

Testimony of
Charles A. Samuels
Before the House Energy and Commerce Committee,
Subcommittee on Commerce, Manufacturing and Trade
Hearing on Draft Bill to Revise the
Consumer Product Safety Improvement Act

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Summary

The CPSIA is an important contribution to consumer product safety. It has a number of defects, however, in that it is over-prescriptive, unduly restricts Commission discretion and lacks proportion and balance in dealing with safety risks. The draft legislation goes far in remedying these deficiencies while maintaining the strengthened and new authorities.

The concept of a publicly available database makes sense in the internet age as a tool for consumers. Unfortunately, this database, as prescribed by Congress and developed by the Commission, is not well designed to provide useful, accurate information to consumers or manufacturers. The existing database procedures do not comport with the original intent of the CPSIA which is that reports should only be posted from those who are harmed, their family or representatives or actual public safety agencies. Nor do the CPSC procedures require resolution of well-founded claims of material inaccuracy before reports are posted or require sufficient information such that manufacturers can respond to and evaluate the reports. The draft legislation resolution goes a long way to resolve these issues.

The legislation's tightening of the definitions of who may report on the database will improve and focus the database while retaining the important roles of consumer groups, trial attorneys, and industry representatives on CPSC matters. The legislation's requirements for resolution of claims of material inaccuracy before posting on the internet will add quality and fairness to the database, and the procedure for ascertaining specific models will enhance the value of the program to consumers, manufacturers and CPSC.

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Dear Chair Bono Mack and Members of the Subcommittee:

Thank you for the opportunity to testify on this important matter. Product safety regulation has been at the center of my professional interest for 25 years. I have the privilege of serving as General Counsel for the Association of Home Appliance Manufacturers and have represented many individual companies – manufacturers, retailers and importers -- before the CPSC and in Canada, Europe and elsewhere on product safety matters. Like my colleagues on this panel, I am a strong supporter of a fully resourced, focused and effective Commission which has the tools to protect Americans from unsafe products.

That is why I supported the revamping of the federal product safety laws which led to the Consumer Product Safety Improvement Act, and I believe that many of the provisions in the law were necessary and appropriate. The hard working and dedicated career and political officials at the Commission have been laboring to interpret and implement the new requirements.

Unfortunately, as well intentioned as it was, the legislation contains elements of over-reaching, over-prescription and distortion of the Agency's mission and obligations in ways that do not well serve consumers and are a great burden on regulated industry. There was a lack of appreciation that many of the issues that arose during the so-called "year of the recall" were mostly violations of existing law which simply needed full implementation and compliance.

The March 29, 2011 discussion draft makes great strides towards remedying the imbalances and deficiencies in the current law. Yet, the draft also does not do violence to the

core provisions of the law and, in my view, in some respects does not go far enough. Obviously, compromises and moderation are necessary to reach agreement and this draft is an excellent start. All the essential provisions of CPSIA would be intact and would be implemented as contemplated but in a more reasonable fashion. Like much legislation, 90 percent of the benefits of CPSIA are achieved with reasonable application of the core provisions and the more extreme or unreasonable provisions or interpretations of those provisions create great problems with little consumer benefit. This bill goes far to remedy that imbalance.

The Commission must remain capable of carrying out its mission and, where necessary, added authority and resources are appropriate. I support the expanded subpoena powers in Section 9 of the draft. Also, I support strengthening the provisions that make it unlawful for anyone, including industry, trial lawyers, consumers, or consumer groups, to make misrepresentations to the Commission regarding, but not limited to, the database. Our federal product safety system relies extensively on honesty and good faith reporting and where there are breaches of that obligation they should be penalized.

I will focus on the database provision. I support the policy that modern technology should be used to disseminate good and easily accessible information to consumers about product safety. Even under the law prior to CPSIA that type of database could have been created. In CPSIA, you instructed CPSC to build such a platform.

It makes no sense, however, for so much of the resources of this Commission to be invested in this effort unless it provides useful and quality information to the extent feasible. The database will never be perfect and it is unreasonable and not necessary that every piece of information placed on it be fully vetted beforehand by the CPSC. But, due to the over prescription in the legislation and some unfortunate interpretations by the Commission, we have

a database that can be manipulated for purposes other than that intended. Also, vague, useless and incorrect information can be placed on the database. This not only harms manufacturers, retailers and importers whose products are impugned but harms consumers who receive bad information and are not able to focus on those products where there are real safety problems.

Fortunately, discrete but significant changes can be made to the current law, as exemplified in this draft, which will greatly improve the operation, utility and fairness of the program while maintaining its essential characteristics to provide quick, useful information to consumers.

First, the spirit and even the letter of Section 6A(b) of the Consumer Product Safety Act requires that posted reports of harm should come from those who suffer harm or risk of harm, their family members, legal representatives and those in a position to directly know about the incident. Although they play huge roles in the activities of the CPSC, the database should not be a platform for the submissions of manufacturers, trade associations, trial lawyers or consumer groups who are trying to make policy or regulatory points, enhance their economic or competitive opportunities or advantages or simply provide third or fourth hand information. All of these folks, including myself, have important roles to play with the CPSC but not as reporters.

Therefore, in Section 8(a)(1)(A) of the draft bill, I support the tighter definition of “consumers” to restrict it to the persons who actually suffer harm or risk of harm related to the use of the product, their next of kin or members of their household, legal representatives or another person expressly authorized by any such person. The latter could be an advocacy group or anyone else.

I also support striking the term “public safety entities” which, unfortunately, the Commission has misconstrued, and making clear that you are restricting the reports to police,

fire, ambulance, emergency services, law enforcement and related public safety officials.

