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SAFETY FIRST: THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 2008

*Eileen Flaherty**

I. INTRODUCTION

The United States Consumer Product Safety Commission (CPSC) is an independent federal regulation agency that has the job of protecting “the public from unreasonable risk of serious injury or death from thousands of types of consumer products” under the agency’s jurisdiction.¹ The CPSC works with the industry to develop voluntary standards, enforce mandatory standards, recall products, conduct research on potentially hazardous products and inform the consumer about these hazards.²

On August 14, 2008, President Bush signed into law the Consumer Product Safety Improvement Act of 2008 (CPSIA).³ The Act was a result of a bipartisan effort by Congress to overhaul the CPSC and put safer products on the shelves, especially for children, at a time when millions of products were recalled due to potentially hazardous materials. The bill was praised by consumer groups and consumers.⁴ However, because of the swiftness the bill was enacted, there may be some unintended consequences. Industry manufacturers state that the bill is unclear and they are unsure of how to comply without being hit with the new heavy penalties.⁵ Small and medium size businesses contest that they will not be able to afford the new testing or comply

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¹ U.S. Consumer Product Safety Commission, About, <http://www.cpsc.gov/about/about.html> (last visited Jan. 25, 2009).

² U.S. Consumer Product Safety Commission, Who We Are, <http://www.cpsc.gov/cpsc/pub/pubs/103.html> (last visited Jan. 25, 2009). [hereinafter *Who We Are*].

³ House Speaker Nancy Pelosi, Consumer Product Safety Act, <http://www.speaker.gov/legislation?id=0244> (last visited Jan. 25, 2009).

⁴ See *Comprehensive Children’s Product Safety Commission Reform Legislation: Hearing Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce*, 110th Cong. (2007) [hereinafter *Hearing*] (statement of Rachel Weintraub, Director of Product Safety and Senior Counsel, Consumer Federation of America).

⁵ Lyndsey Layton and Anny Shin, *Toymakers Assail Cost of New Law*, WASH. POST, Dec. 21, 2008, at A3.

with other provisions and will have to shut their doors.⁶ With these new regulations, the price of doing business will increase, and as a result, the prices of consumer products may go up. Will consumers, in the middle of a recession, be able to afford these increases?

This note will first discuss the history of the Consumer Product Safety Commission and how over the years the agency has become less and less effective in protecting Americans. This note will also discuss the CPSIA of 2008, and the portions that will affect consumers and the industry. Finally this note will discuss the potential unintended consequences of the bill. Even with the potential detrimental consequences of the new law, consumers will benefit from the act. Overall, consumers will be safer and can be confident that the products they are buying will be safe.

II. HISTORY AND FUNCTION OF THE CONSUMER PRODUCT SAFETY COMMISSION

Congress created the CPSC in 1972 under the Consumer Product Safety Act.⁷ The CPSC is an independent government agency, which does not report to any other agency in the federal government.⁸ Congress created the CPSC to protect the public “against unreasonable risks of injuries associated with consumer products.”⁹ Nation-wide uniform standards were one of the reasons that Congress created the CPSC.¹⁰ Prior to 1972, safety standards for consumer products were regulated at the state level and therefore, with state standards often differing, there was a wide discrepancy.¹¹ Conflicting standards were a problem for manufactures who were trying to keep costs down while complying with each state’s different regulations.¹² With the creation of the CPSC, safety standards were uniform on a federal level.¹³

The marketplace failing to police itself was another reason for the creation of the CPSC.¹⁴ Neither the laws in place nor the threat of litigation were enough to prevent companies from making and selling defective products.¹⁵ With the inception of the CPSC, the agency had the authority to make regulations for industries and participate in

⁶ *Id.*

⁷ Who We Are, *supra* note 2.

⁸ US Recall News, Consumer Product Safety Commission CPSC History, May 30, 2008, <http://www.usrecallnews.com/2008/05/us-consumer-product-safety-commission-cpsc.html>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Hearing, supra* note 4 (statement of Rachel Weintraub).

¹⁵ *Id.*

recalls of hazardous products nationwide.¹⁶

The mission statement of the CPSC is to protect the American public from unreasonable risk of injury and death from consumer products.¹⁷ The CPSC has 15,000 consumer products under its control including those in the home, sport, recreation, and schools.¹⁸ They do not monitor vehicles, alcohol, firearms, food, drugs, cosmetics, pesticides or medical devices.¹⁹

The top branch of the CPSC consists of three commissioners who are nominated by the President and confirmed by the Senate for staggered seven year terms.²⁰ One of the Commissioners is designated chairperson by the President.²¹ The current acting chairman of the CPSC is Nancy Nord, who was confirmed on April 29, 2005.²² At present, there is only one other commission, Thomas Hill Moore.²³ The third spot is vacant, a sign of the current conditions of the CPSC.²⁴ The three commissioners set the policy for the CPSC.²⁵ Below the commissioners are five officers: Congressional Relations, Equal Employment, Minority Enterprise, General Counsel, Inspector General and Executive Director.²⁶ The executive director oversees the commission's policy and administration.²⁷ Fields that report to the executive director include: Compliance and Field Operation, Hazard Identification and Reductions, Financial Management, Planning and Evaluation, Human Resources, Information and Public Affairs, Information Management and Technology, International Programs and Intergovernmental Affairs.²⁸

The CPSC collects information on death, injury and incidents from sources all around the United States including emergency rooms, consumers, manufacturers and retailers in trying to reduce hazardous products from being on the shelves.²⁹

¹⁶ US Recall News, *supra* note 8.

