

# COMMENT

## FROM CHINA WITH LEAD: THE HASTY REFORM OF THE CONSUMER PRODUCT SAFETY COMMISSION\*

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*“The Boy Scouts of America said that a painted plastic badge[,] which was made in China [and] is given after tests[,] revealed high levels of lead paint. Even worse, it was the merit badge for eating merit badges.”<sup>1</sup>*

## I. INTRODUCTION

With the above quip, news of the 2007 consumer product recalls jumped from the newsroom into the world of parody. Indeed, the amount of newspaper ink devoted to product recalls provided ample fodder for satirists<sup>2</sup> and ample worry for consumers.<sup>3</sup> Newspapers carried such headlines as “600,000 Toys Join Recall List,”<sup>4</sup> “State Finds Lead Hazard In Its Free Lunch Totes,”<sup>5</sup> and “Mattel Recalls 19 Million Toys Sent From China.”<sup>6</sup> The fact that many of these product recalls involved children’s

1. *Saturday Night Live: Season 33, Episode 2* (NBC television broadcast Oct. 6, 2007).

2. See *Top Chinese Manufacturing Recalls*, THE ONION, June 27, 2007, available at [http://www.theonion.com/content/statshot/top\\_chinese\\_manufacturing](http://www.theonion.com/content/statshot/top_chinese_manufacturing) (offering a humorous look at recalled products).

3. See Bob Eckert, Op-Ed., *In Defense of Mattel*, WALL ST. J., Sept. 11, 2007, at A19 (acknowledging consumer concern over recalls); see also *Protecting Children From Lead-Tainted Imports: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 110th Cong. 3–4 (2007) [hereinafter *Protecting Children Hearing*] (statement of Rep. Cliff Stearns, Member, H. Comm. on Energy & Commerce) (calling attention to parents’ worries about recalled toys).

4. Maurice Possley, *600,000 Toys Join Recall List*, CHI. TRIB., Sept. 27, 2007, § 3, at 1.

5. Abigail Goodman & Marc Lifsher, *State Finds Lead Hazard in Its Free Lunch Totes*, L.A. TIMES, Sept. 21, 2007, at A1.

6. Louise Story & David Barboza, *Mattel Recalls 19 Million Toys Sent from China*, N.Y. TIMES, Aug. 15, 2007, at A1.

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toys and lead contamination intensified the publicity surrounding the problem.<sup>7</sup>

Adding an additional wrinkle to critical analysis of the issue, the majority of recalled consumer products originated from one source: China.<sup>8</sup> Statistically, of the 472 recalls of consumer products in 2007, 94% involved products imported from China.<sup>9</sup> These numbers have led some critics to characterize the spate of recalls as a “Chinese problem.”<sup>10</sup> While not everyone points to China as the sole bad actor, most stakeholders and commentators believe that China plays a significant role in the safety of consumer products.<sup>11</sup>

At the center of the controversy sits the Consumer Product Safety Commission (CPSC or Commission), the U.S. regulatory agency charged with “protect[ing] the public against unreasonable risks of injury associated with consumer products.”<sup>12</sup> As the agency responsible for policing consumer products, the frenzy surrounding the product recalls has placed

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7. See *id.* (quoting Sen. Klobuchar’s concerns about children’s safety); see also Jayne O’Donnell & Mindy Fetterman, *When It Comes to Toys, Buying American Is Tough*, USA TODAY, Oct. 5, 2007, at 1B (describing parents’ efforts to avoid lead tainted toys); Press Release, Public Citizen, House Committee Should Put Children First, Pass Tougher Toy Regulations (Dec. 13, 2007), available at <http://www.citizen.org/pressroom/release.cfm?ID=2570> (drawing attention to threats posed to children by recalled products).

8. See Eric S. Lipton & David Barboza, *As More Toys Are Recalled, the Trail Ends in China*, N.Y. TIMES, June 19, 2007, at A1 (reporting that China manufactured a majority of recalled products). Such numbers led a CPSC Commissioner to categorize the summer of 2007 as “the summer of the recalled toys made in China.” *Protecting Children Hearing, supra* note 3, at 33 (statement of Comm’r Thomas Moore, Consumer Product Safety Commission).

9. Press Release, Public Citizen, New Report, “Santa’s Sweatshop: Made in DC with Bad Trade Policy,” Documents Root Causes of Imported Toy Crisis (Dec. 19, 2007), available at <http://www.citizen.org/pressroom/release.cfm?ID=2576>; see also CPSC Recalls and Product Safety News, <http://www.cpsc.gov/cpsc/pub/prerel/prerel.html> (last visited Apr. 9, 2009) (enabling consumers to search for recalls by month and year or product type).

