



March 23, 2022

**To:** Consumer Product Safety Commission

**Re:** Safety Standard for Operating Cords on Custom Window Coverings (Docket No. CPSC-2013-0028)

The Institute for Policy Integrity at New York University School of Law (“Policy Integrity”)<sup>1</sup> respectfully submits the following comments to the Consumer Product Safety Commission (“CPSC”) regarding its proposed safety standards for custom corded window coverings (“Proposed Rule”).<sup>2</sup> Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

In response to continued risk of strangulation to children by custom window covering cords, the CPSC proposes requiring that custom window coverings eliminate or otherwise make their cords inaccessible by shortening the cord length, using a rigid cord shroud, or adopting other passive guarding devices.<sup>3</sup> We make the following observations and recommendations regarding the CPSC’s cost-benefit analysis for the Proposed Rule:

- Adding a child premium to the value of a statistical life (“VSL”) is consistent with federal guidance and international practice. However, if the CPSC chooses to justify a final rule using a child VSL premium, it should offer a theoretical justification that is not based on life-years.
- The CPSC has authority to consider unquantified impacts in its cost-benefit analysis and should include avoided parental grief as an unquantified benefit of the Proposed Rule—but only to the extent that such grief is not already reflected in the child VSL premium.
- The CPSC should consider avoided litigation costs as a (quantified or unquantified) benefit of the Proposed Rule.
- The CPSC should consider avoided product recall costs as a (quantified or unquantified) benefit of the Proposed Rule.

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<sup>1</sup> This document does not purport to present New York University School of Law’s views, if any.

<sup>2</sup> Safety Standard for Operating Cords on Custom Window Coverings, 87 Fed. Reg. 1014 (Jan. 7, 2022) (to be codified at 16 C.F.R. pt. 1260) [hereafter Proposed Rule].

<sup>3</sup> *Id.* at 1014.

- The CPSC should consider using a break-even analysis to incorporate unquantified benefits.

**I. If the CPSC chooses to justify the Proposed Rule using a child VSL premium, it should articulate a theoretical justification that is not based on life-years.**

In assessing the benefits of avoided child mortalities under the Proposed Rule, the CPSC considers a child-specific VSL up to 3 times the standard estimate used for adults by federal agencies.<sup>4</sup> Assigning a higher value to child risk reductions, sometimes referred to as a “child premium,” is consistent with *Circular A-4*, a longstanding guidance document from the Office of Management and Budget (“OMB”) on best practices in regulatory cost-benefit analysis,<sup>5</sup> as well as with international regulatory practice. However, if the CPSC chooses in its final rule to apply a child VSL premium, it should articulate a theoretical framework for doing so that does not rely on life-years. Moreover, to the extent that the CPSC chooses a specific VSL multiplier as a child premium, it should ensure that the empirical studies used to support that specific value are grounded in the same theoretical justification the Commission has articulated.

*A. Using a child VSL premium is consistent with Circular A-4 and international practice.*

Departing from the standard VSL when evaluating child-focused risk reductions is consistent with *Circular A-4*, which acknowledges that it is “rarely feasible to measure a child’s willingness to pay for health improvement and an adult’s concern for his or her own health is not necessarily relevant to [the] valuation of child health.”<sup>6</sup> Following this acknowledgment, *Circular A-4* notes that some studies examining parental willingness to pay suggest “that parents may value children’s health more strongly than their own health” and that this research may need to be expanded to “include a societal interest in child health and safety.”<sup>7</sup> *Circular A-4* also notes that when performing a cost-benefit analysis for a rule with benefits to both children and adults, “the monetary values for children should be at least as large as the values for adults.”<sup>8</sup> This language provides flexibility for agencies interested in using a child VSL premium given that the value used for children only needs to be “at least as large as” that of the VSL for the general population. This is the only deviation from the standardized VSL that *Circular A-4* endorses.<sup>9</sup>

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<sup>4</sup> *Id.* at 1045.

<sup>5</sup> OFFICE OF MGMT. & BUDGET, CIRCULAR A-4 (2003), [https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/regulatory\\_matters\\_pdf/a-4.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf).

