



Consumer Federation of America

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Statement of Rachel Weintraub,
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Before the
U.S. Consumer Product Safety Commission
Public Hearing on Petition Requesting Rulemaking on Products Containing Organohalogen
Flame Retardants [Docket No. CPSC–2015–0022]

I appreciate the opportunity to provide comments to you on the petition of the American Academy of Pediatrics, American Medical Women’s Association, Consumer Federation of America, Consumers Union, Green Science Policy Institute, International Association of Fire Fighters, Kids in Danger, Philip J. Landrigan, M.D., M.P.H., League of United Latin American Citizens, Learning Disabilities Association of America, National Hispanic Medical Association, Earth Justice and Worksafe submitted to the Consumer Product Safety Commission (CPSC) urging the CPSC to adopt mandatory standards under the Federal Hazardous Substances Act to protect consumers from the health hazards caused by the use of non-polymeric, additive form, organohalogen flame retardants in children’s products, furniture, mattresses and the casings surrounding electronics.

I am Rachel Weintraub, Legislative Director and General Counsel at Consumer Federation of America (CFA). CFA is a non-profit association of approximately 280 pro-consumer groups that was founded in 1968 to advance the consumer interest through advocacy and education.

In my testimony, I will discuss CPSC’s legal authority to adopt standards under the Federal Hazardous Substances Act (FHSA) and why labeling under the FHSA is not adequate to protect consumers.

I. CPSC’s Legal Authority to Adopt Mandatory Standards Under the Federal Hazardous Substances Act to Protect Children from the Health Hazards Caused by the use of Non-Polymeric, Additive Form, Organohalogen Flame Retardants in Children’s Products, Furniture, Mattresses and the Casings Surrounding Electronics

A. Federal Hazardous Substances Act (FHSA)

The CPSC has clear authority to take the actions requested in this petition. The Petition requests that the CPSC adopt mandatory standards under the Federal Hazardous Substances Act to protect consumers from the health hazards caused by the use of non-polymeric, additive form, organohalogen flame retardants in children’s products, furniture, mattresses and the casings surrounding electronics.

The FHSA gives the CPSC the authority to require precautionary labeling on hazardous consumer products and to ban products that pose a hazard to consumers when labeling would not adequately protect consumers from the hazard.

The FHSA establishes that in order to ban a product, the CPSC “may by regulation declare to be a hazardous substance . . . any substance or mixture of substances,”¹ which is “toxic,”² if such substance “may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use.”³ The FHSA defines “toxic” to mean any substance that has “the capacity to produce personal injury or illness to man through ingestion, inhalation, or absorption through any body surface.”⁴

The CPSC’s regulation explains that “[s]ubstantial personal injury or illness means any injury or illness of a significant nature. It does not have to be severe or serious but it cannot be an “insignificant or negligible injury or illness.”⁵ A household product that is determined to be a “hazardous substance” cannot be sold without a warning label, and if a warning label is not adequate – as it is not here – the product cannot be sold.

The FHSA specifically focuses on children’s products. The FHSA includes that any “article intended for use by children, which is a hazardous substance, or which bears or contains a hazardous substance in such manner as to be susceptible of access by a child,” is automatically deemed a “banned hazardous substance.”⁶ In the case of a household article classified as a “hazardous substance,” but not intended for use by children, the CPSC may classify it as a “banned hazardous substance“ despite its labeling, if the CPSC determines that

notwithstanding [any] cautionary labeling . . . , the degree or nature of the hazard involved in the presence or use of such substance in households is such that the objective of the protection of the public health and safety can be adequately served only by keeping such substance, when . . . intended or packaged [for use in the household], out of the channels of interstate commerce.⁷

The CPSC has recognized that the FHSA “defines the term ‘toxic’ very broadly,” and “[t]his broad statutory definition covers both acute and chronic toxicity.”⁸ While the CPSC regulations and guidelines discuss the particular chronic hazards of cancer, neurotoxicity, and developmental

¹ 15 U.S.C. § 1262(a)(1).

