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August 8, 2011

Comments of the Hearth, Patio & Barbecue Association Regarding the Petition Requesting Safeguards for Glass Fronts of Gas Vented Fireplaces

Docket Number CPSC – 2011-0028

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I. Introduction and Summary.

The Hearth, Patio & Barbecue Association ("HPBA" or "the Association") appreciates the opportunity to comment on (i) the petition filed by Carol Pollack-Nelson, Ph.D., requesting safeguards for glass fronts of gas-vented fireplaces and (ii) the petition filed by Mr. William S. Lerner requesting a rulemaking to require a "high temperature warning system." For the reasons stated herein, HPBA believes that there are insufficient policy and legal bases for granting either petition and initiating a rulemaking.

HPBA is supportive of increased efforts by industry and the Consumer Product Safety Commission ("CPSC" or "the Commission") to decrease the number of burn injuries relating to gas fireplaces. The industry is taking the lead in a significant strengthening of the applicable CSA/ANSI standard and is enhancing its consumer information and education campaign to supplement individual company efforts.

II. HPBA

HPBA, located in Arlington, Virginia, represents and promotes the hearth products and barbecue industries in North America. The association includes manufacturers, retailers, distributors, manufacturer representatives, service installation firms and other companies and individuals who have business interests related to the hearth, patio and barbecue industries.

HPBA's members manufacture, import, distribute, sell, install and service products that include factory built fireplaces, gas logs, fireplace inserts, and accessories. HPBA represents more than 2,350 firms, 255 of which manufacture industry products for the U.S. and Canada. Most manufacturers of gas fireplaces are HPBA members, and we estimate that our members ship approximately 90% of all hearth appliance shipments.

The Association provides professional member services and industry support, including statistics, government relations, marketing, advertising, and consumer education. HPBA takes the leadership role for its members in industry voluntary standards, regulatory efforts and consumer communications. Through its 13 affiliate organizations, the Association is able to effectively communicate to its members and the trade, and organize programs around the country, which benefits industry and consumers.

III. Industry and Product Description

Although gas-fueled fireplaces have been around for many years, it is only since the mid-1980s that the product category became very popular. The ease and convenience of watching a realistic fire without the bother of lighting a wood fire drives this popularity. The industry is predominated by small and medium sized North American manufacturers and the vast majority of product is produced in this country.

The industry has been heavily hit by the recession. Approximately 1,800,000 gas hearth appliances (fireplaces, stoves, inserts, fireboxes and gas logs) were shipped in 2000. By 2010, this number had declined to 651,000. Of the gas hearth appliances shipped last year, 304,500 were gas fireplaces; a decade ago that number was 717,900. Net dollar sales to the manufacturers of gas fireplaces totaled $186.4 million in 2010 versus $330.6 million ten years ago.

HPBA members produce hearth products for both the new home and remodeling industries. During 2010, an estimated 28% of the overall fireplaces, stoves, and fireplace inserts produced for the U.S. marketplace were produced for the builder market while 72% were produced for the remodeling market.

HPBA estimates that it represents approximately 25,300 retailer employees in the United States, and that an additional 10,000 individuals are employed by various hearth appliance manufacturers or as sales representatives and/or distributors in the industry. Almost all of these jobs are U.S. based. The industry's current condition – its size, its U.S. employment, and its ability to absorb a mandatory federal standard – are all relevant considerations in whether the Commission should move forward on the rulemaking, particularly when, as discussed below, substantial voluntary initiatives are well underway.

IV. Industry Safety Efforts

Glass fronts can become hot and if touched can cause burns. This clear and obvious risk is why from the beginning of the modern industry it has been critical to communicate to consumers that the heat source causes the glass front to become hot. Company and industry communications on the product, including use and care manuals, have emphasized this important warning.

In 2007, HPBA created a unique warning label (http://www.hpba.org/safety-information/fireplace-and-stove-glass-safety) that has been used widely by manufacturers in their operating manuals and installation literature.[1] In addition to individual company communications and education efforts, the Association extensively distributed a safety pamphlet (http://static.hpba.org/fileadmin/Glass_Safety/HPBA_GasBrochure_web.pdf) to its member companies for show rooms and customers, as well as to pediatric offices, hospitals, and specialty medicine organizations. Over 60,000 brochures have been distributed to date. The pamphlet and safety symbol are also available to download from

[1] See http://www.mantisbyempire.com/assets/MANTIS/manuals/27298-1-1010 (EN,FR) B(F,P)28(B,C,G)M(N,P)-4, F(F,I,W)BM(N,P)-2 OWNER'S MANUAL.pdf and http://literature.mhsc.com/monessen/manuals/54D7050_BDV7_3.pdf.

the Association's website. As discussed below, efforts are underway to enhance the communications and education programs.