¹⁷ U.S. Consumer Product Safety Commission, 2008 Performance and Accountability Report: Saving Lives and Keeping Families Safe 3(2008) [hereinafter Accountability Report] available at <http://www.cpsc.gov/cpsc/pub/pubs/reports/2008par.pdf>.

¹⁸ US Recall News, *supra* note 8.

¹⁹ U.S. Consumer Product Safety Commission, Frequently Asked Questions, <http://www.cpsc.gov/about/faq.html>. (last visited Jan. 25 2009) [hereinafter CPSC FAQ].

²⁰ *Id.*

²¹ *Id.*

²² U.S. Consumer Product Safety Commission, Biographical Information: Nancy Nord, <http://www.cpsc.gov/cpsc/pub/bios/nord.html> (last visited Jan. 25, 2009).

²³ U.S. Consumer Product Safety Commission, Biographical Information: Thomas Hill Moore, <http://www.cpsc.gov/cpsc/pub/bios/moore.html> (last visited Jan. 25, 2009).

²⁴ U.S. Consumer Product Safety Commission, Organization Chart, <http://www.cpsc.gov/about/orgchart.pdf> (last visited Jan. 26, 2009).

²⁵ CPSC FAQ, *supra* note 19.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Accountability Report, *supra* note 17, at 3.

A. Voluntary Standards

According to the Consumer Product Safety Act, the CPSC must rely on voluntary standards that are created by the industry if the standards would eliminate or adequately reduce the risk of injury addressed and there is likely to be compliance with the voluntary standards.³⁰ The agency has stated that voluntary standards are often faster and cheaper than mandatory standards, yet offer the same safety protection as the mandatory standards.³¹ Voluntary safety standards usually start with a staff member of the CPSC recommending a new standard or modification of an existing standard to a voluntary standard organization.³² Voluntary standard organizations such as American Society for Testing and Materials (ASTM) develop the standards for the industry.³³ After recommendations by the CPSC staff, the organization may conduct technical assessments.³⁴ They then publish a proposal for comment, receive and evaluate those comments go on to publish a standard.³⁵ The CPSC staff participates in this process by providing expert advice, information and technical assistance based on their data reports of how the deaths, accidents and injuries occur.³⁶ It is important to note that the CPSC staff does not vote on proposed voluntary rule changes or the new standards.³⁷ Only the comments of the CPSC staff are considered throughout the voluntary rulemaking process.³⁸ This process could take months or years to be finalized into a standard for the industry.³⁹

B. Mandatory Rulemaking

By law, the CPSC can issue mandatory standards only when they find that the voluntary standard will not eliminate or adequately reduce the risk of injury or death, or that it is unlikely that there will be substantial compliance with the voluntary standard within the industry.⁴⁰ The CPSC may initiate the rulemaking process based on petitions from outside parties or based on observations of the CPSC

³⁰ 15 U.S.C.A. § 2056 (1982).

³¹ Accountability Report, *supra* note 17, at 3.

³² *Id.* at 4.

³³ ASTM International, About ASTM International, <http://www.astm.org/ABOUT/aboutASTM.html> (last visited Jan. 26, 2009).

³⁴ Accountability Report, *supra* note 17, at 4.

³⁵ *Id.* at 4-5.

³⁶ *Id.* at 5.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Accountability Report, *supra* note 17, at 4.

⁴⁰ *Id.*

staff.⁴¹

Making a mandatory rule is a multi-step and often time-consuming process.⁴² The first step is the Advance Notice of Proposed Rulemaking (ANPR) in which the CPSC seeks input from all interested parties (consumer, industry medical community and governmental agencies).⁴³ Performance standards rather than design standards are often developed to give manufacturers the most flexibility in meeting requirements.⁴⁴ Included in the ANPR, is a summary of all regulation options that have been considered, an explanation of why the existing standard is insufficient and it also invites a notice of any relevant voluntary rulemaking or intentions to develop rulemaking.⁴⁵

Within twelve months of the ANPR, the agency must publish the second step, the Notice of Proposed Rulemaking (NPR).⁴⁶ At this point, the agency must show a cost-benefit analysis of the proposed rule, explain why the current rule is not adequate, describe reasonable alternatives and again invite comments from the public and industry.⁴⁷

Within sixty days of the NPR, the CPSC must issue a final rule or withdraw the NPR.⁴⁸ The agency must state the degree and nature of risk, approximately how many products will be subject to the new rule, the effect the rule will have on the cost, utility and availability to consumers; and how it will disrupt manufacturers.⁴⁹

This rulemaking process has not proven to be efficient, during the George W. Bush Administration, the agency only once met the timeline for issuing a rule.⁵⁰ And, if the industry starts developing a voluntary rule, the CPSC must abandon its efforts and wait to see if the voluntary standard will adequately reduce the hazard.⁵¹ The CPSC has been criticized for the amount of time it takes to create standards and their seemingly complacency with rulemaking.⁵²

An example of how the mandatory rulemaking process may end prematurely is the rule regulating child bath seats. In 1994, ASTM developed voluntary standards for baby bath seats.⁵³ The CPSC took

⁴¹ *Id.*

⁴² Lisa M. Keefe, *Protecting Yourself from Hazardous Goods Research Products Before Making Purchases, Report Problems*, ORLANDO SENTINEL, Dec. 21, 1988, at 10.

⁴³ Accountability Report, *supra* note 17, at 5.

⁴⁴ *Id.*

⁴⁵ Peter Gosselar, *Held Back: Unfinished Consumer Product Safety Commission Rules, Class of 2007*, 5 (Public Citizen Mar. 2008), available at <http://www.citizen.org/documents/CPSCClassOf2007.pdf>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 6

⁵¹ Gosselar, *supra* note 45, at 5.

⁵² See Keefe, *supra* note 42.