<sup>6</sup> *Id.* at 31.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*; Sean Hannon Williams, *Statistical Children*, 30 YALE J. ON REG. 63, 73 (2013), <https://heinonline.org/HOL/Page?handle=hein.journals/yjor30&id=1&collection=journals&index=>.

International regulatory practice also supports the use of a child VSL premium, particularly in the context of a safety rule focused on health benefits for very young children. For example, when analyzing child safety policies, Norway supplements its standard analysis by using a child-specific VSL that is twice that of the general population VSL.<sup>10</sup> Additionally, a VSL-related guidance document from the Organization for Economic and Co-operation and Development (“OECD”) notes that studies in the United States and Europe find a higher VSL for children “due to parents’ altruistic concerns for their children”; that using a child VSL “premium” in policy assessments is “likely to be particularly helpful in ensuring that resources and policy efforts are allocated efficiently;” and that the political case for a child VSL premium is strengthened by OECD governments’ “special role in protecting the interests of children with respect to risks in general.”<sup>11</sup>

*B. The CPSC should not rely on a life-years approach to justify a child VSL premium.*

While it does not explicitly apply it in its final tally of costs and benefits, the CPSC suggests the possibility of using a child-specific VSL that is between 1.2 and 3 times the standard VSL figure.<sup>12</sup> This range is based on a 2018 IEC literature review commissioned by the CPSC that surveyed willingness-to-pay studies for fatal and non-fatal risk reduction.<sup>13</sup> Aside from noting that consumers may value a risk reduction to children more than one to themselves, the CPSC does not articulate a theoretical justification for using a higher VSL for children.<sup>14</sup> Nonetheless, the IEC report on which the CPSC relies explains that while the reason for higher child valuations is not “well-understood,” some justifications may include, “for example, [] children’s longer life expectancies.”<sup>15</sup> Justifying a child VSL premium with a life-years approach, however, is not consistent with economic theory or the empirical literature. If the CPSC chooses in its final rule to articulate a theoretical justification for a higher, child-specific VSL, it should refrain from applying a life-years approach and instead consider a better-supported justification.

A life-years approach to calculating VSL is at odds with economic theory. Fundamentally, the approach reflects the fact that as individuals age, their future life expectancy and health decline.<sup>16</sup>

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<sup>10</sup> ROYAL NORWEGIAN MINISTRY FIN., COST-BENEFIT ANALYSIS 16 (2012), <https://www.regjeringen.no/en/dokumenter/nou-2012-16/id700821/?ch=3>.

<sup>11</sup> See ORG. FOR ECON. CO-OPERATION & DEV., VALUING MORTALITY RISK REDUCTIONS IN REGULATORY ANALYSIS OF ENVIRONMENTAL, HEALTH AND TRANSPORT POLICIES: POLICY IMPLICATIONS 28 (2011), <https://www.oecd.org/env/tools-evaluation/48279549.pdf> [hereinafter OECD Report].

<sup>12</sup> Proposed Rule, *supra* note 2, at 1045.

<sup>13</sup> *Id.*; see IEC, VALUING REDUCTIONS IN FATAL RISKS TO CHILDREN (2018), [https://www.cpsc.gov/s3fs-public/VSL\\_Children\\_Report\\_FINAL\\_20180103.pdf?crqdQGttjTalnQbCPf3.7freqXkMrEbu](https://www.cpsc.gov/s3fs-public/VSL_Children_Report_FINAL_20180103.pdf?crqdQGttjTalnQbCPf3.7freqXkMrEbu) [hereinafter 2018 IEC Report].

<sup>14</sup> See Proposed Rule, *supra* note 2, at 1044, 1053, 1058.

<sup>15</sup> 2018 IEC Report, *supra* note 13, at 9.

<sup>16</sup> See W. Kip Viscusi, *How to Value a Life*, 31 J. ECON. FINAN. 311, 315 (2008), available at [https://law.vanderbilt.edu/files/archive/280\\_How-to-Value-a-Life.pdf](https://law.vanderbilt.edu/files/archive/280_How-to-Value-a-Life.pdf).