In addition to the warnings, communications and education described above, a number of fireplace manufacturers provide products with safety guards or make safety guards available as accessories.

V. Existing ANSI/CSA Requirements

Consensus standards applicable to gas fireplaces are found in the gas fireplace standards ANSI Z21.50/CSA 2.22b (Vented Gas Fireplaces) and ANSI Z21.88/CSA 2.33 (Vented Gas Fireplace Heaters) (the "ANSI standards" or "standards"). These standards have continued to evolve despite the products being a relatively new product category. The standards, among other provisions, require a number of safety measures, including preventing delayed ignition incidents and glass shattering. Since 2009, ANSI Z21.88-2009 has required that manuals and installation instructions contain a clear safety warning and a universal symbol for burns risks.

Although these standards are nominally "voluntary," as a practical matter they are mandatory because of their incorporation in building codes and standards. Receipt of testing marks from accredited laboratories is critical to product marketability. The standards have evolved in the years since ANSI Z21.50 was created in 1965. ANSI Z21.88 was created in 1996.

The CSA and ANSI processes (the "ANSI standards process") are transparent and open to interested persons and the public. For example, the ANSI Z21/83 Committee includes representatives from the CPSC, Underwriters Laboratories, servicers and utilities, and consumer representatives. Indeed, petitioner Lerner is a member of the

Working Group of the Z21/CSA Joint Technical Committee Advisory Group on Standards for Vented Warm Air Heaters, alternately referred to as the Vented Heater Glass Surface Temperature Working Group, (the "Working Group") which makes recommendations to the vented heater Technical Advisory Group (TAG). This same TAG has met with petitioner Dr. Pollack-Nelson on several occasions.

VI. CSA Standards Improvement

On July 21, 2010, the CSA Z21 Joint Technical Advisory Group on Standards for Vented Gas Fired Warm Air Heaters reactivated the Working Group to consider concerns about preventing burns from glass fronts. The Working Group includes not only manufacturers but members from utilities, service companies, and certification laboratories. In particular, the Working Group is focused on so-called passive interventions such as safety barriers.

The Working Group met on March 3, 2011, May 17, 2011, and again August 3 and 4, 2011. The Working Group is moving in an accelerated fashion towards substantial revisions to the standards, which would require that safety guards, physical barriers, and other systems be made available for all gas fireplaces that are installed less than 4 feet above the floor. The review also includes the consideration of alternative or supplemental warning systems, although they are not considered to be the most effective or primary approach to take for greater safety as it is not clear they are able to adequately prevent or mitigate contact burns from touching the glass door.

This process already underway will take approximately 9-12 months to finalize a revised standard. ANSI approval will follow several months thereafter. In order to accelerate the process, another meeting of the Working Group is scheduled for September

of this year, after which it may receive letter ballot consideration from the TAG. We anticipate the revised standard will be published in mid-2012, with an effective date about 18 months after the standard's publication.

Important details of the standard are still to be worked out by the standards' writers but directionally it will require the availability of safety barriers or equivalent protection. These requirements will be defined through a performance test in a formal certification process to ensure that severe contact burns cannot occur by touching the glass fronts or safety barrier when the safety measures are in place. The exact details of the performance or design standard, and to what extent the safety guard or equivalent must be mounted, shipped or made available still needs to be determined. There will also need to be definitions of important terms such as the safety components.

These are difficult but by no means insurmountable issues. For example, a standard (i) must ensure that the safety guard or barrier will not become so hot as to cause severe burns if contact is made, (ii) will allow a person to remove their hand from the surface, and (iii) the barrier will remain reasonably rigid or intact. Clearly, there will be design challenges for many models. There are also aesthetic issues which significantly, even predominantly, affect the attractiveness and marketability of the product. There will be design challenges for many models. Finally, it also is important that the guard be removable and allow access to the fireplace for cleaning and maintenance and for fully-unobstructed viewing under circumstances where no guard is needed or desired – for example, where no children are present or in the residence.

It must be recognized that any form of standard will not be foolproof since safety barriers can and should be removable by consumers, installers, and others when the

appliance can be safely operated without the barrier (much like a child safety gate at the top of the stairs is removed when the child is old enough to manage the risk of an open stairway safely). Also, as noted, a decision must be made whether to provide as a substitute, or an acceptable supplement, auditory, and visual warning systems. If such substitute or supplemental systems are to be allowed, similar rigor will need to be applied to establish performance tests and criteria for certification.