⁵³ U.S. Consumer Product Safety Commission, *Voluntary Standards: Bath Seats*,

part in developing the standards which were published in 1999.⁵⁴ The standards were revised and the CPSC concluded that they did not meet safety requirements.⁵⁵ In October of 2002, the agency published an Advanced Notice of Proposed Rulemaking.⁵⁶ Before the rule took effect, the industry developed a voluntary standard that was extremely similar to that proposed by the CPSC and so the voluntary standard was adopted and the mandatory standard was no longer needed.⁵⁷ It took eight years for a rule that the CPSC approved to be in place for baby bath seats, a sign of the sluggishness of the agency with regard to rulemaking.

C. Identifying Hazards and Compliance

The CPSC compliance staff identifies defective products through their own investigations or through consumers.⁵⁸ They collect data from different sources to find emerging hazards, and identify products that need new standards.⁵⁹ One source is the National Electronic Injury Surveillance System (NEISS) which provides estimates of product injuries from samples of emergency rooms across the country.⁶⁰ The agency also collects and reviews thousands of death certificates that relate to a death by a consumer product.⁶¹ Then the agency systematically reviews the death and injury data that it collects and groups like products together.⁶² The staff investigates certain incidences to see how a particular product was involved in the death or injury and then analyzes the information.⁶³ The staff performs special studies in areas identified by a strategic planning process.⁶⁴ The review of this information identifies emerging hazards.⁶⁵

D. Recalls

The CPSC recalls products that are defective or violate the mandatory safety standards.⁶⁶ An item is defective if it presents a

<http://www.cpsc.gov/volstd/bbybath/bbybath.html> (2006).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Accountability Report, *supra* note 17, at 5.

⁵⁹ *Id.* at 8.

⁶⁰ *Id.* at 7.

⁶¹ *Id.* at 8.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Accountability Report, *supra* note 17, at 8.

⁶⁵ *Id.*

⁶⁶ *Id.* at 5.

substantial risk to the public.⁶⁷ When a recall is necessary, the compliance staff of the CPSC first contacts the responsible company.⁶⁸ In 2008, there were 563 cooperative recalls, all which were voluntary.⁶⁹ When a company fails to report injuries from a product, the CPSC can sue in court and demand civil penalties.⁷⁰ A recall doesn't always mean the product is no longer useful.⁷¹ Sometimes, a product might need a replacement part or a customer might at be able to exchange it.⁷²

E. Consumer information

The CPSC also alerts consumers about defective products through different outlets including; print, listerves, the internet, and its hotline.⁷³ Their Neighborhood Safety Network is a network of 5,500 different organizations in which the CPSC informs them of dangerous products, and those organizations or individuals share the information with people who otherwise would not know about the recalls.⁷⁴ The CPSC has also started the "Drive to One Million Campaign" in which the goal is to have one million consumer sign up for electronic email updates on product safety.⁷⁵ Consumers can also check the CPSC website to find information on product recalls.⁷⁶ The CPSC works with media outlets to get the word out about product recalls.⁷⁷ Getting the information to the consumer is an important step for the CPSC; however, despite their efforts, many recalled products are in the hands of consumers, who don't know they are potentially dangerous.⁷⁸

F. Budget

When the CPSC was created, Congress appropriated 34.7 million dollars to the agency with a staff of 786 full-time employees.⁷⁹ During the Regan Administration, the CPSC's budget and staff were cut, along with other regulatory agencies.⁸⁰ Today its budget, not

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *See id.*

⁷¹ US Recall News, *supra* note 8.

⁷² *Id.*

⁷³ Accountability Report, *supra* note 17, at 6.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ U.S. Consumer Product Safety Commission, <http://www.cpsc.gov/index.html> (last visited Jan. 26, 2009).

⁷⁷ Accountability Report, *supra* note 17, at 6.

⁷⁸ *Id.*

⁷⁹ *Hearing, supra* note 4 (statement of Rachel Weintraub).

⁸⁰ Barry Meier, *Product Safety Commission is Criticized as Too Slow to Act*, N.Y. TIMES, Sept. 21, 1991, at 1.

keeping up with inflation, has seriously decreased.⁸¹ In 1980 there were 978 employees, and in 2008 only 401 – the fewest in the history of the CPSC and a loss of almost sixty percent.⁸² In 1991 the agency's budget was 37 million, down from 43.9 million in 1979.⁸³ The low budget, and reduction of staff was at a time when the CPSC needs for collecting data was increasing because of the fast pace changes which were occurring in the area of consumer products.⁸⁴

There has been concern since the late 1980s about the agency's ability to effectively do its job – prevent injuries and death from unsafe products.⁸⁵

In 1981, the regulatory powers of the CPSC were cut when it was required to use the voluntary safety standards adopted by the industry, if those standards were safe rather than imposing its own regulations.⁸⁶ Since that ruling combined with the decrease budget and declining staff, the CPSC's effectiveness in preventing injuries and deaths has declined.⁸⁷

For example, the CPSC was slow to develop standards for child-resistant lighters.⁸⁸ In 1985, the CPSC was petitioned by Diane Denton, a nurse in a hospital burn unit about the potential danger of disposable lighters.⁸⁹ First, the CPSC allowed a voluntary standard, but it was dropped because the agency found that smaller companies might not comply.⁹⁰ Lighter companies refused to disclose what safety research they did, and the CPSC waited ten months before issuing subpoenas for the information.⁹¹ At that time, under the law, the CPSC had to give a manufacturer a chance to review and dispute any data about its product.⁹² The agency was also not allowed to release any data that manufactures had disclosed about potential hazards of a product.⁹³ A former commission member stated, "The agency's performance has been a travesty. It is not what Congress had in mind when it created the agency to protect the public against household standards."⁹⁴

⁸¹ See *Hearing, supra* note 4 (statement of Rachel Weintraub).