Using a life-years approach thus leads to a higher assigned value to saving the lives of children and a lower one for those of older people, because they theoretically have “less quantity and less quality of life” remaining.<sup>17</sup> A simple life-years approach values each year of life the same and includes no factors beyond life expectancy to explain how valuation changes with age. However, this linear approach to valuation deviates from economic theory in significant ways. First, mortality risk reductions should be calculated based on how much an individual is willing to pay for that risk reduction.<sup>18</sup> One possibility not accounted for in the life-years approach is that such a valuation will not be constant for every life-year throughout the life cycle because as a good becomes scarcer, individuals will value it more.<sup>19</sup> Older individuals may also have higher incomes that lead them to pay more, and background risk or varying probabilities of death may affect how they choose to allocate resources for risk reduction.<sup>20</sup> While there is an assortment of plausible economic models that try to explain why willingness-to-pay varies with age, none of them “offers even lukewarm support for the diminishing linear relationship between life expectancy and willingness to pay that undergirds the life-years method.”<sup>21</sup>

The life-years approach also does not square with the empirical literature. Empirical willingness-to-pay valuations generally do not bear a linear relationship to age, and no significant evidence suggests that parental preferences for risk reductions to children track life-years.<sup>22</sup> Societal preferences “at most categorize people into rough age groups, and do not support using life-years to allocate resources within these groups.”<sup>23</sup> In fact, some studies show that older people tend to value their final years of life more.<sup>24</sup> Relatedly, the implicit child premium in the life-years approach tends to be lower than the premium suggested by parental willingness-to-pay studies.<sup>25</sup> This indicates that the higher willingness to pay identified in such studies reflects considerations beyond those captured by the life-years approach. For example, the life-years approach does not capture “fair innings,” the idea that “younger individuals have not yet had an opportunity to experience a full life.”<sup>26</sup> Fair innings helps explain why people might give priority to risk reductions that target children.<sup>27</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> RICHARD REVESZ & MICHAEL LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 80 (2008).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 81.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 81–82; Williams, *supra* note 9, at 82; *see also* W. Kip Viscusi & Joseph Aldy, *The Value of a Statistical Life: A Critical Review of Market Estimates Throughout the World*, 27 *J. Risk & Uncertainty* 5 (2003) (showing ambiguous results as to the relationship between age and willingness-to-pay for adults).

<sup>23</sup> Williams, *supra* note 9, at 82.

<sup>24</sup> *Id.*; *see also* Viscusi, *supra* note 16, at 315.

<sup>25</sup> Williams, *supra* note 9, at 82.

<sup>26</sup> 2018 IEc Report, *supra* note 13, at 9; *see id.* at 103.

<sup>27</sup> Williams, *supra* note 9, at 103.

C. *If the CPSC uses a child VSL premium to justify the Proposed Rule, it should articulate a theoretical justification for the premium that is consistent with the empirical literature.*

If the CPSC chooses to apply a VSL multiplier to account for a child premium, it should articulate a justification for using the premium that is more consistent with the empirical literature than a life-years approach. Such a justification will likely rely on the willingness-to-pay of adult respondents because “children do not possess the necessary cognitive abilities to formulate preferences for their own health risk reductions.”<sup>28</sup> In choosing a framework, the CPSC may look to the Environmental Protection Agency, which has identified three possible perspectives: the societal perspective, adults-as-children perspective, and parental perspective.<sup>29</sup>

First, the societal perspective focuses on how the public would allocate resources to children. This includes respondents’ allocation of resources to both their own children, if they have any, and the children of others.<sup>30</sup> Some studies that focus on how the general public would allocate resources to reduce risks to children show that even non-parents value risk reductions to children more, suggesting that “giving priority to children is widely viewed as a legitimate goal of government.”<sup>31</sup>

Second, the adults-as-children perspective requires adults to “place themselves in the position of children, for example by asking adults about preferences they currently exhibit as they think back to their own childhood and the risks they faced.”<sup>32</sup> This approach avoids relying on child responses and instead uses “values [that] are reported by individuals considering their own selves.”<sup>33</sup> The adult-as-children approach may, however, undervalue child-specific VSLs if it fails to account for the “expected growth in income to be earned by today’s children over the course of their lives relative to today’s adults.”<sup>34</sup>