The industry is committed to this substantial upgrade of the standard which, as a practical matter, will put into the marketplace on an ongoing basis – each year – hundreds of thousands of safety guards, barriers or equivalent measures. This is a substantial undertaking by a relatively small industry which is suffering badly from the economy in general and the housing downturn in particular.

VII. Consumer Education and Outreach

In addition to the "hard" standard discussed above, industry plans to significantly increase its consumer/parent education and communications through actions by individual companies and as an industry. We seek CPSC's input – as well as partnership – to develop a sustained (but sustainable) campaign of consumer education. We envision elements of:

- enhanced markings and information on products and product literature,
- improved training of retailers, builders and distributors,
- incorporation into the literature that pediatricians, educators, and others distribute to parents,
- enhanced liaison with first responders, emergency, and fire service groups, and

- outreach to the hospitality industry.

We will discuss these elements with the Commission, and hope to roll out elements of the new program within the timeframe of the CSA recommendations.

With CPSC assistance, industry can better leverage available resources, public and private. As Chairman Tenenbaum wrote to Senator Franken on May 19, 2011:

> "One other area that I have directed staff to review is our public outreach and education efforts in this area. During my tenure as Chairman, I have focused not just on improving safety standards but also making sure that consumers are educated about hidden hazards in and around homes and public settings."
>
> "With regard to gas fireplace-related injuries, one possible example of additional outreach could be working with hotels and other places of public accommodation to ensure that they have barriers and appropriate warnings around products that create quantities of heat sufficient to cause burns. To that end, I have asked the Commission's Office of Information and Public Affairs to look at possible messaging opportunities, through social media and other means, to further educate stakeholders, parents and caregivers about the potential danger of gas fireplaces in places where small children are likely to have access."

http://franken.senate.gov/files/letter/110519_Chairman_Tenenbaum_Letter_Gas_Fireplace_Injuries.pdf. Industry appreciates and supports these comments and looks forward to working closely with the Commission.

VIII. Lerner Petition

As discussed above, Dr. Pollack-Nelson's petition, while virtuous in its goal, is unnecessary in the light of the industry's efforts. Given the diversity of designs and models of gas fireplaces, it makes much more sense to allow industry to develop a

flexible and useful standard rather than an across-the-board government mandate. An approach which emphasizes – through standards and education – that consumers use safety barriers, particularly when children are present, is a much more effective approach than a government mandate. Relying on expert industry and standards bodies to develop and interpret the standards allows the Commission to apply its resources to other risks where there is less non-governmental activity.

These points also apply to Mr. Lerner's petition, but his petition raises additional issues. First, the proposed technological approach does not prevent children or others from touching the hot surface. Second, it is not appropriate public policy to base a standard on what appears to be the petitioner's proprietary intellectual property and economic interests. See U.S. Submission to OECD on Standard Setting (June 2010), p. 8-10, *available at* http://www.justice.gov/atr/public/international/269554.pdf; U.S. Dep't of Justice & Fed. Trade *Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (Apr. 2007), p. 6-7, *available at* http://www.justice.gov/atr/public/hearings/ip/222655.pdf. The Commission staff met with Mr. Lerner on April 14, 2011 and the meeting memorandum notes this issue. http://cpsc.gov/library/foia/meetings/mtg11/lerner04142011.pdf.

Third, it is not clear that a red light warning or similar measure is an effective safety message, and could potentially serve to attract rather than repel. Small children may not be affected by this or similar warnings and so parental supervision will still be required. Even then, although there are applications of a red light as a sign of a hot surface, there are also applications where a red light does not indicate a hot product, material or surface (e.g., consumer electronics in the standby, inactive modes). There

also has been no demonstration of the feasibility or cost of this approach. And, if the system technology fails it could be a dangerous "false negative." We also note that not all gas fireplaces have electrical inputs.

Although Mr. Lerner's design will be thoroughly evaluated by the Working Group and its parent committees, there is no basis for consideration of his proposal by the Commission.

IX. Consumer Product Safety Act (CPSA) Standards and Provisions

CPSA Section 7(a), 15 U.S.C. 2056, provides that any standard "shall be reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product." Although any accident involving fireplace products is highly regrettable and those involving children are particularly tragic, they are preventable through the proper use and supervision of the product. It is obvious by the very nature of this product that, like other heating appliances, it has a hot exterior. Product and industry communications make this point clear.

