

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

2030 M Street, 8<sup>th</sup> Floor  
WASHINGTON, D.C. 20036  
Phone (202) 326-6000  
Fax (202) 331-1869  
<http://www.naag.org>

JAMES E. MCPHERSON  
*Executive Director*

May 28, 2008

PRESIDENT  
LAWRENCE G. WASDEN  
*Attorney General of Idaho*

PRESIDENT-ELECT  
PATRICK C. LYNCH  
*Attorney General of Rhode Island*

VICE PRESIDENT  
JON BRUNING  
*Attorney General of Nebraska*

IMMEDIATE PAST PRESIDENT  
THURBERT BAKER  
*Attorney General of Georgia*

Hon. Daniel K. Inouye, Chairman  
United States Senate  
Senate Committee on Commerce,  
Science and Transportation  
Via Fax

Hon. Ted Stevens, Vice Chair  
United States Senate  
Senate Committee on Commerce,  
Science and Transportation  
Via Fax

Hon. John D. Dingell, Chairman  
United States House of Representatives  
House Committee on Energy and Commerce  
Via Fax

Hon. Joe Barton, Ranking Member  
United States House of Representatives  
House Committee on Energy and Commerce  
Via Fax

Dear Senators Inouye and Stevens and Representatives Dingell and Barton:

We, the undersigned Attorneys General, respectfully submit these comments on the House and Senate versions of H.R. 4040 to explain to Congress the importance of ensuring that our existing enforcement powers are not diminished, but are instead supplemented, by this legislation. We appreciate the efforts of both the House and Senate in developing this important legislation to protect our citizens, especially children, from dangerous products. Both the House and Senate versions of the bill make many important changes, including imposing lower lead concentration limits on all parts of children's products, requiring that children's products be tested before sale, and increasing the powers and resources of the Consumer Product Safety Commission ("CPSC"). This letter addresses matters of particular concern to state Attorneys General.

Many state Attorneys General and state and local public health agencies with the resources to do so are leading important efforts to ensure that children are not exposed to toxic chemicals in toys and other products. These state and local agencies have collected and sampled toys at stores and at community events and have initiated investigations and enforcement actions under state law where necessary. While many toys with excessive lead levels have been found and removed from store shelves in the past few months, new recalls of lead-tainted children's

products are still regularly announced. The federal government does not and — even with the anticipated increases in the CPSC’s budget — will not have adequate resources to address this problem alone. The additional expertise and tools of state and local governments are needed to keep consumers, particularly children, safe from dangerous products.

We support granting state Attorneys General statutory authority to enforce federal consumer protection laws. Both versions of H.R. 4040<sup>1</sup> promote uniform interpretation of federal consumer safety laws by preventing states from suing under federal law in cases where the CPSC has already begun formal enforcement, allowing states to sue on federal law violations only in federal court, and granting CPSC the ability to intervene in and appeal the outcome of such suits. Providing broad and flexible federal enforcement authority to the Attorneys General complements the states’ ability to protect our citizens and respond to new and varied threats.

We are concerned, however, that without further clarification a court may erroneously rule that the new federal enforcement powers in H.R. 4040 are the sole means states will have to address lead-tainted toys and other dangerous consumer products. We do not believe that Congress intends to deprive states of the traditional tools needed to protect the health and safety of their citizens. Instead, we believe that in enacting H.R. 4040 Congress intends that the new federal enforcement powers will supplement existing state enforcement authorities<sup>2</sup>, not displace them. Section 20(d) of the Senate version of H.R. 4040 makes it clear that the new federal enforcement tools are meant to coexist with current state authority:

Nothing in this section shall prevent the attorney general of a State from exercising the powers conferred on the attorney general, or other authorized State officer, by the laws of such State. Nothing in this section shall prohibit the attorney general of a State, or other authorized State officer, from proceeding in State or Federal court on the basis of an alleged violation of any civil or criminal statute of that State.<sup>3</sup>

Without this clarifying language, the new law could inadvertently impede the ability of state officials to protect the safety of our children. We therefore urge Congress to include this important provision in the final version of the bill.

Further, we are concerned that without clarification, the attorney and expert fee-shifting provision of section 217 of the House version of H.R. 4040 may deter states from actually using the new federal enforcement authority. Because this provision uses the same fee-shifting language that currently exists in section 24 of the Consumer Product Safety Act (15 U.S.C. § 2073), we understand that it would allow a fee recovery against a state only in “exceptional circumstances” where the state’s claims are found to be “unreasonable, frivolous, meritless, or vexatious.”<sup>4</sup> Even for meritorious cases, however, Attorneys General may be unwilling to take

---

<sup>1</sup> H.R. 4040 (House) § 217; H.R. 4040 (Senate) § 20.

<sup>2</sup> For example, existing state authorities often include issuing investigatory subpoenas and filing suit under state unfair and deceptive acts and practices laws.

<sup>3</sup> There is no equivalent language in the House bill.

<sup>4</sup> See H.R. Conf. Rep. 94-1022, at 23 (1976) (legislative history of the Consumer Product Safety Commission Improvements Act of 1976), reprinted in 1976 U.S.C.C.A.N. 1017, 1025; see also *Christiansburg Garment Co. v. Equal Employment Opportunity Comm’n*, 434 U.S. 412, 422 (1978).

the risk that a court would order state taxpayers to fund the defendant's legal fees. We believe that section 20 of the Senate bill, which allows fee-shifting only if the state prevails, does not deter state enforcement actions in federal court and is preferable.<sup>5</sup>

We also support the provisions in both versions of H.R. 4040<sup>6</sup> that would prevent the CPSC and the Executive Branch from going beyond Congress's intent and declaring state laws and causes of action to be preempted. These provisions in H.R. 4040 do not change the preemptive effect of the statutes that the CPSC enforces, but they do ensure that the CPSC and the Executive Branch will not expand preemption beyond what Congress intended. This is an important clarification.