Third, the parental perspective is “a logical valuation-by-proxy approach for children’s health risk.”<sup>35</sup> This approach relies on eliciting values from “adults who seem likely to have the child’s best interests at heart” and incorporates the informational advantage parents have as primary caregivers into their preferences regarding child welfare.<sup>36</sup> That is, the approach reflects how

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<sup>28</sup> Carla Guerriero et al., *Are Children Rational Decision Makers When They Are Asked to Value Their Own Health? A Contingent Valuation Study Conducted with Children and Their Parents*, 27 HEALTH ECON. e55, e55 (2018), <https://doi.org/10.1002/hec.3562>.

<sup>29</sup> ENV’T PROT. AGENCY, CHILDREN’S HEALTH VALUATION HANDBOOK, at 2-6 to 2-8 (2003).

<sup>30</sup> *Id.* at 2-7.

<sup>31</sup> Williams, *supra* note 9, at 78–79.

<sup>32</sup> CHILDREN’S HEALTH VALUATION HANDBOOK, *supra* note 29, at 2-8.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 2-9.

well-informed and well-intentioned parents allocate resources for risk reduction to their children, which also provides insight into how they may reallocate resources in response to regulation.<sup>37</sup> This approach also “aligns agency practice with other areas of the law that regulate child safety” because most child safety decisions are delegated to parents.<sup>38</sup>

Each of these theoretical perspectives may incorporate different considerations. If the CPSC decides to use a particular multiplier to justify a child premium, it should thoroughly review the different theoretical perspectives and carefully choose the one(s) that best reflect the Commission’s considerations in the Proposed Rule. The CPSC should then refine the range of studies it looks at to determine the VSL multiplier such that these studies are consistent with the chosen theoretical justification. That is, if the Commission decides to follow a parental perspective, it should consider only studies that assess willingness-to-pay from a parental perspective in determining the appropriate child premium. In addition, because willingness-to-pay is closely tied to cultural determinants such as risk preference,<sup>39</sup> the Commission should, to the extent possible, rely on U.S.-based studies and clearly indicate when a study has an international focus.

## **II. The CPSC should consider parental grief as an unquantified benefit of the Proposed Rule, but should avoid double counting this benefit.**

The CPSC has the authority to consider unquantified impacts from the Proposed Rule. While the Commission notes that some of the costs and benefits of the mandatory standard are uncertain, the Proposed Rule does not explicitly list unquantified impacts.<sup>40</sup> The CPSC should expand its analysis to include avoided parental grief, an important benefit of the Proposed Rule that has been considered by at least one other federal agency in regulatory action. In doing so, the CPSC should avoid double counting this benefit by considering whether and to what extent parental grief is captured by a child VSL premium, should the Commission choose to apply one.

### *A. The CPSC has authority to consider unquantified costs and benefits.*

The Consumer Product Safety Act (“CPSA”) requires that the CPSC find that a “reasonable relationship” exists between the expected benefits and costs of a proposed regulation.<sup>41</sup> Congress intended for the CPSC to consider unquantified effects in concluding whether a reasonable

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<sup>37</sup> Williams, *supra* note 9, at 72. A parent may respond to regulations that exceed the parent’s resource preferences by reallocating resources. For example, a parent may respond to a bike helmet mandate by reducing the time they spend supervising their child riding a bicycle. *Id.*

<sup>38</sup> *Id.* at 71–72.

<sup>39</sup> See Viscusi & Aldy, *supra* note 22, at 36.

<sup>40</sup> Proposed Rule, *supra* note 2, at 1053.

<sup>41</sup> 15 U.S.C. § 2058.

relationship exists; the statute specifically instructs the Commission to include “costs and benefits that cannot be quantified in monetary terms”<sup>42</sup> in its cost-benefit analysis.