Further, a regulatory standard is not "reasonably necessary" to prevent or reduce the risk because consensus standards to modify the product, as well as education efforts, can impact and reduce the risk of injury. The law is clear in Section 7(b)(1) that voluntary safety standards are preferred over CPSC standards "whenever compliance with such voluntary standards will eliminate or adequately reduce the injury addressed and it is likely there will be substantial compliance with such voluntary standards."

As we have detailed, the contemplated revised industry standard and expanded education efforts are both aggressive and progressive, designed to reduce risk of injury by making more widely available safety guards and assisting adults in understanding the

nature of the risk. There will be high levels of compliance. The ANSI standard is applicable to the entire gas fireplace industry and is incorporated in building codes and standards. Retailers and conformity assessment organizations will require compliance. Further, the violation of a voluntary standard may be relevant in product liability litigation. The existing requirements in the standards achieve virtually total, industry-wide compliance and there is no reason to believe that anything will be different with safety guards and related requirements.

Further, the Commission does not need to rely only on industry assertions about the status, development and efficacy of voluntary standards. CPSA Section 7(b)(2) states that the Commission shall "devise procedures to monitor compliance with any voluntary standards" which have been relied upon by the Commission, were developed with participation of the Commission, or whose development the Commission has monitored.

As a practical matter, the Commission is integrally involved in the ANSI standards process. In fact, industry welcomes and encourages CPSC participation and monitoring of the accelerated development of the revised standards. CPSC staff is already attending the Working Group meetings. The Commission and other interested persons have real-time knowledge of the development and viability of the standards process. Through NEISS and other mechanisms, the Commission can also monitor the impact of the standards and communications program (which will be enhanced with the Commission's involvement).

These CPSA provisions are based on the premise that mandatory federal standards are relatively undesirable and cannot possibly keep pace with the diversity and multitude of consumer products in the American marketplace. Rather, the robust

consensus standards and conformity assessment process in the United States is a bulwark of safety for the American consumers and has proven to be extremely effective.

If a rulemaking were initiated, the procedure for consumer product safety rules in CPSC Section 9, 15 U.S.C. 2058 carries forward the heavy emphasis on evaluating and relying on alternative voluntary consumer product safety standards. There would be misallocation of Commission resources to institute a rulemaking now when there is a viable consensus standard revision process already underway, which will ultimately require deferral. CPSA Sections 9(a)(2) and (3) require an evaluation in a rulemaking of why a voluntary standard is not satisfactory to eliminate or adequately reduce the risk of injury. There is no point in undertaking this evaluation at the very time that the industry standard is evolving, being actively amended, and will soon be put in place. Section 9(a)(6) invites the submission of voluntary standards as alternatives including "a statement of intention to modify or develop a voluntary consumer product safety standard to address the risk of injury … together with a description of a plan to modify or develop the standard." In this case, even before an Advance Notice of Proposed Rulemaking or Notice of Proposed Rulemaking, concrete actions have been taken to develop a substantially revised standard, as Commission staff can attest.

In addition, a mandatory federal standard, with its associated compliance and administrative costs, when compared to a substantial new industry standard, undoubtedly will fail under the required cost-benefit analyses, particularly taking into account the size of many of the companies in the industry, their financial resources, employment impacts and other important criteria contained explicitly in CPSA. These issues also are of concern in the President's recent executive orders on regulatory reform to which he has

been encouraging independent agencies to conform as much as possible (Exec. Order No.13563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 21, 2011); Exec.Order No.13579, 76 Fed. Reg. 41587 (July 14, 2011)).

X. Conclusion

It benefits all parties to foster efforts between industry (manufacturers) and trade (distributors, retailers, and builders), the Commission, and other groups interested in safety to reduce the incidence, severity, and risk of injuries in every sector. Gas fireplaces and glass doors are no exception. The question is what is the best approach? The law is clear that serious, voluntary consensus efforts to reduce the risk are the preferred solution and precisely such efforts are well underway. A continuing program of consumer education through product distribution channels and to parents through medical professionals, educators, and safety providers also is critical so that glass fireplaces are used with strict parental supervision.

The consideration factors in 16 C.F.R. Section 1051.9 granting or denying a petition argue for a denial of this petition. The Commission action is not "reasonably necessary" to eliminate or reduce the risk of injury in light of alternative, viable standards and education efforts. Commission priorities should be focused on product areas not under consensus standards development.

Under these circumstances, HPBA urges the Commission not to pursue a rulemaking but rather invest its limited resources in a beneficial consensus standards process and work with industry and others on improving safety awareness for the use of this product.