10. See *Enhancing the Safety of Our Toys: Lead Paint, the Consumer Product Safety Commission, and Toy Safety Standards: Hearing Before the Subcomm. on Financial Services and General Government of S. Appropriations Comm.*, 110th Cong. 63–67 (2007) [hereinafter *Toy Safety Standards Hearing*] (statement of Sen. Sam Brownback, Member, S. Appropriations Comm.) (criticizing China forcefully).

11. See, e.g., *Fiscal 2008 Budget: Consumer Product Safety Commission: Hearing Before the Subcomm. on Consumer Affairs, Insurance, and Automotive Safety of the S. Comm. on Commerce, Science and Transportation*, 110th Cong. 5–6 (2007) [hereinafter *CPSC 2008 Budget Hearing*] (statement of Rachel Weintraub, Director of Product Safety, Consumer Federation of America) (insisting that ultimate responsibility for product safety lies with the manufacturer, regardless of the country of origin); Nicholas Casey, Nicholas Zamiska & Andy Pasztor, *Mattel Seeks to Placate China with Apology*, WALL ST. J., Sept. 22, 2007, at A1 (reporting Mattel’s efforts to accept its share of blame for recalls).

12. 15 U.S.C. § 2051(b)(1) (2006).

the CPSC under the public microscope.<sup>13</sup> Policy makers, special interest groups, and commentators have leveled sharp and withering criticism at the Commission.<sup>14</sup> One Senator went so far as to say that “[t]he CPSC has failed.”<sup>15</sup> In an attempt to address the apparent need for an overhaul of the CPSC, Congress,<sup>16</sup> the executive branch,<sup>17</sup> and various consumer groups<sup>18</sup> put forth agendas to increase the Commission’s resources and revamp the CPSC as a whole. As a result, Congress passed the Consumer Product Safety Improvement Act of 2008 (CPSIA),<sup>19</sup> which President Bush signed into law on August 14, 2008.<sup>20</sup>

With the foregoing in mind, this Comment seeks to examine the data behind the 2007 recall crisis and briefly but critically analyze pertinent sections of the CPSIA. Part II of the Comment addresses the Commission’s history and purposes. Part III examines the current environment for imported consumer goods and the effects of the publicity surrounding the recalls. After an examination of these issues, Part IV seeks to evaluate sections of the CPSIA and offers alternative suggestions for the purpose of enhancing product safety without creating unnecessary or overly broad regulation. It is the opinion of the Author that the passage of the CPSIA stemmed from an overreaction to a series of high publicity recalls of consumer products (and other imported goods) manufactured in China. Therefore, while lawmakers have taken certain appropriate steps to improve the CPSC, the legislation may eventually prove too burdensome, costly, and unwieldy.

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13. See *Toy Safety Standards Hearing*, *supra* note 10, at 58 (statement of Sen. Richard Durbin, Chairman, Subcomm. on Financial Services and General Government) (noting that the CPSC tended to “[fly] below the radar” prior to the recent controversy).

14. See, e.g., Press Release, Public Citizen, Consumer Product Safety Chief Nancy Nord Should Resign (Oct. 31, 2007), available at <http://www.citizen.org/pressroom/release.cfm?ID=2535> (criticizing the CPSC); Christopher Conkey, *Safety Agency Is Grilled*, WALL ST. J., Sept. 13, 2007, at A12 (reporting criticism).

15. Conkey, *supra* note 14. On a separate occasion, Senator Durbin referred to the CPSC as a “toothless tiger.” Nicholas Casey & Andy Pasztor, *Safety Agency, Mattel Clash over Disclosures*, WALL ST. J., Sept. 4, 2007, at A1.

16. See generally CPSC Reform Act of 2007, S. 2045, 110th Cong. 52–55 (2007) (bolstering CPSC regulatory power); Consumer Product Safety Modernization Act, H.R. 4040, 110th Cong. (2007) (same).

17. See Exec. Order No. 13,439, 3 C.F.R. 227 (2008) (establishing the Interagency Working Group on Import Safety “to promote the safety of imported products”).

18. See Letter from Rachel Weintraub, Dir. of Prod. Safety, Consumer Fed’n of Am. et al., to Sen. Daniel Inouye, Chairman, Comm. on Commerce, Sci. & Transp. (Oct. 26, 2007), available at [http://www.consumersunion.org/pub/core\\_product\\_safety/005073.html](http://www.consumersunion.org/pub/core_product_safety/005073.html) (outlining groups’ support for strengthening the CPSC).

19. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016 (2008).

20. *Id.*

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## II. OVERVIEW OF THE CPSC

In light of the number of recalls of imported consumer products in 2007, critics increased scrutiny and criticism of the CPSC.<sup>21</sup> In order to better evaluate the CPSC's role in the controversy, it is helpful to understand the Commission's history up to this point.

