantial Product Hazard Reporting regulations make clear that:

"since the extent of public exposure and/or the likelihood or seriousness of injury are ordinarily not known at the time a defect first manifests itself, subject firms are urged to report if in doubt as to whether a defect could present a substantial product hazard. On a case-by-case basis the Commission and the staff will determine whether a defect within the meaning of section 15 of the CPSA does, in fact, exist and whether that defect presents a substantial product hazard. 16 C.F.R. § 1115.4(e).

Length of time a product is on the market should not be used by manufacturers or the CPSC as a proxy for a decrease its presence in the marketplace. The CPSC therefore should not authorize manufacturers to determine the risk to the public based upon the amount of time a product has been on the market. This ignores the gravity of potential harm – where the risk associated with an individual product may greatly increase for any (even if only a few) products that remain in the hands of consumers over time. As some products age, they develop defects from wear and tear as well as exposure to the elements. Under this proposal, there will be no incentive for manufacturers to design out end-of-life problems. This proposal could also have the effect of creating an incentive for a company to wait to report incidents and to hide the problem until a product is "older." In addition, we question how the CPSC will create a threshold for the number of products remaining in use before the requirement expires. Whose data will be used and how can the CPSC determine the actual number of products still in use? This adds such ambiguity to the reporting requirement that it makes it nearly impossible to determine compliance. For example, many of the 16 products Graco failed to report for which they were subsequently penalized, have a useful life of well over 10 years. These juvenile products sometimes get passed from one generation to the next. At what point does a manufacturer, as well as the CPSC, disavow responsibility for the product?

Warning Labels and Instructions

We strongly object to reliance on the adequacy of warning labels and instructions as factors to determine whether a product presents a substantial hazard. Warning labels often are completely inadequate to warn consumers about and to protect them from safety hazards. Labels and instructions cannot be read by young children, and risks often are ignored, go unnoticed by, or are not fully understood by caregivers and other adults. Moreover, warnings in instruction manuals are not likely to be passed on to subsequent users of products. We are concerned about how the CPSC can give guidance to manufacturers about the adequacy of warnings without first understanding their measured effectiveness. Finally, we urge the CPSC to work with companies to identify possible unreasonable risks, and to determine how best to ensure that hazards are designed out of products.

Example:

> The warning labels placed on virtually all lawn mowers to avoid contact with a rotating blade were ineffective at preventing blade contact injuries, Not until the CPSC mandated the use of a "deadman control" on all mowers was there reduction in number of injuries.

## Conclusion

We have grave concerns that these proposed changes to the interpretive rule for Section 15(b) reporting requirements will have a deleterious effect on product safety. These proposed interpretations, if adopted by the Commission, would shift responsibility for—and possibly awareness of -- substantial product safety hazards away from the Commission to manufacturers, distributors, and retailers, who have an incentive to downplay the hazard. Rather than clarifying the responsibilities of manufacturers, the proposed new rules will make the system even more ambiguous and give safe haven to those companies seeking to downplay current or emerging safety hazards. The current reporting system under 15(b) – while far from perfect and already suffering from underreporting of safety hazards – will only worsen under the proposed new rules.

These proposed changes will, we fear, result in fewer and delayed reports and will shield the public from critical information they need to protect their families from substantial product safety hazards that otherwise that could result in injury and even death. We strongly encourage the Commissioners to reject the proposed revisions to 16 C.F.R. Part 1115.

Respectfully submitted,


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