Section 8(a)(1)(B) of the draft bill. Many of us consider ourselves to be representatives and advocates of public safety but this provision ought to be focused on governmental and health authorities and the like.

These revisions do not mean that the interest and information of competitors, trial lawyers and consumer groups are or should be irrelevant to the Commission. Certainly, those are sources of information that the Commission should gather and evaluate when considering whether there should be regulatory action or if there has been a violation of the law, a substantial product hazard or a defect, but such information, which is often indirect and biased, should not be presented to the public through the database. It, of course, may be disclosable through FOIA. Trial lawyers and consumer groups have sufficient means to present their views and do not need a government platform.

The requirement that the Commission attempt to ascertain from the reporter the location and availability of the product is an important requirement. Section 8(a)(2)(A) of the draft bill. For a manufacturer or retailer to attempt to respond and evaluate the complaint, or for the Commission to look further at the alleged incident, such information can be critical. We should all want the database to be used by manufacturers and retailers to consider whether there is a situation that needs to be remedied. Similarly, if the report is made by someone other than the victim, then the CPSC should know who the actual person harmed is. This is critical for follow up by the Commission and, where the identification is released, for follow up by retailers and manufacturers.

One of the major but unnecessary deficiencies of the database, as it has been implemented by the Commission, is the erroneous agency decision to publish the report

regardless of whether a good faith, substantial claim of material inaccuracy has been submitted but it has not been resolved within 10 days. This is unfair, a lack of due process and absolutely not what we should be expecting from our federal government. We have great freedom in this country to blog and publicly report about almost anything without much legal restriction, but the government should show more prudence and responsibility.

The draft properly provides that if a manufacturer notifies the Commission of a material inaccuracy in a report and the Commission determines that the claim is “potentially valid,” the Commission must resolve that inaccuracy before posting. Section 8(b)(2)(B)(ii) of the draft bill. The Commission may communicate with the reporter, investigate the incident or provide the manufacturer a reasonable period of time to investigate and resolve the material inaccuracy claim. This should not be and does not need to be an endless process. It is highly likely, as was reported during the soft launch/pilot, that the vast majority of database reports will receive little or no response from the manufacturer and at most there will be a response suitable to be placed on the database along with the consumer report. But, in those cases where a company has gone to the effort to evaluate and provide positive proof that a report is materially inaccurate, that ought to be resolved before the report is posted. Once a posting is made, pulling it from the database later is of limited value given the realities of how the internet works and how it may already have affected consumers.

The database as now implemented also is significantly deficient in that it allows consumers to report allegations about products which do not specify a particular model of a product such that the information is useless, even deceptive, to the public and impossible for companies to evaluate. Under their corporate names and brands, many manufacturers and retailers have multiple -- dozens -- of models, which can be quite different, often manufactured

in different places. A database report that Brand A caused harm, when there may be many models and types of Brand A, makes meaningful response by the manufacturers, even putting explanatory material on the database, and internal evaluation often impossible. Therefore, I support the language in the discussion draft that a manufacturer may respond that the report is insufficient for determining which of the manufacturer's products are the basis of the complaint. Section 8(b)(1)(i) of the draft bill. But, a company must provide information to assist the person submitting the report to sufficiently identify or provide an adequate description of the report. If manufacturers sufficiently document this issue then the Commission should be able to work with the consumer to provide that information before the posting is made. Submitters should be required to provide a serial or model number where available and tracking label information for children's products.

I am confident that under these provisions a very high percentage of the reports still will go on the database very quickly, some with explanatory information from the companies. A small percentage -- where the product has been misidentified or where there is proof that the product did not or could not have caused the harm -- should be resolved in an expeditious way by the Commission which is experienced to do so. There should be a high but not impossible hurdle for companies to demonstrate why material should not be posted.

In this regard, the present 10-day limitation for companies to evaluate and respond to a report and for the Commission to resolve any issues is extraordinarily short and unreasonable. Even well-organized companies will have difficulty dealing with some of these reports, particularly where they are fragmentary and where no consumer identification is provided. I recommend that the ten days be increased to 15 days which will have no material impact on the

timing of postings or value of the database to consumers but provide some means or opportunity for companies to consider the information.

Also, there is an unfortunate and inappropriate indication from some at the Commission that, as a practical matter, the Commission is limiting its review of material inaccuracy in a narrow and cramped way to cover only those cases where there has been a misidentification of the product -- i.e., the Company does not make the type of product or the product related to the incident was another brand. Those cases are very important and will be often the simplest to resolve but that is definitely not the limit of material inaccuracy. The Commission's own regulations indicate an understanding that material inaccuracy includes all relevant facts that might significantly impact a consumer's decision on whether to purchase a product and therefore go to issues of causation. According to the CPSC, "materially inaccurate information is a report of harm" with "information that is false or misleading, and which is so substantial and important as to affect a reasonable consumer's decision making about the product." 16 C.F.R. §1102.26(a).

It will often be impossible for the Commission to resolve causation issues and make a determination whether there is a material inaccuracy, but sometimes it will be clear and there will be sufficient proof that the product could not have caused the incident or the risk of harm. In those cases, inaccurate information should not be placed on a public database. Again, even if not in the public database, the report will be in the CPSC database for internal evaluative purposes which can lead to an investigation.

It does not require an amendment of the law, but Congress should make clear to the Commission that second and third hand reports do not constitute reports of harm eligible for the database. Also, consumer complaints of dissatisfaction about the quality or performance of the

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product which do not relate to a report of harm should not be posted. These are concerning indications in these regards from the early database activities.

I hope that these comments are helpful, and I would be pleased to answer your questions. This important corrective legislation will rebalance the law while fully maintaining the benefits and protections to consumers.