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Testimony of

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"Protecting the Playroom: Holding Foreign Manufacturers Accountable for Defective Products"

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Good morning Chairwoman Sanchez, Ranking Member Cannon and members of the Subcommittee. I am Pamela Gilbert and I am a partner in the law firm of Cuneo Gilbert & LaDuca. I have been asked to testify today to share with you insights I gained as executive director of the U.S. Consumer Product Safety Commission from 1996 through May, 2001. I am testifying on my own behalf and all the opinions expressed are my own.

Thank you for giving me the opportunity to testify on the critically important issue of accountability for dangerous products that are sold in the U.S. but produced by foreign manufacturers.

The summer of 2007 might well be remembered as the summer of the toy recalls. At one point, it seemed every day brought new reports of dangers posed by another well-loved toy that could be lurking in our children's playrooms – Thomas and Friends trains with unsafe levels of lead; Easy-Bake Ovens that could entrap and burn children; Polly Pocket dolls with magnets that were dangerous if swallowed or aspirated; and Barbie doll accessories with high levels of lead. This left parents wondering if any toy they buy will be safe for their children.

Adding to the public's concern is the fact that just about all of the recalled toys were manufactured in China. In fact, according to the Toy Industry Association, toys made in China make up 70 to 80 percent of the toys sold in the U.S. Some industry analysts estimate that only about 10 percent of toys sold here are actually made in the U.S.A.

The question of whether we can hold these foreign manufacturers accountable for harms caused by their toys is not merely an interesting academic exercise. It is really the heart of the issue. Accountability is the key to making sure that we are providing the right incentives for manufacturers and others in the stream of commerce to make and sell safer products. Accountability is also the key to ensuring that people who are injured by dangerous products can be compensated and that dangerous products can be removed from the market quickly. With such a large percentage of the toys we buy for our children being manufactured abroad, it is incumbent upon us to ensure that our system of accountability includes foreign manufacturers, and where that is not possible, to ensure that others in the stream of commerce can be held responsible.

It is not my role here today to discuss the difficulties, under current product

liability law, of holding foreign manufacturers accountable to injured people in the U.S. There are other, more qualified witnesses to discuss those issues. I am here to explain some of the obstacles faced by the Consumer Product Safety Commission when the agency tries to conduct a recall of a product that was manufactured in China or in another foreign country. I would note, however, that most of the obstacles that injured individuals face in the product liability system – obtaining jurisdiction, conducting discovery, and enforcing judgments – also make it very difficult for the CPSC to carry out a product recall with a foreign firm.

The Consumer Product Safety Commission is charged with protecting the public from hazards associated with at least 15,000 different consumer products, ranging from toys to home appliances to all-terrain vehicles. CPSC's mission, as set forth in the Consumer Product Safety Act, is to "protect the public against unreasonable risks of injury associated with consumer products." CPSC's statutes give the Commission the authority to set safety standards and work with industry on voluntary standards, collect death and injury data, educate the public about product hazards, and ban and recall dangerous products.

My testimony will focus on the authority of the CPSC over firms that sell defective or dangerous products. As I am sure the subcommittee is aware, over the years, CPSC's budget has shrunk, impairing its ability to effectively carry out its mission. Furthermore, the Commission recently has come under fire for poor leadership and management. I do not intend, however, to address CPSC's current difficulties in my testimony, unless I am asked by a member of the subcommittee.

Section 15 of the Consumer Product Safety Act[1] requires companies to make reports of hazardous products to the Commission and sets forth the procedures for conducting a recall of such products. Under section 15, manufacturers (defined as a manufacturer *or* importer), distributors and retailers who discover that one of the products they sell does not comply with a consumer product safety rule, contains a defect which creates a substantial risk of injury to the public, or creates an unreasonable risk of serious injury or death, must immediately inform the Commission.

In addition, section 15 authorizes the Commission to order the manufacturer, distributor or retailer to notify the public of the product hazard and to conduct an appropriate corrective action to remove the hazard from the marketplace and from people's homes. The statute allows the manufacturer, distributor or retailer to elect to repair or replace the product, or offer refunds to the public less an allowance for use for products more than one year old. These corrective action plans are commonly referred to as product recalls.

For purposes of our discussion today, what is critical about the scheme adopted by section 15 is that manufacturers – including importers – distributors and retailers are *equally* responsible for notifying the Commission and the public and conducting a recall when they sell a dangerous product. To illustrate why this is so important, and how it may play out in practice, I am going to use a recent recall as a case study.

Last week, more than four million sets of a children's art product containing beads called Aqua Dots were recalled in cooperation with the CPSC. According to the Commission's press release, the sets were recalled because the coating on the beads that causes the beads to stick together when water is added contains a chemical that turns toxic when many are ingested. Children who swallow the beads can become comatose, develop respiratory depression or have seizures.

Before the recall, the Commission had two reports of serious injuries from children swallowing the Aqua Dot beads. A 20-month-old became dizzy and vomited several times before slipping into a comatose state and being hospitalized after swallowing several dozen beads. A second child who swallowed the beads also vomited and slipped into a coma and was hospitalized for five days before recovering.

According to news reports, the beads contained an adhesive solvent called "1,4 butylene glycol," which can simulate the so-called date-rape drug gamma hydroxyl butyrate or GHB when ingested, causing seizures, coma or death. According to the

toy's manufacturer, the problem had been traced to a Chinese factory under contract that substituted a toxic chemical for a safe glue during manufacturing.