⁸² *Id.*

⁸³ Meier, *supra* note 80.

⁸⁴ *Hearing, supra* note 5 (statement of Rachel Weintraub).

⁸⁵ ConsumerUnion.org, *Michael Baroody is the Wrong Person for the Job*, April 26, 2007, available at http://www.consumersunion.org/pub/core_product_safety/004428.html.

⁸⁶ See Meier, *supra* note 80.

⁸⁷ National Consumers League, National Groups Call for Adoption of Pro-Consumer Policies, Dec. 11, 2008 available at http://www.nclnet.org/news/2008/consumer_priorities_12112008.htm.

⁸⁸ See Meier, *supra* note 80.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

With deregulation, the CPSC, lost some of its power and by law, must first seek voluntary standards.⁹⁵ Because of these actions, the agency has been criticized for “dragging its feet”.⁹⁶ Relying on industries to develop voluntary standards was not seen as an efficient way to keep products safe.⁹⁷ The multi-step rulemaking process was being regarded as burdensome and overly friendly to the industry.⁹⁸ The agency has been accused of lack of direction and giving the industry too much leeway.⁹⁹

The slow response time is simply because the CPSC does not have the funds or manpower to regulate all industries. Between 1990 and 2007, the CPSC had 38 mandatory rules and developed 390 voluntary rules.¹⁰⁰ Between 2004 and 2007 alone, only 3 mandatory rules were put into effect and 141 voluntary rules.¹⁰¹

IV. 2007: YEAR OF THE RECALL

2007 is known as the “Year of the Recall.”¹⁰² There were a record 473 recalls by the CPSC alone.¹⁰³ This doesn’t include peppers laced with salmonella or spinach tainted with e-coli recalled by the FDA.¹⁰⁴ Thirty million potentially hazardous children’s toys were pulled from the shelves all around the country.¹⁰⁵ Among toy recalls, the majority were no-brand name, low price products sold at dollar stores.¹⁰⁶ However, in 2007, the consumer products that were pulled from the shelves were not only cheap products from the dollar store, but high end brands as well. Liz Claiborne recalled \$95 Juicy Couture charm bracelets that were found to contain high levels of lead.¹⁰⁷

The very heavily-reported story in 2007 was the recall of

⁹⁵ *Adrift Product Safety Agency Needs Fixing, Critics Charge*, ST. LOUIS POST-DISPATCH, Mar. 28, 1989, at 7D.

⁹⁶ See Keefe, *supra* note 42.

⁹⁷ See Patricia Callahan, *2.4 Millions More Toys Pulled: Recalled Items Were Sent as Replacements*, CHICAGO TRIB., March 18, 2008, at 1 (“emblematic of how the docile and underfunded agency failed to protect children”). See also, ConsumerUnion.org, *Hazardous Product Incidents Highlight Need For Reform of Product Safety System*, Feb. 7, 2008, available at http://www.consumersunion.org/pub/core_product_safety/005396.html, (“For years CPSC has been operating like a toothless tiger with no bark or bite”) [hereinafter Hazardous Product].

⁹⁸ Gosselar, *supra* note 45, at 5.

⁹⁹ See *Adrift Product Safety Agency Needs Fixing, Critics Charge*, *supra* note 95.

¹⁰⁰ Gosselar, *supra* note 45, at 6.

¹⁰¹ *Id.*

¹⁰² Debra Kaufman, *A Banner Year for Recalls: Tainted Products Were Among Health Care’s Biggest Stories in 2007*, Electronic Media, Crain Communications Inc., Mar. 24, 2008.

¹⁰³ *Id.*

¹⁰⁴ National Consumers League, *supra* note 87.

¹⁰⁵ See Kaufman, *supra* note 102. See also, *The President and Product Safety*, N.Y. TIMES, Aug. 5, 2008, at A18.

¹⁰⁶ Sheryl Harris, *Millions of Toys Recalled in ’07*, CLEV. PLAIN DEALER, July 12, 2007, at C1.

¹⁰⁷ *Id.*

children's products, especially those made in China.¹⁰⁸ The number of recalled products imported from China has doubled in the last five years because many companies outsource the manufacturing of their products to China.¹⁰⁹ China is responsible for sixty percent of all the products that were recalled and make up seventy to eighty percent of toys that are sold in the United States.¹¹⁰ Many of the children's toys that were recalled in 2007 contained lead which when ingested can cause damage to the nervous system, kidney and result in poor muscle control in children.¹¹¹ Other hazardous products recalled included Aqua Dots, which contained beads that metabolize into the "date-rape" drug and magnets that came apart from a toy, and when swallowed connected and ripped through a child's intestinal tract.¹¹²

The problem with importing goods from China, is that China is seen as an unreliable partner in outsourcing manufacturing.¹¹³ Chinese companies often close and reappear under a new name, thereby rarely suffering any consequences after producing dangerous toys.¹¹⁴ The CPSC only had a small amount of port investigators and a small budget to fight the rapidly growing number of Chinese imports.¹¹⁵ That is, 100 field investigators and compliance personnel around the country to inspect ports, warehouses, and stores housing twenty-two billion dollars worth of toys and tens of billions of dollars worth of consumer products.¹¹⁶

A major criticism of the CPSC was the length of time it took to get a hazardous product off the shelves.¹¹⁷ It is routine for weeks to pass between the time a safety hazard is reported to the CPSC and the public is warned.¹¹⁸ This length of time is because there are a number of items that must be indentified and put in place before a recall is announced, putting consumers at risk while tainted products sit on the shelves.¹¹⁹

Dubbing 2007 the "Year of the Recall" TV stations responded in force.¹²⁰ The health departments' testing toys made "huge" news

¹⁰⁸ See Kaufman, *supra* note 102.