Executive orders on regulatory cost-benefit analysis likewise emphasize the importance of considering unquantified effects.<sup>43</sup> Executive Order 12,866 specifies that costs and benefits include “costs and benefits that are difficult to quantify”<sup>44</sup> in addition to quantified effects. Executive Order 13,563 offers further insight into the types of unquantified effects agencies can consider, including “equity, human dignity, fairness, and distributive impacts.”<sup>45</sup> The Memorandum on Modernizing Regulatory Review from President Biden reaffirms Executive Orders 12,866 and 13,563, and again emphasizes the importance of considering “regulatory benefits that are difficult or impossible to quantify.”<sup>46</sup>

In the Proposed Rule, the CPSC reached the conclusion that the benefits bear a reasonable relationship to the costs without fully discussing unquantified impacts, despite its authority to do so.<sup>47</sup> The CPSC explains that some impacts of the Proposed Rule are uncertain, such as the true cost of compliance (the Commission’s estimate relies on data from 2019) and the actual lifespan of window coverings (a longer lifespan leads to higher benefits).<sup>48</sup> The CPSC Staff Briefing Package for the Proposed Rule, on which the CPSC relied in preparing its analysis, does discuss some unquantified benefits, such as avoided pain and suffering, improved aesthetics of cordless window coverings and better reliability during lift or tilt operations.<sup>49</sup> However, the Commission does not list and analyze important unquantified impacts, such as avoided parental grief, in the Proposed Rule. CPSC should make explicit its consideration of these unquantified benefits in reaching its conclusion that the benefits are reasonably related to the costs for the Proposed Rule.

*B. Parental grief is a significant unquantified benefit that has been considered by at least one other federal agency.*

The Staff Briefing Package for the Proposed Rule recognizes the difficulty in quantifying “intangible costs” such as “the physical and emotional trauma of injury as well as the mental

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<sup>42</sup> *Id.*

<sup>43</sup> Independent agencies are exempted from Executive Orders, including Order No. 12,866. 58 Fed. Reg. 51735, § 3(b) (Oct. 4, 1993). Nevertheless, Executive Orders often reflect best practices in regulatory cost-benefit analysis.

<sup>44</sup> Exec. Order No. 12,866, 58 Fed. Reg. 51735.

<sup>45</sup> Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

<sup>46</sup> Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. 7223 (Jan. 26, 2021).

<sup>47</sup> See Proposed Rule, *supra* note 2, at 1058.

<sup>48</sup> *Id.* at 1053.

<sup>49</sup> See STAFF BRIEFING PACKAGE: DRAFT NOTICES OF PROPOSED RULEMAKING FOR CORDED WINDOW COVERINGS, TAB K: PRELIMINARY REGULATORY ANALYSIS OF THE DRAFT PROPOSED RULE FOR CUSTOM WINDOW COVERINGS, at 168, 186–87 (2021), <https://www.cpsc.gov/s3fs-public/NPRs-Add-Window-Covering-Cords-to-Substantial-Product-Hazard-List-Establish-Safety-Standard-for-Operating-Cords-on-Custom-Window-Coverings-updated-10-29-2021.pdf?VersionId=HIM05bK3WDLRZrINgogQLknhFvhtx3PD> [hereinafter TAB K].

anguish of victims and caregivers” in the context of non-fatal injuries.<sup>50</sup> These non-economic costs, the text continues, “typically represent the largest component of injury cost and need to be accounted for in any benefit-cost analysis involving health outcomes.”<sup>51</sup> While this analysis focused on non-fatal injuries, fatal injuries also create great intangible costs for parents. Parents may witness the accident or find the child after strangulation has occurred, resulting in grief and anguish.<sup>52</sup> Additionally, parents may feel responsible for strangulation accidents, either because they chose to install the window coverings in the home or because the accident in question occurred during a period when the child was left unsupervised. While some aspects of parental grief are quantifiable, such as productivity losses, many are not.<sup>53</sup> These unquantified costs should be incorporated into the CPSC’s analysis.

