

Written Statement of S. Mike Gentine Before
The Subcommittee on Consumer Protection & Commerce of the
U.S. House Committee on Energy & Commerce

“Protecting Americans from Dangerous Products:
Is the Consumer Product Safety Commission Fulfilling Its Mission?”

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Chair Schakowsky, Ranking Member McMorris Rodgers, and members, thank you for inviting me to appear before you today. And thank you, as well, for holding this hearing to talk about the vital work being done at the Consumer Product Safety Commission.

First, I should note that I am appearing today in my personal capacity. My opinions are my own opinion and may not represent those of any former or current employer, firm, or client

I am honored not only to be speaking with you, but also to be sharing this panel with [three] tireless consumer advocates, each of whom I have come to know and respect during my time in the CPSC world. We all share a vision of a consumer products marketplace free of unreasonable risks, even though we may disagree on how to realize that vision.

I have also had the privilege of working alongside many of the talented, dedicated career staff at CPSC, who devote their time and energy to understanding and addressing potential unreasonable risks consumers may face. Every officer and employee of the agency is a public servant in the truest, noblest sense of that term, and they all deserve our thanks.

CPSC's Mission

The notice for this morning's hearing asks a simple question – "Is the Consumer Product Safety Commission Fulfilling Its Mission?" From my perspective, the answer is equally simple: Yes.

As you know, the CPSC is charged with protecting the public against unreasonable risks of injury associated with consumer products. Since its creation in 1972, the CPSC has worked alongside the consumer products industry to fulfill that mission. Much of that work, however, goes unnoticed and unheralded. Each year – from thousands of incident reports to hundreds of to dozens of standards activities – CPSC is continuously engaged in a variety of efforts that most consumers never see, but that benefit every consumer.

More Consensus than Voluntary

The third of these activities – collaborating with voluntary, consensus standards bodies – has been the target of significant criticism recently. I fear that criticism is founded on some misunderstandings about the role voluntary, consensus standards play in protecting consumers.

First, we should unpack the terminology. It is true that they are voluntary standards in the sense that noncompliance does not carry the threat of government sanction, but there are a variety of influences that drive manufacturers toward compliance. Just to name three:

- Many retailers condition shelf space on compliance and certification to relevant voluntary standards;
- Failing to comply with an applicable standard can damage a brand; and
- CPSC staff and courts in civil litigation can and do view voluntary standards as drawing a de facto line between defective and non-defective products.

Second, they are genuinely consensus standards, the products of collaboration between manufacturers, retailers, consumers, and other stakeholders. These stakeholders include CPSC staff, whose opinions carry great weight and can often be dispositive, particularly regarding juvenile products, because of both staff's valuable expertise and the agency's role.

Indeed, collaboration can be more meaningful in standards development than in notice-and-comment rulemaking. By the time any agency even requests comment, much of its thinking on an issue is frequently cemented. By contrast, the voluntary, consensus standards process embeds collaboration from the outset.

The voluntary, consensus standards process offers a number of advantages over mandatory rulemaking, each of which contributes to greater consumer safety.

- First, they are a vital force multiplier. In Fiscal Year 2019, CPSC is engaged with 76 different standards. The agency simply does not have the resources to develop mandatory rules for even half that number, and a CPSC massive enough to do so would be one whose price tag taxpayers would be loath to pay and whose burden on regulated industry would likely far outweigh the safety benefit it would provide.
- Second, the standards bodies are made up of product-specific experts. CPSC staff, by virtue of their number, must necessarily be generalists. A CPSC mechanical engineer may work on strollers in the morning and generators after lunch. While their broad expertise makes them valuable partners on an array of subjects, CPSC staff do not have the luxury of being as immersed in any one product as people who design, produce, or use that product every day.
- Third, the voluntary standards process is faster and nimbler than mandatory rulemaking can ever be. Much is made of the burdens imposed on CPSC by Section 9 of the CPSA (15 U.S.C. § 2058). I think this criticism is generally overwrought – how would it benefit anyone, for example, for CPSC to impose anything but the least burdensome rule it can to achieve its safety objective? Even accepting these arguments, though, APA notice-and-comment rulemaking is almost always a question of years, while voluntary, consensus standards can evolve in months or, on discrete, pressing issues, weeks. These standards are better able to adapt to both developing hazards and emerging innovations.

Returning to the voluntary nature of these standards – which, as mentioned, can often be fairly described as nominal – CPSC has a variety of tools available to make them closer to mandatory.

- First, under Section 104 of the Consumer Product Safety Improvement Act of 2008 (15 U.S.C. § 2056a), CPSC can adopt and strengthen standards for durable infant or toddler products, giving them the same force of law as Section 9 rules. I cannot agree with the impulse to stretch this term beyond any meaning. However, for those products that are genuinely within the scope of what Congress meant by that term, Section 104 provides the best of both worlds: the force of a mandatory rule with the collaboration, expertise, and agility of a voluntary, consensus standard.

- Second, under the unfairly maligned Section 9 of the CPSA, CPSC can formally rely on a standard that it believes would adequately reduce a hazard and would likely see substantial compliance. While this does not turn the standard into a rule, it does create a reporting obligation for any company whose products do not comply, marking that company as separate and apart from its industry and providing a basis for enforcement.
- Third, under Section 15(j) of the CPSA (15 U.S.C. § 2064(j)), CPSC can use the presence or absence of readily observable markers of compliance with an effective, widely adopted standard as the basis for deeming by rule that a product presents a substantial product hazard. This places the standard on a middle-ground footing: Noncompliance does not expose a company to penalties, but the product is subject both to mandatory recall and to refused entry at the ports. (15 U.S.C. § 2066(a)(4)).