¹⁰⁹ Eric S. Lipton & David Barboza, *As More Toys are Recalled, the Trail Ends in China*, N.Y. TIMES, June 19, 2007, at A1.

¹¹⁰ *Id.*

¹¹¹ David Lazarus, *Toying with Children's Safety*, L.A. TIMES, Aug. 31, 2007, at Business 1.

¹¹² Noam N. Levey, *Consumer Database Faces Fight*, L.A. TIMES, Mar. 6, 2008, at 11; see also Callaghan, *supra* note 97.

¹¹³ See Lazarus *supra* note 111.

¹¹⁴ Editorial, *Policing Needed on Chinese Imports*, VA.-PILOT, June 23, 2007, at 8.

¹¹⁵ *Id.*

¹¹⁶ Lipton, *supra* note 109.

¹¹⁷ See Lazarus, *supra* note 111.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See Kaufman, *supra* note 102.

stories in 2007. Media affiliates noticed more coverage of recalls in 2007 because the recall stories easily grabbed one's attention, they were "highly promotable".¹²¹ Some called the stories "sensational" because overall not that many children get sick from lead toys.¹²² It is crisis reporting, it doesn't affect many people, but people react strongly to the stories because they are concerned about their health.¹²³

Nevertheless, even if the news stories were "sensational", the more news stories about a particular subject, the more people start to pay attention and the more instances get noticed. The more instances, political pressure heightens and new laws are proposed. This is the path news about the recalls took to overhaul the CPSC. After the stories were reported by the media, consumer groups which had been urging tougher standards were heard by lawmakers.¹²⁴ Congress aggressively began working on a bill to overhaul the CPSC and regulate consumer products, especially children's products.¹²⁵ Toymakers did not wait for Washington to pass a bill before changing their toy safety regulations.¹²⁶ Because of the amount of press, companies were getting from the large amount of recalls, major toy companies tighten standards for their products.¹²⁷ The CPSC as well responded to the crisis and instituted a new procedure to have more shipments inspected by compliance officers at U.S. ports.¹²⁸

Congress overwhelmingly responded to the crisis.¹²⁹ The Senate Committee on Homeland Security and Governmental Affairs launched an investigation into the safety standards for children's toys and clothing.¹³⁰ Senator Mark Pryor started pushing a bill to overhaul the CPSC because he observed that products would sit on the shelves for months before being pulled for violating safety standards.¹³¹

The SAFE Act sponsored by Rep. Diana Degette and

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Hearing, supra* note 4 (statement of Rachel Weintraub).

¹²⁵ Lazarus, *supra* note 111.

¹²⁶ Mary Sheddon, *Seeking Safer Toys*, TAMPA TRIB., Nov. 30, 2008, at 1.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See Lazarus *supra* note 111. See also, Leah Nylen and Adrienne Kroepsch, S2045 – CPSC Reform Act of 2007, CQ Bill Analysis, Mar. 3, 2008 (FN: S 2663 sponsored by Mary Pryor, to overhaul the CPSC; HR 404 sponsored by Bobby Rush would change protective standard for allowable lead in children's consumer products and overhaul CPSC; HR 3641 sponsored by Rosa DeLauro, included requirement for testing of children's products, HR 3903, Jim Matheson, require multi-stage testing process for children's toys; --3499 Hooley, would require 3rd party testing of children's toys; S 1833 Bill Nelson, Senate version of 3499, HR 814 Dennis Moore, would require the CPSC to issue regulations mandating child-resistant closure on all portable gasoline containers, S 2038, Amy Klobuchar, would prohibit the introduction or delivery interstate commerce of children's products with lead; S 1510 Bill Nelson, require CPSC to promulgate rules concerned safety and labeling of portable generators.)

¹³⁰ Lazarus, *supra* note 111.

¹³¹ Levey, *supra* note 112.

Congresswoman DeLauro, suggested banning lead in children's toys, giving mandatory recall authority back to the CPSC and a tracking system for consumer products.¹³²

Nancy Nord wrote a letter to Senators Pryor and Inouye outlying her concerns for the bill that they had proposed.¹³³ Nord suggested that the proposed bill contained a number of measures that she felt were outside CPSC's main mission statement.¹³⁴ She also suggested that several of the bill's provisions would strain the agency.¹³⁵ This included a whistleblower provision which would have the CPSC hear whistleblower complaints made by industry employees.¹³⁶ Nord also stated that in the letter to Senator Pryor that raising the cap on penalties would flood the agency with every consumer complaint by companies for fear they be penalized if they withheld the information.¹³⁷ In this process Nord felt that true safety issues would not be recognized within the flood of complaints.¹³⁸ Nord was criticized by Congress for "dragging" her feet at the legislation, when they felt it was her job to lead the charge of product safety.¹³⁹

HR 4040 and S4045 were the bills left standing from the House and Senate combining to become the CPSC Reform Act of 2007.¹⁴⁰ The National Association of Manufacturers expressed reservations about the bill.¹⁴¹ It supported increased funding and more staff for the CPSC, it did not support the bill's provision which would allow state attorneys general to bring civil suits.¹⁴² Industry groups bitterly opposed the measure which would put a public consumer database in place.¹⁴³ They asserted that the database could unduly alarm consumers about products and would potentially give away confidential disclosures.¹⁴⁴ The industry supported the more industry friendly HR 4040.¹⁴⁵ Consumer groups, on the other hand, backed the stricter Senate version.¹⁴⁶

¹³² PBS NewsHour with Jim Lehrer, *Analysis of the Latest Economic News – Part 1* (PBS television broadcast Nov. 2, 2001).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Anny Shin, Product Safety Chief Sees Setbacks in Senate Bill*, WASH. POST, Oct. 26, 2007, at D2.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Office of Sen. Mark Pryor, *Senate Democrats Discuss Consumer Safety*, US Federal News, Nov. 1, 2007.