The avoidance of parental grief has been deemed a substantial unquantified benefit by at least one other federal agency: the National Highway Traffic Safety Administration (“NHTSA”). NHTSA considered parental grief in its evaluation of rearview camera systems to reduce the risk of backing over young children and other groups.<sup>54</sup> For this rule, the monetized costs exceeded the monetized benefits.<sup>55</sup> However, NHTSA cited “significant” unquantified benefits, notably parental grief, that are “not fully or adequately captured in the traditional measure of the value of a statistical life” to justify the rule.<sup>56</sup>

Like the backup camera safety rule, the Proposed Rule primarily benefits young children. Strangulations and accidents involving window blind cords uniquely pose a risk to young children. The CPSC should, as NHTSA did, recognize that the standard VSL “does not adequately account for the value of reducing the risk that parents will be responsible for the death of or serious injury to their own children.”<sup>57</sup> Therefore, considering parental grief is particularly justified in the context of this child-safety-focused rule.

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<sup>50</sup> *Id.* at 168.

<sup>51</sup> *Id.*

<sup>52</sup> One of fourteen fatalities recorded by the CPSC was witnessed while nine nonfatal incidents were witnessed. *See* Proposed Rule, *supra* note 2, at 1036.

<sup>53</sup> Productivity losses may occur as a result of absenteeism or so-called “presenteeism” (on-the-job productivity losses). One study found an average cost of \$9,638 for presenteeism and noted that by the 6-month mark post child death, self-reported ability to perform their job increased to an average of 62%. *See* Fox et. al, *Child Death in the United States: Productivity and the Economic Burden of Parental Grief*, DEATH STUDIES, 1–6 (2014), <https://doi.org/10.1080/07481187.2013.820230>.

<sup>54</sup> *See* Federal Motor Vehicle Safety Standards; Rear Visibility, 79 Fed. Reg. 19,178, 19,239 (Apr. 7, 2014).

<sup>55</sup> *Id.* at 19,239.

<sup>56</sup> *Id.* at 19,236.

<sup>57</sup> *Id.*; *see also* Cass R. Sunstein, *Rear Visibility and Some Unresolved Problems for Economic Analysis (With Notes on Experience Goods)*, 10 J. BENEFIT COST ANAL. 317, 333 (2019), <https://doi.org/10.1017/bca.2019.30>.

*C. The CPSC should avoid double counting parental grief.*

If the CPSC decides to apply a specific VSL multiplier to account for a child premium, inclusion of parental grief as a separate unquantified benefit may lead to double counting. The extent of double counting would depend on the specific studies chosen by the CPSC to justify a particular multiplier. In particular, the structure of a study's questions and the theoretical justification undergirding it may affect what is included in the valuation. For example, parents responding to questions about their willingness-to-pay for risk reductions to their own children may already incorporate their desire to avoid grief. Such a valuation may not, however, include the parental grief of both parents or that of non-parent caregivers. The CPSC should therefore carefully analyze whether and to what extent double counting may occur if it considers parental grief alongside a child VSL premium.

**III. The CPSC should consider avoided litigation costs as a (quantified or unquantified) benefit of the Proposed Rule.**

The CPSC should consider avoided litigation costs to manufacturers and consumers arising out of product liability and wrongful death actions. Strangulation-related product liability lawsuits brought against window covering manufacturers (and other third-parties) remain common,<sup>58</sup> even though there is substantial compliance by custom window coverings with the current, voluntary standard.<sup>59</sup> Both consumers and manufacturers can incur significant costs litigating these cases, such as attorneys' fees, and manufacturers may also pay settlements or jury-awarded damages. The settlements and compensatory or punitive damages awards can represent transfers of millions of dollars from manufacturers to plaintiffs.<sup>60</sup> The CPSC believes that a mandatory safety standard would reduce or completely eliminate the risk of strangulation,<sup>61</sup> and it should add avoided litigation-related costs to the expected benefits of the Proposed Rule, as either quantified or unquantified benefits.