These tools allow voluntary, consensus standards to strengthen CPSC's hand in dealing with the distinct minority of manufacturers who choose to ignore their peers' efforts to protect consumers. This provides a more level playing field, rather than one that slants in the favor of the noncompliant manufacturer.

In Defense of Fairness and Accuracy

Another area of CPSC policy that has come under scrutiny based on what I believe are misunderstandings of its role is the information disclosure procedures reflected in Section 6 of the CPSA, particularly Section 6(b). These procedures are exactly that – procedures; they do not prescribe or proscribe any outcome, but they have been painted as some kind of gag order. This is simply inaccurate.

All 6(b) requires is that CPSC take reasonable measures to ensure that its public statements about a company are fair and accurate. It is in no one's interests – least of all consumers' – for CPSC to make unfair, inaccurate statements. These could only add to consumer confusion and risk diminishing their trust in CPSC's brand.

Critics may point to the requirement that CPSC retract any product-specific statement it later determines to have been inaccurate. However, as a court noted when CPSC was not even three years old:

“Once the government condemns a product as inherently dangerous and unfit, that denouncement may well be tantamount to an economic death knell. Where a product is once shrouded with suspicion, especially suspicion cast upon it by the government, the harm is irrefragable.” *Relco, Inc. v. Consumer Prod. Safety Comm'n*, 391 F.Supp. 841, 846 (1975) (holding the Commission's duty to protect accuracy and fairness so essential that it could not be delegated to staff).

At the same time, where a pressing public need compels CPSC to speak more quickly than Section 6(b) ordinarily contemplates, the agency has several options for doing so. The agency can file an administrative complaint under Section 15 or an imminent hazard action under Section 12. It can make a “health and safety” finding under Section 6 to shorten the notice periods. And, where a

potential hazard relates more to a category than to a particular product, CPSC Section 6 does not even apply.

Not only are the costs of the Section 6 procedures generally overstated, but its benefits are at least equally understated. In addition to helping CPSC avoid informational missteps, these protections give companies greater confidence in engaging with CPSC staff. The threshold for reporting information to CPSC is – quite deliberately – set very low, much lower than the bar for mandating a recall. Necessarily, then, CPSC staff receive mountains of information that never does and never would form the basis of any product action. Nonetheless, consumers benefit because CPSC staff has greater visibility.

Critics often contrast Section 6 with other agencies' statutes, noting that other agencies are not subject to the same restrictions. While that is true, it is only half of the truth: Other agencies do not have the same statutory access to information in the first place. NHTSA, for example, only receives potential defect-related information when a company has determined the defect exists. The TREAD Act broadened this somewhat in specific categories, but not to CPSC's level: CPSC receives "information which reasonably supports the conclusion" that a defect may exist. Different levels of confidence carry different responsibilities.

Opportunities for Improvement

As I said at the outset, I do believe the Consumer Product Safety Commission is Fulfilling Its Mission. However, like any human endeavor, there are areas in which the agency can improve.

First, I agree with the consensus of the upholstered furniture industry and with consumer advocates concerned about the presence of chemicals that CPSC should adopt California's Technical Bulletin 117-2013, regarding furniture flammability. This standard has proven effective, and manufacturers can meet it without using flame retardants. While I do not fully share the alarm with which some view these chemicals, I do believe that, to the extent we can achieve our safety goals without them, we should do so. If nothing else, this allows a product to be just as safe at lower cost, which makes it available to more consumers.

Second, CPSC should adopt ASTM 2057-17, concerning furniture tip-over. I realize conversations about improving that standard are ongoing – as they should always be with any standard or rule – but using CPSC's tools to increase compliance benefits consumers and protects compliant domestic industry against noncompliant, generally imported product.

Additionally, there are three areas of CPSC activity that I believe could benefit from additional resources.

First, CPSC's importation authority is one of its most immediate opportunities to protect consumers. However, the agency can only staff handful of the 328 ports of entry into the United States. CPSC cannot – and should not attempt to – fill this gap with personnel alone. Modern data analytics can provide the same benefit without the costs. If CPSC had the data tools to more reliably identify higher-risk shipments on paper, it could better target its enforcement efforts, inspecting more of those shipments while allowing known-compliant products to enter commerce

unimpeded. The agency has taken great strides in this direction, but further commitment would be a benefit to all.

Second, CPSC's broader toolset for risk assessment should be modernized. One of its key tools – the National Electronic Injury Surveillance System or NEISS – is widely regarded as the gold standard in product-related epidemiology. However, it has tarnished with age. NEISS relies on manual coding of records gathered from emergency room personnel, who are rightly more concerned with treating their patients than with asking detailed questions about products. This leaves CPSC with information that has many errors, holes, or inconsistencies. The agency is working to improve NEISS – such as by extending it to urgent care facilities – but a more significant investment in data quality would allow the agency to concentrate its resources on the areas of greatest concern.

Third and finally, CPSC's award-winning Fast Track voluntary recall program has been a great benefit to consumer safety. However, in recent years, the word "Fast" has lost some of its meaning, with some Fast Track recalls taking months and months for approval. While of course CPSC must do its due diligence, it is not in anyone's best interest to unnecessarily impede companies whose sole aim is to take swift action to protect consumers. CPSC should rededicate itself to working with these companies to quickly resolve Fast Track recalls, so that these products are remedied promptly.

Conclusion

I began this testimony with two assertions: That the CPSC is fulfilling its mission, and that its successes are the result of the tireless efforts of the talented, dedicated public servants who make up the agency. While the agency can and should always look for ways to improve, consumers can take comfort in their reliable watchdog in Bethesda.