² 15 U.S.C. § 1261(f)(1)(A)(i).

³ 15 U.S.C. § 1261(f)(1)(A).

⁴ 15 U.S.C. § 1261(g).

⁵ 16 C.F.R. § 1500.3(c)(7)(ii).

⁶ 15 U.S.C. § 1261(q)(1)(A). Special rules apply to articles like chemical sets that are inherently hazardous if they are appropriately labeled and are intended for use by mature children. *Id.*

⁷ 15 U.S.C. § 1261(q)(1)(B).

⁸ *Labeling Requirements for Art Materials Presenting Chronic Hazards; Guidelines for Determining Chronic Toxicity of Products Subject to the FHSA; Supplementary Definition of “Toxic” under the Federal Hazardous Substances Act*, 57 Fed. Reg. 46,626, 46,656 (Oct. 9, 1992).

or reproductive toxicity, “*the definition is not limited to these hazards, but includes other chronic hazards.*”⁹ The determination of what is “toxic” under the FHSA “is a complex matter requiring the assessment of many factors.”¹⁰ There is no formula for what is “toxic,” and no requirement that risks meet any particular threshold before regulation is warranted. As the Court of Appeals for the D.C. Circuit has explained: “There is no indication in the language of the [FHSA] or its legislative history that the Commission was bound to develop a precise ‘body count’ of actual injuries that will be reduced by each regulatory provision.”¹¹

Non-polymeric, additive form, organohalogen flame retardants pose chronic hazards to consumers because of their physical, chemical and biological properties. These hazards are well documented and include reproductive impairment, neurological impacts, endocrine disruption and interference with thyroid hormone action, genotoxicity, cancer and immune disorders. These adverse health impacts meet the standard established in the FHSA for a toxic substance that has the capacity to produce personal injury or illness to man through ingestion, inhalation, or absorption through any body surface. In addition, through the reasonably foreseeable handling or use of children’s products, furniture, mattresses and electronics, consumers can be exposed to these chemicals since they migrate out of the product.

Thus, due to the hazards posed by non-polymeric, additive form, organohalogen flame retardants in children’s products, furniture, mattresses and the casings surrounding electronics, CPSC has the authority under the FHSA to declare these products a banned hazardous substance.

B. Courts Interpretation of the FHSA

1. Deference to CPSC

Courts have not questioned the conclusion that a variety of household products containing chemicals, such as Drano (a drain declogger) and Liquid Wrench (a spray lubricant) are “hazardous substances” within the meaning of the FHSA.¹²

⁹ *Id.* at 46657 (emphasis added).

¹⁰ 57 Fed. Reg. 46,626, 46,657. In 2008, the FHSA was amended to make it easier for the CPSC to issue regulations finding that a substance is a “hazardous” or “banned hazardous” substance. Prior to the 2008 amendments, proceedings for the issuance of regulations under the FHSA were governed by section 701 of the Federal Food, Drug and Cosmetic Act (“FFDCA”). 21 U.S.C. § 371. Some case law suggested that the FFDCA set a high bar for regulation. *Cf. Consumer Fed’n of Am., v. CPSC*, 883 F.2d 1073 (D.C. Cir. 1989) (upholding the CPSC’s denial of a petition to ban the use of methylene chloride in household products because it did not meet the FFDCA standard). Since that case was decided, Congress dropped the requirement that FHSA regulations meet the FFDCA’s “reasonable grounds” standard. *See* Pub. Law 110-314 § 204(b)(2) (Aug. 14, 2008). Instead, proceedings to ban a “hazardous substance” are governed solely by provisions of the FHSA. 15 U.S.C. § 1261(q)(2) (“Proceedings for the issuance . . . of regulations [related to banning a “hazardous substance”] shall be governed by the provisions of subsections (f) through (i) of section 1262 of this title,” except in the event of imminent hazard when more streamlined procedures may apply). The 2008 amendment signifies Congressional intent to make it easier for the CPSC to regulate under the FHSA.

