

THE WHITE HOUSE

WASHINGTON

May 15, 2008

The Honorable John Dingell
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Dingell:

This letter represents the views of the Administration on H.R. 4040 as passed by the Senate and House on March 6, 2008 and December 19, 2007, respectively. The Administration has previously transmitted our views in letters dated October 29, 2007 and December 7, 2007, and in a Statement of Administration Policy dated March 3, 2008. We are pleased to see that several of the recommendations from the President's Action Plan for Import Safety have been included in both bills. Both the House and Senate versions of the Consumer Product Safety Reform Act represent serious attempts to upgrade our consumer safety system and there is much to support in both bills. However, the Administration has serious concerns about provisions in both bills, and believes that if these provisions were enacted into law, they could have a profoundly negative impact on the Consumer Product Safety Commission (CPSC) that would jeopardize consumer safety.

The Administration remains strongly opposed to enforcement of CPSC safety standards by State Attorneys General. Consumer interests are best protected by uniform national standards that allow for regulatory consistency and predictability. We are particularly concerned by language in the Senate bill that appears to give State Attorneys General broad powers to interpret what constitutes violations of the various acts enforced by CPSC. Allowing States to act independently when they believe citizens "are being threatened or adversely affected by a violation of any consumer product safety rule" and allowing States to pursue claims that CPSC may have already determined are not violations of the Acts under its jurisdiction will lead to differing, burdensome standards across the fifty States. Moreover, there is no apparent justification for the provision in section 20(g) of the Senate bill creating a new and separate standard for the award of legal fees to State Attorneys General that differs from the Consumer Product Safety Act's existing general standards governing the award of legal fees. The Administration is concerned about the potential for abuse that can result from the use of contingency fee agreements by State Attorneys General.

The Administration is strongly opposed to the inclusion of putative whistleblower protections in this legislation which are unnecessary to protect American consumers and needlessly raise questions about the U.S. Government supervision of Federal employees. These provisions will cause a serious increase in the number of frivolous claims brought

against private employers and may seriously threaten the ability of CPSC to enforce its mission. Adequate whistleblower protections for Federal employees already exist in current law. By empowering CPSC employees to refuse to comply with their stated duties if they had a “reasonable belief” that what they were doing violates an “order, regulation, rule, or other provision” of CPSC administered statutes, the proposed legislation unnecessarily broadens the definition of protected activity in a way that may impede actions done in the normal course of work. Managerial oversight must be maintained for CPSC to function properly and protect consumers. To ensure that enforcement agencies receive the best and most complete information from regulated industries, and to avoid complicating this legislation with unnecessary legal concerns regarding how and when Federal employees may disclose certain confidential or privileged information, these provisions should be dropped or modified to ensure that Federal agencies retain the ability to supervise employee disclosures.

The Administration strongly opposes the creation of a CPSC-based database of deaths, injuries, illness, or risks related to consumer products. A government-run public database that includes all unsubstantiated complaints from any source will result in a significant increase in wasteful litigation and could harm CPSC’s regulatory effort by discouraging legitimate private disclosures from sources, such as local police and fire departments and regulated industries, that currently voluntarily submit safety concerns so that CPSC may investigate. This database will also distract from CPSC’s regulatory mission as CPSC will have to dedicate significant resources to maintaining it at the cost of other safety and enforcement activities.

The Administration strongly opposes direct submission to Congress of all CPSC budgetary documents as an impediment to the operations of the executive branch.

The Administration opposes any change to the rules governing Federal preemption which will allow for varying safety standards across the 50 States and District of Columbia. The preemption of State law by Federal regulation exists to provide consistent and uniform standards and avoid interference with interstate commerce, and Congress could undermine this by empowering States to overrule Federal standards.

The Administration is also opposed to all sections of the bills that pursue product-specific regulations through the legislative process. Although we may ultimately support regulation of some of these products, the adoption of product-specific regulatory standards should not be achieved through legislative action but through the normal rulemaking process, which allows for public comment and proper weighing of the costs and benefits of regulation. The Administration is seriously concerned that adequate transition time be provided for manufacturers, suppliers, and retailers to adopt new standards for any specific regulations that are passed through this legislation.

As a related matter, the Administration is seriously concerned about the inclusion, for the first time, of a ban on phthalates in children’s products. CPSC has already rejected a ban on phthalates due to the lack of evidence supporting their risk to human health, and the National Academy of Science is currently evaluating the health risks of phthalates in

consumer products. Banning a product before a conclusive, scientific determination is reached is short-sighted and may result in the introduction of unregulated substitute chemicals that harm children's health. The Administration is also concerned about the definition of "children's products" and "child care articles" in this section, which could create regulatory conflicts between CPSC and FDA.

The Administration believes that it should be illegal to sell a banned product, a recalled product, or one that violates a mandatory standard. However, we strongly encourage including in the legislation a standard of knowledge and willfulness for such sales. We are particularly concerned about how such a prohibition will impact secondary retailers, such as on-line sellers, thrift stores, and local garage sales. As suggested by the President's Action Plan for Import Safety, a standard of willfulness must also be included in any criminal sanctions for violations of the acts enforced by CPSC.

The Administration supports enhancing penalties in our current system and private sector-based voluntary certification programs, similar to the risk-based program envisioned in the President's Action Plan for Import Safety. We remain extremely concerned that mandatory third-party testing of certain children's products will be an excessive burden on manufacturers and could result in barriers to entry for smaller firms. The Administration is strongly concerned about provisions that would require that the laboratories that test certain children's products for conformity with consumer product safety standards be independent and privately owned. Among those concerns is that the requirement could disrupt imports of children's products from countries where government laboratories are the primary testing entities.

The Administration is concerned that Section 44 of the Senate bill requires CPSC to prohibit toy imports (in some cases permanently) from manufacturers with "a persistent pattern" of manufacturing toys with substantial product hazards, when there is no similar requirement that the CPSC prohibit domestic manufacturers in such circumstances from putting goods into U.S. commerce. In addition, Section 44 is imprecise and overbroad, potentially leading to import prohibitions on toys for which no pattern of defects has been detected or for which evidence shows that the safety problems have been resolved and are unlikely to be repeated. The Administration has similar concerns with Section 38(c) of the Senate bill, which requires refusal of imports that fail to meet inspection and recordkeeping requirements, since it does not provide for similar prohibitions on domestic products whose manufacturers fail to meet those requirements. Section 44 and Section 38(c) could prompt complaints from U.S. trading partners and could encourage trading partners to adopt similarly restrictive measures against U.S. exports.

The Administration is concerned that a race-based study of product-related risks will not pass the Constitutional requirement of strict scrutiny under the equal protection component of the Fifth Amendment. The Administration also believes that restrictions on the sharing of information by CPSC in Section 18 of the Senate bill are far too narrow and could restrict the timely sharing of information by government entities when needed.

Thank you for your continued concern for the safety of American consumers. We look forward to working with you to achieve reasonable reforms at CPSC that strengthen, rather than weaken, our well-functioning consumer product safety system.

Sincerely,

A handwritten signature in black ink that reads "Keith Hennessey". The signature is written in a cursive style with a horizontal line underneath the name.

Keith Hennessey
Assistant to the President for Economic Policy and
Director, National Economic Council

Identical letter sent to:

The Honorable Daniel Inouye
The Honorable Ted Stevens
The Honorable Joe Barton