We applaud both the House and Senate for their work to improve consumer safety, and we respectfully request that Congress consider these requests and comments as it develops the final language for H.R. 4040.

Sincerely,



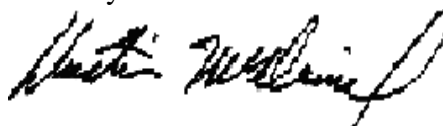
Troy King  
Attorney General of Alabama



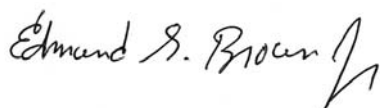
Talis J. Colberg  
Attorney General of Alaska



Terry Goddard  
Attorney General of Arizona



Dustin McDaniel  
Attorney General of Arkansas



Edmund G. Brown, Jr.  
Attorney General of California



John Suthers  
Attorney General of Colorado



Richard Blumenthal  
Attorney General of Connecticut



Joseph R. Biden, III  
Attorney General of Delaware

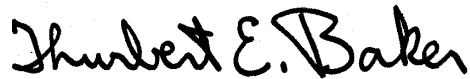
---

<sup>5</sup> As to the amount of fees and costs that may be awarded, it is appropriate to authorize a court to award a prevailing state its "reasonable attorneys' fees" and "reasonable expert witnesses' fees," as determined by 15 U.S.C. § 2060(f). That standard is more clearly articulated in section 217 of the House bill than in its Senate counterpart.

<sup>6</sup> H.R. 4040 (House) § 218; H.R. 4040 (Senate) § 17.



Peter Nickles  
Acting Attorney General of the District of  
Columbia



Thurbert E. Baker  
Attorney General of Georgia



Mark J. Bennett  
Attorney General of Hawaii



Lisa Madigan  
Attorney General of Illinois



Tom Miller  
Attorney General of Iowa



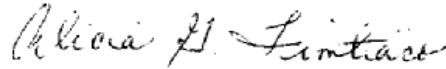
Jack Conway  
Attorney General of Kentucky



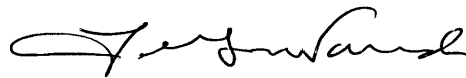
G. Steven Rowe  
Attorney General of Maine



Bill McCollum  
Attorney General of Florida



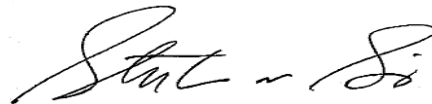
Alicia G. Limtiaco  
Attorney General of Guam



Lawrence Wasden  
Attorney General of Idaho



Stephen Carter  
Attorney General of Indiana



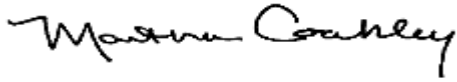
Stephen Six  
Attorney General of Kansas



James D. Caldwell  
Attorney General of Louisiana



Douglas F. Gansler  
Attorney General of Maryland



Martha Coakley  
Attorney General of Massachusetts



Michael Cox  
Attorney General of Michigan



Lori Swanson  
Attorney General of Minnesota



Jim Hood  
Attorney General of Mississippi



Jeremiah W. Nixon  
Attorney General of Missouri



Mike McGrath  
Attorney General of Montana



Jon Bruning  
Attorney General of Nebraska



Catherine Cortez Masto  
Attorney General of Nevada



Kelly Ayotte  
Attorney General of New Hampshire



Anne Milgram  
Attorney General of New Jersey



Gary King  
Attorney General of New Mexico



Andrew Cuomo  
Attorney General of New York



Roy Cooper  
Attorney General of North Carolina



Wayne Stenehjem  
Attorney General of North Dakota



Tom Winters  
First Assistant Attorney General of Ohio



W.A. Drew Edmondson  
Attorney General of Oklahoma



Hardy Myers  
Attorney General of Oregon



Tom Corbett  
Attorney General of Pennsylvania



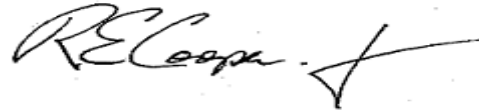
Patrick C. Lynch  
Attorney General of Rhode Island



Henry McMaster  
Attorney General of South Carolina



Larry Long  
Attorney General of South Dakota



Robert E. Cooper, Jr.  
Attorney General of Tennessee



Greg Abbott  
Attorney General of Texas



Mark Shurtleff  
Attorney General of Utah



William H. Sorrell  
Attorney General of Vermont



Rob McKenna  
Attorney General of Washington



Darrell V. McGraw, Jr.  
Attorney General of West Virginia



Bruce A. Salzberg  
Attorney General of Wyoming

cc: Hon. Barbara Boxer, United States Senate  
Hon. Kay Bailey Hutchinson, United States Senate  
Hon. Amy Klobuchar, United States Senate  
Hon. Mark Pryor, United States Senate  
Hon. John Sununu, United States Senate  
Hon. Diana DeGette, United States House of Representatives  
Hon. Bobby Rush, United States House of Representatives  
Hon. Jan Schakowsky, United States House of Representatives  
Hon. Cliff Stearns, United States House of Representatives  
Hon. Henry Waxman, United States House of Representatives  
Hon. Ed Whitfield, United States House of Representatives