¹¹ *Forester v. CPSC*, 559 F.2d 774, 788 (D.C. Cir. 1977).

¹² *See Miles v. S.C. Johnson & Son, Inc.*, No. 00 C 3278, 2002 Westlaw 31655188, at *1 (N.D. Ill. Nov. 25, 2002) (“CPSC has determined that sodium hydroxide, the primary ingredient in Drano, is a hazardous substance.”); *Wagoner v. Exxon Mobil Corp.*, 832 F. Supp. 2d 664, 668 (E.D. La. 2011) (“Defendant does not argue that its Liquid Wrench product contains a banned hazardous substance”); *cf. Leibstein v. LaFarge N. Am., Inc.*, 689 F. Supp.

Courts have also given significant deference to the CPSC’s determinations that a product is a “hazardous substance.” For example, the Second Circuit Court of Appeals agreed with the CPSC that foam spray paint (essentially food-colored shaving cream) intended for use by children is a “hazardous substance” under the FHSA.¹³ The court “defer[red] to the agency’s interpretation of the substantial injury requirement” because it was not arbitrary, capricious or manifestly contrary to law.¹⁴ The court emphasized that the statute only required that the product “may cause” substantial injury, and did not require that the product would “likely” cause injury.¹⁵

2. Precedent for Regulating Classes of Products Under the FHSA

The Petition requests that the CPSC ban a class of flame retardants in four product categories. There is solid precedent for regulating classes of products under the FHSA. In *Toy Manufacturers of America, Inc. v. CPSC*, 630 F.2d 70 (2d Cir. 1980), a trade association of toy manufacturers challenged a rule issued under the FHSA, which banned toys intended for use by young children that present choking hazards because of small parts. The toy industry argued that the FHSA was intended to deal only with specific, individual articles, and “not with a broad range of products at the same time.”¹⁶ The court soundly rejected this argument, saying: “Certainly, nothing in the FHSA explicitly limits the employment of its banning procedures to situations involving only individual products”¹⁷ The court went on to note that “[t]he legislative history appears clear in favoring general prescriptive regulations of *the broadest, most comprehensive type* and would favor case-by-case proceedings only where such general prescriptive regulations prove impossible.”¹⁸ The court relied on language from the FHSA legislative history in which the Senate Report states:

It is intended that most determinations made by the (CPSC) will be in the form of general prescriptive rules, further amplifying the definition of . . . hazardous substances where necessary.¹⁹

The class of organohalogen flame retardants in the product categories described in the Petition is like small parts in toys: these chemicals are intrinsically dangerous by virtue of their inherent characteristics. Consumer products in the four categories at issue pose hazards when they

2d 373, 381 (E.D.N.Y. 2010) (it is undisputed that cement product is a “hazardous substance” because it is corrosive).

¹³ *United States v. Articles of Banned Hazardous Substances Consisting of an Undetermined Number of Cans of Rainbow Foam Paint*, 34 F.3d 91 (2d Cir. 1994).

¹⁴ 34 F.3d at 97.

¹⁵ *Id.* at 97-98.

¹⁶ 630 F.2d at 74.

¹⁷ *Id.*

¹⁸ *Id.* (citation omitted) (emphasis added).

¹⁹ S. Rep. No. 91-237, 91st Cong., 1st Sess. 5 (1969).

contain any organohalogen flame retardant because of the intrinsic tendency of these semi-volatile chemicals to migrate out of products and attach to other media, such as house dust. Thus, for purposes of being a “hazardous substance” under the FHSA, each foreseeable way that these four categories of products are used, including, handling, mouthing, lying on and within, sleeping on, sitting in, playing with, or watching (as in a television) can pose a risk of harm to consumers if organohalogen flame retardants are added to these product categories during manufacturing. Indeed, the products may cause substantial personal injury or substantial personal illness as a result of their mere presence in the household, which is plainly a foreseeable handling or use.