¹⁴⁰ Nylén, *supra* note 129.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Levey, *supra* note 112.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Nylén, *supra* note 129.

After the House and the Senate both passed their own versions, Congress reached a consensus on HR 404 and S4045 and the Consumer Product Safety Improvement Act of 2008 was sent to President Bush.¹⁴⁷

V. CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 2008

On August 14, 2008 President Bush signed into law the Consumer Product Safety Improvement Act of 2008.¹⁴⁸ This bill was a bi-partisan effort to keep consumers safe after the crisis in 2007. The CPSIA amends the Consumer Product Safety Act and overhauls the CPSC. The bill regulates the manufacturing of children's toys, includes a public database and requires certification by manufacturers, some of the significant portions of the bills are discussed.

Children's toys were most affected by the new legislation. The bill brought into effect stringent laws regarding children's products, not only toys. A "children's product" is defined by Section 245 of the Act as "a consumer product designed or intended primarily for children twelve years of age or younger."¹⁴⁹ This language is stricter than the original House version which defined a children's product as that intended for the use of a child of seven years of age or younger.¹⁵⁰ There are certain factors that must be met to determine if a product will be categorized as made for a twelve year old child or younger. In response to the high number of Chinese imports containing lead, amounts of lead in a toy are limited to 400 ppm.¹⁵¹ This restriction will begin February 10, 2009 and will increase in subsequent years.¹⁵² There are exceptions to the lead provision including allowing the CPSC to exclude a product if it determines that there is no danger of it being absorbed by children through swallowing, mouthing, breaking or the general aging process of a product.¹⁵³

There is also a provision that mandates testing of children's products. A manufacturer must have a sample tested by an independent assessment body to show that the product conforms to all applicable safety standards.¹⁵⁴ The third party certification site must be accredited by the CPSC.¹⁵⁵ The certification must certify that the

¹⁴⁷ *Id.*

¹⁴⁸ House Speaker Nancy Pelosi, Consumer Product Safety Act available at <http://www.speaker.gov/legislation?id=0244> (last visited Jan. 25, 2009).

¹⁴⁹ Robert Helland Jr., Antony B. Kapper & Stephen P. Murphy, Reed Smith, *An Analysis of the Consumer Product Safety Act of 2008*, available at <http://www.reedsmith.com/library/>.

¹⁵⁰ *Id.*

¹⁵¹ Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, §101 available at <http://www.cpsc.gov/cpsia.pdf>.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at § 102.

¹⁵⁵ *Id.*

product meets all applicable safety standards and include a date, place, name, address and phone number of where the certification took place.¹⁵⁶ Testing can be completed by a government agency unless it is determined that the government is influenced by the industry or company.¹⁵⁷

Children's products must also be tracked.¹⁵⁸ The manufacturers of children's products must place a distinguishing mark on the product and packaging to identify the manufacturer, production time period, and any other information such as a batch number.¹⁵⁹ This will help facilitate the recall process.¹⁶⁰

The CPSC also must adopt the voluntary toy standards of the ASTM and has one year to review and determine if stricter standards need to be put in place.¹⁶¹

And finally, the Act bans certain phthalates in children's toys, which are known to cause developmental delays.¹⁶² This provision of the act was a compromise between the House and Senate version of the bill, with the Senate version banning phthalates and the House version containing no requirement of a ban.¹⁶³

Other requirements of the Act not pertaining exclusively to children's products include a public database.¹⁶⁴ The searchable public database will allow consumers to get updated information on possible hazardous products. The public database, which the industry did not want in place for fear of disclosing company privilege information, needs to be enacted within 180 days of the bill.¹⁶⁵ Manufacturers can ask the CPSC to redact confidential information and if the CPSC refuses, bring the agency to court.¹⁶⁶

Penalties will be stricter for violators of the new regulations under Section 217. The maximum civil penalty is \$100,000 which is up from \$8,000 per violation.¹⁶⁷ The cap on damages is 15 million dollars, up from the current of 1.825 million.¹⁶⁸ Criminal penalties will also be stricter with a maximum of five years for knowingly and willfully violating consumer product safety laws.¹⁶⁹

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Consumer Product Safety Improvement Act of 2008, *supra* note 151 at § 103.

¹⁵⁹ *Id.*

¹⁶⁰ Helland, *supra* note 149, at 3.

¹⁶¹ Consumer Product Safety Improvement Act of 2008, *supra* note 151, at § 106.

¹⁶² *Id.* at § 108.

¹⁶³ Helland, *supra* note 149, at 4.

¹⁶⁴ Consumer Product Safety Improvement Act of 2008, *supra* note 151, at § 212.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at § 217; Helland, *supra* note 149, at 6.

¹⁶⁸ Consumer Product Safety Improvement Act of 2008, *supra* note 151, at § 217.