The CPSC has previously considered costs arising out of product liability actions as part of the Injury Cost Model (ICM). However, in 2018, product liability insurance and litigations costs

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<sup>58</sup> See e.g., Aimee Green, *Mom of 3-year-old Strangled by Window Blinds Cord Sues Apartments for \$4 Million*, THE OREGONIAN (June 24, 2016) (noting that the attorney representing the child's estate against the apartment complex and window blind manufacturer has also represented clients in 60 other window blind product liability cases since 2003), [https://www.oregonlive.com/clackamascounty/2016/06/mom\\_of\\_3-year-old\\_who\\_strangle.html#:~:text=The%20mother%20of%20a%203,with%20her%20mother%20on%20Feb.](https://www.oregonlive.com/clackamascounty/2016/06/mom_of_3-year-old_who_strangle.html#:~:text=The%20mother%20of%20a%203,with%20her%20mother%20on%20Feb.)

<sup>59</sup> See Proposed Rule, *supra* note 2, at 1039.

<sup>60</sup> See, e.g., Sean Walker, *Jury Awards Reno Mahe Family \$25M in Lawsuit Over 3-year-old's Death*, KSL.COM (Sept. 23, 2021), <https://www.ksl.com/article/50247497/jury-awards-reno-mahe-family-25m-in-lawsuit-over-3-year-olds-death>.

<sup>61</sup> See Proposed Rule, *supra* note 2, at 1042.

were removed,<sup>62</sup> likely due to the risk of double counting.<sup>63</sup> Double counting can occur with respect to damage awards—when there is an overlap between an award and the health benefits of a rule. However, the CPSC does not use the ICM for safety rules. Moreover, there are litigation costs associated with product liability actions that do not overlap with health benefits, such as attorneys’ fees and time spent litigating, that should nonetheless be considered.

Although there are no publicly available reports from the Commission regarding the total number of such suits, manufacturers of consumer products are required to report information about settled or adjudicated lawsuits to the CPSC.<sup>64</sup> This information can help quantify litigation costs, and settlement and damages awards are often available within court records. Even without quantification, the CPSC should consider avoided litigation costs as an unquantified benefit of the Proposed Rule.

#### **IV. The CPSC should consider avoided product recall costs as a (quantified or unquantified) benefit of the Proposed Rule.**

In the Proposed Rule, the CPSC addresses recalls twice. First, the CPSC describes previous efforts to address the window cord hazard through recalls.<sup>65</sup> It notes that between “January 1, 2009 and December 31, 2020, CPSC conducted 42 consumer-level recalls.”<sup>66</sup> Of the 42 consumer-level recalls, the most recent five recalls involved custom window blinds, covering about 300,000 units.<sup>67</sup> In 2015, Blinds To Go issued a recall for 200,000 custom blind units because the tension device did not sufficiently hold down the shade’s chain or cord loop, thus creating a strangulation hazard.<sup>68</sup> As part of the recall, consumers were instructed to request a free retrofit kit in order to remedy the issue, which included a new part and instructions, at the manufacturer’s expense.<sup>69</sup> In addition to the post-sale consumer refunds or replacements, the

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<sup>62</sup> See Bruce Lawrence, et al., *The Consumer Product Safety Commission’s Revised Injury Cost Model*, PAC. INST. RES. & EVALUATION 7 (2018), <https://www.cpsc.gov/s3fs-public/ICM-2018-Documentation.pdf?YWuW4Jn0eb2hExeA0z68B64cv6LIUYoE>. The ICM is used by CPSC to assess the benefits to society of preventing non-fatal acute injuries; the estimates can be used to support CPSC rulemaking.

<sup>63</sup> See Safety Standard Addressing Blade-Contact Injuries on Table Saws, 82 Fed. Reg. 22190, 22214 (May 12, 2017) (codified at 16 C.F.R. pt. 1245) (“there was the possibility of some double counting”).

<sup>64</sup> 15 U.S.C. § 2084.

<sup>65</sup> See Proposed Rule, *supra* note 2, at 1030.