It doesn’t make sense for CPSC to regulate a product containing one organohalogen flame retardant only to see the same product manufactured with another flame retardant with the same physico-chemical properties.²⁰ Based on the understanding that the FHSA “favor[s] general prescriptive regulations of the broadest, most comprehensive type and would favor case-by-case proceedings only where such general prescriptive regulations prove impossible,”²¹ and that there is strong evidence documenting that all chemicals in this class – due to their physico-chemical properties – are toxic and may cause substantial injury or illness, consumer products containing organohalogen flame retardants as a class must be understood as “hazardous substances” within the meaning of the FHSA.²²

C. CPSC has a Documented History Under the FHSA of Addressing Chemical Hazards in Consumer Products

The CPSC has regulated certain products containing specific chemicals under the FHSA due to the hazards posed by those chemicals. The request in this petition is consistent with those previous actions. CPSC found that a number of substances are determined to be “banned hazardous substances”²³ because “they possess such a degree or nature of hazard that adequate cautionary labeling cannot be written and the public health and safety can be served only by keeping such articles out of interstate commerce”²⁴

CPSC banned “[m]ixtures that are intended primarily for application to interior masonry walls, floors, etc., as a water repellent treatment and that are extremely flammable,”²⁵ “[c]arbon

²⁰ The fact that sulfuric acid is a single chemical, not a chemical class, and that drain openers is a single product category are irrelevant distinctions for purposes of this Petition. The CPSC’s expressed preference for remedying consumer risk without inviting a similarly risky product as its replacement is just as applicable here as with the drain openers.

²¹ 630 F.2d at 74.

²² Under the authority of the FHSA, products containing several chemical substances have been found to be “hazardous substances,” requiring labeling. These include: diethylene glycol; ethylene glycol; products containing 5% or more benzene; methyl alcohol; turpentine; toluene, and xylene. When the FDA (which administered the FHSA at the time these regulations were adopted) first proposed to regulate products containing these chemicals as “hazardous substances,” it said it was doing so based on “human experience” and “together with opinions of informed medical experts.” 28 Fed. Reg. 2686, 2686 (Mar. 19, 1963).

²³ 16 CFR 1500.17

²⁴ 16 CFR 1500.17

²⁵ 16 CFR 1500.17(1)

tetrachloride and mixtures containing it (including carbon tetrachloride and mixtures containing it used in fire extinguishers), excluding unavoidable manufacturing residues of carbon tetrachloride in other chemicals that under reasonably foreseeable conditions of use do not result in an atmospheric concentration of carbon tetrachloride greater than 10 parts per million,”²⁶ “products containing soluble cyanide salts, excluding unavoidable manufacturing residues of cyanide salts in other chemicals that under reasonable and foreseeable conditions of use will not result in a concentration of cyanide greater than 25 parts per million,”²⁷ and [g]eneral-use garments containing asbestos (other than garments having a bona fide application for personal protection against thermal injury and so constructed that the asbestos fibers will not become airborne under reasonably foreseeable conditions of use).²⁸

Therefore, it is clear that the CPSC has banned chemicals in consumer products that have posed various risks to consumers since labeling would have been inadequate to protect the public health.

This Petition requests that the CPSC follow that precedent and use its authority under the FHSA to ban children’s products, furniture, mattresses and the casings surrounding electronics containing non-polymeric, additive form, organohalogen flame retardants due to the hazards they pose to consumers.

II. Labeling Products Indicating that they Contain Non-Polymeric, Additive Form, Organohalogen Flame Retardants Would Not Adequately Protect the Public Health

Under the authority of section 2(q)(1)(B) of the Federal Hazardous Substances Act, the Commission may “declare” as “banned hazardous substances” “articles because they possess such a degree or nature of hazard that adequate cautionary labeling cannot be written and the public health and safety can be served only by keeping such articles out of interstate commerce.”²⁹ The FHSA clearly provides the CPSC with the authority to ban products containing a toxic hazardous substance if a label would not be adequate. Our request in the petition meets this threshold.