¹⁶⁹ *Id.*

The Act expands its restriction of the sale, import or export of recalled products. And all products, not only children's toys, must have certification that it is in compliance with the regulations of the Act and tested using a reasonable testing method.¹⁷⁰

The Act contains a "whistleblower statute" which makes it illegal for retailer, manufacturer, import, or distributor's employer to fire or discriminate against employees who report violations or testify in enforcement proceedings.¹⁷¹

The Act expands the CPSC's recall authority to products that violate any rule under the act or "imminently hazardous consumer products".¹⁷² The requirements for a recall include a description of the product, action being taken, number of units affected, degree of the hazard, identifying the manufacturer, dates sold, the injuries or death and any remedy that is available.¹⁷³

In Section 231, the CPSC must not construe the act as preempting any cause of action under state, local common law regarding damage claims.¹⁷⁴ The Act also allows state attorneys general to institute injunctions on unsafe products.¹⁷⁵

The Act not only gives the CPSC more power but the resources to try and carry it out. The Act increases funding for the CPSC over the next seven years to 136.4 million in 2014.¹⁷⁶ The number of employees also increases with 500 more agents in 2013.¹⁷⁷ Also there will be an expedited rulemaking process – no long will the Advanced Notice of Proposed Rulemaking be mandatory.¹⁷⁸

Also in 2007, Chairwoman Nancy Nord was criticized for taking trips funded by companies which were regulated by the agency.¹⁷⁹ As a result, the Congress instituted an industry-sponsored travel band in the CPSIA for the members of the CPSC.¹⁸⁰

This new law will be felt broadly, not only by consumers, but by all participants in the consumer product industry.¹⁸¹ The law was

¹⁷⁰ *Id.* at § 102(a). See also Ruth E. Castro and Edward L. Quevedo, *The Federal Consumer Product Safety Improvement Act of 2008: Measures for Compliance with CPSC'S New Precautionary Approach*, Nov. 18, 2008, available at <http://www.fbm.com>.

¹⁷¹ Consumer Product Safety Improvement Act of 2008, *supra* note 151, at § 219.

¹⁷² *Id.* at § 214.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at § 231.

¹⁷⁵ *Id.* at § 218.

¹⁷⁶ Helland, *supra* note 149, at 7.

¹⁷⁷ *Id.*

¹⁷⁸ Consumer Product Safety Improvement Act of 2008, *supra* note 151, at § 204.

¹⁷⁹ See PBS NewsHour with Jim Lehrer, *supra* note 132.

¹⁸⁰ Consumer Product Safety Improvement Act of 2008, *supra* note 151 at § 206.

¹⁸¹ *Consumer Product Safety Improvement Act of 2008: New Regulatory Landscape for Product Safety*, Lorman Educational Services, September 2008, available at http://www.lorman.com/newsletters/article.php?article_id=1069&newsletter_id=231&category_id=8 [hereinafter Lorman Educational Services]

praised by consumer groups, however, critics say that this new law was reactionary, and because of that, is written very broadly and has unforeseen consequences.¹⁸²

VI. PROBLEMS WITH CPSIA

The industry had to prepare not only for the new laws which took effect immediately, and for the provisions that will come into effect in subsequent months but also those which applied retroactively. Was CPSIA thought out properly, or did the “sensationalism” catch up with Congress, the measure passed too quickly without evaluating all potential consequences?

The consumer product industry will need to make changes in the way it handles business. Companies will need to develop new systems to comply with the new standards.¹⁸³ Systems will need to be developed to track products from the very beginning of production and labels need to be created to display this information.¹⁸⁴ Because of the new public database, companies need to ensure all documents are correctly labeled and do not contain confidential information.¹⁸⁵ In terms of contracts, companies will have to revise purchase agreements, and negotiate special provisions in case one company does not comply with the new safety standards.¹⁸⁶ Companies will also have to be diligent in monitoring and collecting consumer complaints to avoid penalties for not disclosing information.¹⁸⁷

The industry contends that these new implementations will raise the cost of doing business.¹⁸⁸ This is especially true for children’s products. Children’s product industry will have to implement the same procedures other consumer products companies are implementing, but they will also have to reduce the lead in products, and the products must undergo expensive third party testing. Lab testing does not come cheap, certain products can be as much as \$24,000.¹⁸⁹ The toy industry is claiming that the new requirements have created confusing layers and startling new costs that will devastate businesses that are already

¹⁸² TheSmartMomma.com, *The CPSIA: Good in Theory, Hurting Small, Favorite Green Businesses in Practice*, Dec. 9, 2008 available at http://www.thesmartmama.com/bg/index.php?option=com_content&task=view&id=195&Itemid=23.

¹⁸³ See Lorman Education Services, *supra* note 181.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Lyndsey Layton & Anny Shin, *Toymakers Assail Cost of New Law*, WASH. POST, Dec. 21, 2008, at A3.

¹⁸⁹ *Id.*

struggling in the downward economy.¹⁹⁰ February 9, 2009 is being dubbed “National Bankruptcy Day” because of the implementation of the new CPSIA regulations restricting lead.¹⁹¹ And with the rise in the cost of doing business, prices increase and the consumer will suffer. With the economy in a recession, will consumers be able to take the price hikes of all products?

The Act also applies retroactively, which will have unintended consequences. Toy manufactures will have to discard inventory for the spring line, which was manufactured before the Act were created, but the new restrictions apply.¹⁹² Those in the toymaking industry are calling the new regulations “mania” and state that business are being ruined which it has nothing to do with safety.¹⁹³ Some toys on the shelves comply with the safety standards while others do not.¹⁹⁴ So right now, consumers do not know if the toy they are buying is a toy that a manufacturer is trying to get rid of and could possibility violate the new act, or a toy that meets the safety standards.

