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November 23, 2010

The Honorable Inez Tenenbaum
Chairman
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Dear Chairman Tenenbaum:

I am pleased the Commission delayed consideration of a proposed final rule on implementing the Publicly Available Consumer Product Safety Information Database. Implementing this database properly is very important and I write to clarify the intent of Congress when we passed the relevant provisions of the Consumer Product Safety Improvement Act of 2008 (P.L. 110-314). Several provisions of the staff-proposed final rule run contrary to the intent of Congress and the clear and unambiguous language of the Act.

By way of background, the House-passed version (H.R. 4040) of the database provision reported by the Energy and Commerce Committee by a 51-0 vote did not authorize implementation of a database remotely similar to the one set forth in either the Public Law or the proposed final rule. We had bipartisan agreement to evaluate the efficacy of, and only then improve, the Commission's legacy Injury Information Clearinghouse database based on this evaluation. We provided first for an evaluation of the Commission's current injury databases. Following this evaluation, the bill directed the Commission to submit a plan to Congress on the best way to maintain the publicly available information in a searchable Internet database. The bill also directed the Commission to provide its views on whether the database should include additional information, such as consumer complaints. The bill thus provided for evaluation and another opportunity for Congress to consider the best way of addressing the database. We clearly could have gone further and drafted the bill to require that the database include such information, but we rejected that approach. In fact, the then Committee Chairman and I both opposed -- and the Committee rejected -- amendments during Committee consideration that would have mandated specific reporting requirements. We shared serious concerns that innocent companies should not suffer reputational harm from slanderous or inaccurate information in the

publicly accessible database before the Commission verifies the accuracy of the information. Due process is important and we did not believe the amendment afforded adequate protection to those who could suffer harm from the disclosure of slanderous or inaccurate information.

Similarly, after the Senate passed its bill, the conferees reached a compromise between the narrow House and the broader Senate database provisions to specifically balance the interests of consumers and companies. The approach we agreed upon carefully balanced the objectives of making reports of harm available to the public, ensuring the accuracy of the information, and preventing the disclosure of confidential information. The Commission staff proposal does not properly balance these interests and therefore does not comport with the intent of Congress. The proposal provides that the Commission would submit information where a specific product and manufacturer is identified to that manufacturer for review of potentially confidential information and to ascertain the material accuracy of the information. If a company provides evidence proving that either a breach of trade secrets would result from disclosure of the information or that the information is materially inaccurate, the Commission staff would review the evidence. According to the staff proposal, if the Commission cannot complete its review within 10 days, it would publish the information and remove it at a later date if warranted at the conclusion of its investigation. This process would provide little or no protection for confidential information and will encourage the publication of inaccurate and misleading information. Once the information is public, competitors can learn trade secrets and media can disseminate materially inaccurate information with little hope that the error could be rectified in the future. Congress did not intend such a result, and we went to great lengths to provide reasonable protection to manufacturers from the harm that such publication could entail. The Commission must follow the intent of Congress and allow such information to be withheld pending the completion of its investigation into confidentiality and accuracy.

I am also troubled by the proposed final rule's expansion of the list of entities that may submit reports of harm to the database beyond those specifically enumerated in the law. Congress included an exhaustive and exclusive list of those who may submit reports for the database in section 6A(b)(1)(A) of the Act. Specifically, that section provides that the database shall include "Reports of harm relating to the use of consumer products, and other products or substances regulated by the Commission, that are received by the Commission from (i) consumers; (ii) local, State, or Federal government agencies; (iii) health care professionals; (iv) child service providers; and (v) public safety entities."

In its first draft, the Commission staff sought to create a new category of "others" not contemplated by Congress, which included but was not limited to attorneys, professional engineers, investigators, non-government organizations (NGOs), consumer advocates, consumer advocacy organizations, and trade associations. In its most recent draft, the staff accepts that Congress enacted an exhaustive and exclusive list of reporters and removed the category of "others." However, the proposal now simply redefines the term "consumers" to include attorneys, investigators, professional engineers, agents of a user of a consumer product, and observers of the consumer products being used. Congress did not anticipate that the Commission would propose a definition of "consumer" that so radically departs from the common definition of consumer. If Congress had intended to expand the universe of reporters to include all of the entities identified in the most recent proposal, we would have made it explicit in the Act.

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Finally, the proposal also expands the definition of “public safety entity” to extend beyond federal, state and local law enforcement entities, police, fire, ambulance, emergency medical services, and other public safety officials to now include consumer advocates, NGOs, consumer advocacy organizations and trade associations. Congress did not intend to include these additional entities as is clear by the plain meaning of the text. Accordingly, to comport with Congressional intent, the Commission must strike the expanded definitions of “consumers” and “public safety entity” before it finalizes the rule.

Thank you for the opportunity to clarify the intent of Congress in these matters. I look forward to working with you and the Commission on implementation of the CPSIA.

Sincerely,



Joe Barton
Ranking Member

cc: The Honorable Henry A. Waxman
Chairman