The hazards posed by non-polymeric, additive form, organohalogen flame retardants could not be effectively addressed by a label. First, consumers are not aware of the potential hazard and when the hazard is not obvious, a warning label would not be effective. More importantly, there is no particular type of use, condition, or behavior that a consumer could take to avoid adverse health impacts from exposure to these flame retardants. Knowledge of a potential health hazard, alone, without a clear alternative, will not provide consumers with sufficient information nor options to effectively limit their exposure. Knowledge could increase consumer awareness of health impacts but without clear alternatives to products, may lead to consumer confusion in this context.

²⁶ 16 CFR 1500.17(2)

²⁷ 16 CFR 1500.17(5)

²⁸ 16 CFR 1500.17(7)

²⁹ 16 CFR 1500.17(a)

Significantly, when addressing a product safety hazard, “the safety hierarchy” establishes a recommended approach. “The basic sequence of priorities in the hierarchy consists of three approaches: first to design it out, second to guard, and third to warn.”³⁰ If a product poses a safety hazard to consumers, the first and most effective step is to eliminate the hazard from the product. The second step in the hierarchy is to guard a consumer from the hazard posed by the product. “Personal protective equipment such as rubber gloves and goggles, barricades on the highway, and bed rails on the side of an infant’s crib are examples of physical guards.”³¹ It is unlikely that guarding against the migration of flame retardants from consumer products is feasible.

The lowest level of the hierarchy is warning consumers of the potential hazard. “Warnings are third in the priority sequence because they are generally less reliable than design or guarding solutions.”³² “Warnings are generally most effective when the user is new to the task and especially when the user already believes that risk exists. On the other hand, warnings are least effective when there is no perceived risk. In other words, they are most likely to fail in the very circumstances where they are most needed.”³³

Consumers do not perceive that there is a risk of flame retardant exposure when they are using consumer products. This is the circumstance determined to be the least effective to warn against. Thus, addressing the adverse health impacts from the use of certain flame retardants in children’s products, furniture, mattresses and the casings surrounding electronics through the use of warning labels would not adequately serve the public health and safety of consumers.

III. Conclusion

In conclusion, under the Federal Hazardous Substances Act, the Consumer Product Safety Commission has explicit authority to protect consumers from the health hazards caused by the use of non-polymeric, additive form, organohalogen flame retardants in children’s products, furniture, mattresses and the casings surrounding electronics.

The FHSA gives the CPSC the authority to require precautionary labeling on hazardous consumer products and to ban products that pose such a significant hazard to consumers that labeling would not adequately protect consumers from the hazard. Warning consumers of hazards would not adequately protect consumers from the adverse health impacts of non-polymeric, additive form, organohalogen flame retardants in children’s products, furniture, mattresses and the casings surrounding electronics.

Courts have deferred to the CPSC when the CPSC has acted to ban substances in consumer products under the FHSA and courts have affirmed that the CPSC not only has the authority but

³⁰ Kenneth R. Laughery, Michael S Wogalter, “The Safety Hierarchy and Its Role in Safety Decisions,” available on the web at <http://www.safetyhumanfactors.org/wp-content/uploads/2011/12/314LaugheryWogalter2010.pdf>

³¹ Ibid at 1.

³² Ibid.

³³ Marc Green, “Safety Hierarchy: Design Vs. Warnings,” available on the web at <http://www.visualexpert.com/Resources/safetyhierarchy.html>

that it is preferential to regulate a class rather than an individual ingredient or product. Further, CPSC has a history of banning hazardous chemicals in consumer products.

We urge the Commission to use this authority to grant the request made in the Petition to protect consumers from the documented hazards posed by the use of non-polymeric, additive form, organohalogen flame retardants in children's products, furniture, mattresses and the casings surrounding electronics.