The regulations may affect giant corporations such as Mattel and Hasbro, but medium and small business will suffer the most.¹⁹⁵ They will not have the time or money to comply with the new regulations.¹⁹⁶ Companies will need to have their current inventory tested for lead.¹⁹⁷ Manufacturers will also have to go through inventory and attach labels to identify the origins of a product.¹⁹⁸ There is a possibility that small companies will not be able to afford the new procedures.¹⁹⁹ Testing costs can be very expensive and neither the law nor the CPSC exactly states what the testing must be.²⁰⁰ Will these small companies just not comply with the new standards and put dangerous products on the shelf or will small businesses go out of business trying to stay on top of the regulations?

Another problem is the job the CPSC has with interpreting this new law and enforcing it. The understaffed agency will be hiring more employees but it will take time for them to be hired and trained. While at the same time the staff will need to interpret this new law before it goes into effect. John Mullen, a compliance office at the CPSC was

¹⁹⁰ *Id.*

¹⁹¹ Kiki Fluhr, Editorial, *New Law to Put Thousands Out of Work*, PATRIOT LEDGER, Dec. 13, 2008, at 9.

¹⁹² Alana Semuels, *New Rule for Children's Clothes Have Stores in a Fit*, L.A. TIMES, Jan. 2, 2009, at Business 1.

¹⁹³ Layton, *supra* note 188.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Layton, *supra* note 188.

²⁰⁰ *Id.*

quoted as saying “Because of the way Congress approached this, we will do our best to implement it, but it leaves us running ragged”.²⁰¹ Rulemaking can take years.²⁰² And it is required to exempt materials that do not pose a health hazard to children.²⁰³ What will the companies do in the meantime?

Rulemaking is now expedited without the ANPR being mandatory, but from the agency’s history, rulemaking is stalled quite frequently and the CPSC does not always follow the statute in regards to time frames.²⁰⁴ How do we know it will happen, even with more money and staff, will the CPSC still drag their feet?

Confusion is another problem with the CPSIA. Manufacturers state that the law is unclear and does not clearly state what must be tested or how it should be tested.²⁰⁵ This uncertainty is creating confusion for business plans.²⁰⁶ Standards come into effect, but the CPSC has to make rulings on many of these standards, as to which products apply and which do not. For example, second hand shops will not have to test products for lead, but will be subject to penalties if they sell tainted children’s toys.²⁰⁷

The bicycle industry is also concerned for its future under the CPSIA. Components, such as a valve on a tire of a bicycle may violate the lead standard and would be illegal to sell unless the manufactures get an exemption.²⁰⁸ And now, the CPSC has the job of going through hundreds of requests from manufacturers asking for an exemption.²⁰⁹

So in the meantime, before a rule is issued on who is exempt and who is not, what do companies do? Do they sell their products and risk being fined, or hope that an exemption will come.

While parts of the CPIA are unclear, and there are some doubts the CPSC will be able to perform, the bill should not be disregarded altogether. This legislation was a huge step, a bipartisan act of Congress to help the underfunded CPSC. This act was a meaningful change in terms of the safety of consumer products. Without the act, children would be susceptible to toys with dangerous levels of lead or other potentially harmful materials. While the industry is complaining about the new regulations, consumer advocates point out that the

²⁰¹ *Id.*

²⁰² *See id.*

²⁰³ *Id.*

²⁰⁴ Gosselar, *supra* note 45, at 3.

²⁰⁵ *See* Layton, *supra* note 189.

²⁰⁶ *Id.*

²⁰⁷ *See* U.S. Consumer Product Safety Commission, CPSC Clarifies requirement of New Children’s Product Safety Laws Taking Effect in February, Jan. 8, 2009 available at <http://www.mainemercants.org/docs/CPSC%20Press%20Release%201-8-09.pdf>.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

industry should not be selling these toys in the first place if contain a certain amount of lead.²¹⁰ Without the act, companies could become lackadaisical with regard to product standards because they know the CPSC is underfunded, understaffed and has a tough time enforcing regulations. While there may be an increase in prices, there is no price for the health and safety of consumers.

And the CPSC is making efforts to save small businesses. In response to the large number of organic and natural home-made children's product made, usually by small companies, the CPSC has taken steps to make regulations more clear and to exempt certain products. The agency put out a proposed rule to exclude from lead testing, clothing, toys and other goods made out of natural materials like cotton or wood.²¹¹ This will save small organic makers that were claiming they would have to go out of business because of the rule. Second-hand stores will also still be able to sell children's clothing, and that, in the midst of a recession, will be better for consumers.

In an effort to make unclear language about inaccessible parts containing lead, the agency also exempted electronics that are impossible to make without lead and items with parts that children cannot assess.²¹² This rule will also ease the frustration for products where lead is not accessible. This also shows an attempt by the agency to make the regulation clear for manufacturers who are trying to comply. The move was also swift, a departure from usual CPSC actions, and was proposed, although not finalized, before the lead restrictions come into place on February 10, 2009.

VII. CONCLUSION

While the Consumer Product Safety Improvement may be confusing or unclear at times, this bi-partisan effort is a big step forward and bestows much needed protection to consumers, especially children. While some consequences of the bill are just being felt, others may emerge once all provisions come into effect. And not one will know how effect the bill will be in preventing safety. Given the past efforts of the CPSC, let's hope this bill stops them from "dragging their feet" and become a proactive agency. But this act does that with generous increase in budget and staff, the CPSC can make a fresh new start in protecting what is put on the shelves. While the industry may be complaining about the measures they will need to take because of

²¹⁰ See Layton, *supra* note 188.

²¹¹ Alana Semuels, *Agency Rethink Its Rules on Testing Products for Lead*, L.A. TIMES, Jan. 7, 2009, at Business 3.

²¹² *Id.*

the impact of the bill, there is no right to sell your product if it is not safe, and the measures ensure the consumers that what they are buying are safe. It will hopefully improve consumer confidence in the marketplace.