<sup>66</sup> *Id.*

<sup>67</sup> See STAFF BRIEFING PACKAGE: DRAFT NOTICES OF PROPOSED RULEMAKING FOR CORDED WINDOW COVERINGS, TAB C: SUMMARY OF RECALLS – JANUARY 2009 THROUGH DECEMBER 2020, at 72 (2021), <https://www.cpsc.gov/s3fs-public/NPRs-Add-Window-Covering-Cords-to-Substantial-Product-Hazard-List-Establish-Safety-Standard-for-Operating-Cords-on-Custom-Window-Coverings-updated-10-29-2021.pdf?VersionId=HIM05bK3WDLRZrINgogQLknhFvhtx3PD>.

<sup>68</sup> *Id.*; Press Release, Consumer Product Safety Commission, Blinds To Go Recalls Window Shades (Mar. 31, 2015), <https://www.cpsc.gov/Recalls/2015/blinds-to-go-recalls-window-shades>.

<sup>69</sup> Blinds To Go Recalls Window Shades, *supra* note 68.

costs of shade recalls can also include the logistics of tracking the recalled products and the lost value of unsold stock.

Second, the CPSC considers whether relying on voluntary measures, including voluntary recalls, would sufficiently reduce the risk of cord-induced strangulation, and it concludes that such reliance would not adequately reduce the risk of injury.<sup>70</sup> Thus, the current voluntary standard leaves manufacturers vulnerable to recalls because it fails to sufficiently address the cause of a majority of child strangulation incidents.<sup>71</sup> The mandatory standard would minimize, if not eliminate, the risk of strangulation. The CPSC should attempt to estimate the extent to which a mandatory standard would reduce recalls and the costs associated with them. The estimated value of this reduction should then be added to the expected benefits of the Proposed Rule. Even without quantification, CPSC should consider avoided recall costs as unquantified benefits of the Proposed Rule.

#### **V. The CPSC can incorporate unquantified benefits through break-even analysis.**

The Office of Management and Budget recommends the use of break-even analysis for agencies to consider benefits that cannot be quantified.<sup>72</sup> Engaging in such analysis can help avoid an anti-regulatory bias that results if agencies decide not to regulate because costs are more easily quantified than benefits.<sup>73</sup> A break-even analysis essentially asks, “How high would the unquantified benefits have to be in order for the rule’s costs to be justified?”<sup>74</sup> The CPSC estimates that the Proposed Rule would create aggregate costs between \$156.5 million and \$309 million.<sup>75</sup> Aggregate quantified benefits total \$49.5 million, and this total rises to \$136.9 million if the Commission applies a child VSL multiplier of 3.<sup>76</sup> Thus, in conducting a break-even analysis, the CPSC could explain whether the unquantified benefits identified by the agency—including, but not limited to, the prevention of parental grief, avoidance of litigation costs, and avoidance of recall costs—are worth at least the difference between costs and benefits.

While break-even analysis is useful in the short term, in the longer term CPSC should invest in developing methods for quantifying benefits such as avoided parental grief.<sup>77</sup> Many agencies

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<sup>70</sup> See Proposed Rule, *supra* note 2, at 1053.

<sup>71</sup> See *id.* at 1051 (“One hundred percent of the operating cord incidents involving custom window coverings would have been prevented if the requirements in section 4.3.1 of ANSI/ WCMA–2018 were in effect and covered the incident products.”).

<sup>72</sup> See Circular A-4, *supra* note 5, at 2.

<sup>73</sup> See Richard L. Revesz, *Quantifying Regulatory Benefits*, 102 CAL. L. REV. 1423, 1425 (2014).

<sup>74</sup> See Circular A-4, *supra* note 5, at 2.

<sup>75</sup> Proposed Rule, *supra* note 2, at 1044.

<sup>76</sup> *Id.* at 1045.

<sup>77</sup> Revesz, *supra* note 73, at 1425 (“The movement from nonquantifiable to quantified is not a random event. Instead, it is often the product of a government intervention—whether the funding of private studies or more direct government action. So the question of how to deal with nonquantifiable benefits inevitably leads to the consideration of the optimal governmental role in providing incentives for quantification.”).

would benefit from such research; the Commission, however, is particularly well suited to lead a quantification effort for benefits of this type, because many of its rules aim to protect young children from suffering accidental death or injury in the home.

Sincerely,

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