This is not the first time we have heard of a Chinese factory substituting a harmful chemical for a safe one. In many of the toy recalls involving unsafe levels of lead, a Chinese factory reportedly bought and used leaded paint, against the specifications of the U.S. manufacturer contracting with the Chinese. The question on most peoples' minds is who is responsible when this happens, and how can we ensure that these harmful practices stop?

In the Aqua Dot case, the chain of ownership was as follows: The manufacturer, Moose Enterprise, is a Melbourne, Australia company. Moose Enterprise produced the product in Chinese factories. The North American distributor of Aqua Dots is Spin Master, a company based in Toronto, Canada. All of this means that, until the toys reached stores in the U.S., they were owned and controlled by foreign firms. This type of scenario is becoming increasingly common with toys and other products that are sold here.

In the Aqua Dots case, Spin Master worked cooperatively with the CPSC to conduct the recall. The company set up a website and an 800 number for consumers to use to get a replacement toy for their children. As far as I know, the recall is running smoothly.

If Spin Master did not willingly cooperate with the CPSC, however, this recall could not have happened as quickly or as comprehensively. When companies refuse to cooperate with CPSC on a product recall, the agency can order the company to conduct a recall if it proves after a hearing in accordance with the Administrative Procedures Act that the product is defective and creates a substantial product hazard or that it violates the law. The Commission can also go to federal court and seek an injunction to stop the product from being sold while the hearing is pending. To take these steps, however, CPSC must have personal jurisdiction over the company. In practice, CPSC will rarely pursue an order for a recall against a recalcitrant foreign firm because of the difficulties of succeeding. CPSC has a very limited budget. It will only proceed against a firm if there is a good likelihood of success. When a company is not cooperating, and has limited assets or presence in the U.S., the Commission will try to find another way to accomplish the recall.

Even back in 1973, when the Consumer Product Safety Act was enacted, Congress recognized that there would be situations in which the only U.S. company involved in selling a product in the U.S. would be the retailer. Therefore, as I mentioned in the beginning of my testimony, under section 15 of the CPSA, retailers are equally responsible for notifying the CPSC when a dangerous product may pose a risk to the public, and for implementing measures to remove the product from the marketplace and from people's homes.

As our economy is increasingly global, and goods and services seemingly have no national boundaries, it is a lynchpin of our product safety system that retailers remain responsible for ensuring a safe marketplace.

In general, CPSC calls on retailers to implement a recall only as a last resort. Usually, a product has only one manufacturer and one distributor, but many retailers. To carry out an effective and comprehensive recall through retailers requires agreements with a number of companies. In addition, depending on how broadly the product was distributed, it may be impossible to include in the recall every retailer that sold the product. This is, therefore, not usually the most efficient or effective method of carrying out a recall. But it is critical, for the reasons already discussed, that this option be available to the commission.

In the years since the Consumer Product Safety Act was enacted, the consumer product industry in the U.S. has changed significantly. It used to be that retailers were considered to be "mom and pop" stores, selling products produced by much larger companies. Think of Barbie dolls, manufactured by Mattel, being sold at local "five and dimes" in every community in the country. With the advent of the "big box stores," that scenario has changed substantially.

Now we have Wal-Mart, the largest retailer in the world, which sells over 20 percent of the toys in the U.S. According to experts, the top five retailers control almost 60 percent of the U.S. toy market. In this environment, you can conduct a product recall of a substantial percent of the market with just a handful of companies.

In addition, these large retailers have greater abilities to influence the quality and safety of products than ever before. Therefore, it makes sense to put greater responsibility on these mega-retailers for ensuring the safety of the products we buy. For example, many, if not most, of these large retailers have contracts with testing facilities to test the products they sell. In some instances, they have their own testing facilities. They should bear responsibility for ensuring that the products they sell meet consumer product safety standards, both voluntary and mandatory.

Large retail chains also have increasing market power, which they can use to make sure the products they sell are safe and high-quality. If Wal-Mart, for example, stops selling a certain manufacturer's products because the manufacturer does not have sufficient quality controls in place, the chances are excellent that the manufacturer will improve its practices rather than lose Wal-Mart as a customer.

Furthermore, some retailers are increasingly "cutting out the middle man." That is, they contract with factories in China to manufacture products and ship them directly to the retailer's distribution center for delivery to the store. In those cases, the retailer is the importer. For purposes of the Consumer Product Safety Act, that means the retailer is also the manufacturer. In those cases, there is no reason the retailer should not bear all the responsibility to ensure the safety of the product.

Times have changed. Our economy is global. It is getting increasingly difficult to ensure the safety of the products on store shelves and in consumers' homes. The responsibility for safety must be shared, or there will be gaps in protection. Manufacturers, importers, distributors, and retailers all must work together to restore the faith of the public in the safety of the marketplace.

Certainly, there is room for strengthening our laws so that foreign manufacturers can be held accountable through the U.S. legal and regulatory systems. But I would argue that the barriers to effectively holding foreign firms accountable in the U.S. are always going to be steep, because of distance, language and sovereignty problems. The only way that we can have effective accountability in our global marketplace is for all firms in the stream of commerce to be responsible for the safety of the products they sell and profit from. Regulation must work that way. Liability must also.

Thank you for the opportunity to testify today. I look forward to answering your questions.

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[1]Consumer Product Safety Act, 15 U.S.C. 2064, section 15.