A. *The Creation of the CPSC*

In 1972, Congress passed the Consumer Product Safety Act (CPSA) in response to concerns about the lack of comprehensive regulation in the area of consumer product safety.<sup>22</sup> Congress designed the legislation "to protect the public against unreasonable risks of injury associated with consumer products."<sup>23</sup> At the time, many in public service believed that comprehensive federal legislation could readily accomplish that goal.<sup>24</sup> As one commentator put it, "[e]xpectations about the ability of expanded federal regulatory authority to improve consumers' lives ran high."<sup>25</sup>

At the time, supporters of the CPSA acted in response to the results reported in the National Commission on Product Safety Final Report to the President and Congress.<sup>26</sup> The Final Report stated that 20 million people in the United States suffered injuries in connection with dodgy consumer products.<sup>27</sup> The

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21. See 153 CONG. REC. S11,511 (2007) (statement of Sen. Inouye) (noting that current recall activity has brought the CPSC to public attention).

22. See Consumer Product Safety Act, Pub. L. No. 92-573, § 2(a)(4)–(5), 86 Stat. 1207, 1207 (1972) (codified at 15 U.S.C. § 2051(a)(4)–(5) (2006)) (citing ineffective state and local regulations and inadequate federal regulations as reasons for enacting the CPSA).

23. 15 U.S.C. § 2051(b)(1) (2006). Additionally, the act sought: "(2) to assist consumers in evaluating the comparative safety of consumer products; (3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and (4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries." 15 U.S.C. § 2051(b)(2)–(4) (2006).

24. See Robert S. Adler, *From "Model Agency" to Basket Case—Can the Consumer Product Safety Commission Be Redeemed?*, 41 ADMIN. L. REV. 61, 63–65 (1989) (noting that the National Commission on Product Safety report led to a call for a federal consumer safety agency).

25. *Id.* at 63. Legislators who worked to pass the CPSIA evinced this same faith in the ability of the government to efficiently solve the problem of unsafe products in the hands of consumers. *Cf. Toy Safety Standards Hearing, supra* note 10, at 71 (statement of Sen. Bill Nelson) (asking, with regard to the presence of unsafe products in the marketplace, "[W]hy is our CPSC letting it happen?").

26. See Adler, *supra* note 24, at 63–65 (tracing history of CPSC).

27. *National Commission on Product Safety: Hearing Before the S. Comm. on Commerce*, 91st Cong. 37 (1970) [hereinafter *1970 NCPS Hearing*]. Interestingly, while

report concluded that a lack of regulation left many U.S. consumers exposed to excessive risk.<sup>28</sup> With such concerns in mind, the CPSA provided for the creation of the CPSC,<sup>29</sup> a regulatory agency “whose mandate might best be summed up as a collective command to make almost everything safer.”<sup>30</sup> The Act’s expansive language established the Commission’s broad regulatory jurisdiction,<sup>31</sup> which was seemingly only limited by certain exclusionary provisions in the Act.<sup>32</sup>

It is important to note that the establishment of the CPSC met with little to no resistance from the industries that fell under its jurisdiction.<sup>33</sup> Among its supporters, the agency counted such companies as Montgomery Ward, Motorola, and Zenith.<sup>34</sup> From its inception, the CPSC enjoyed and depended upon the cooperation and support of its regulatory charges.<sup>35</sup> The level of private sector interaction with the CPSC becomes evident in the arena of the agency’s regulatory and enforcement tools, discussed immediately below.

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presenting an alarming picture, commentators have questioned the accuracy of these figures. See Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 36–37 (1982) (contending that the number of preventable injuries was overblown).

28. See 1970 NCPS Hearing, *supra* note 27, at 38 (noting the lack of meaningful federal regulation directed at consumer product safety).

29. See Consumer Product Safety Act of 1972, Pub. L. No. 92-573, § 4(a), 86 Stat. 1207, 1210 (1972) (codified at 15 U.S.C. § 2053(a) (2006)) (establishing the CPSC).

30. Timothy D. Zick, *Reporting Substantial Product Safety Hazards Under the Consumer Product Safety Act: The Product Liability Interface*, 80 GEO. L.J. 387, 387 (1991).

31. See 15 U.S.C. § 2052(a)(1) (2006) (defining “consumer product” expansively); see also Adler, *supra* note 24, at 65 n.30 (providing an excellent analogy comparing CPSC jurisdiction to products in a shopping mall).

32. See 15 U.S.C. § 2052(a)(1)(A)–(I) (2006) (excluding, among other items, tobacco, motor vehicles, and food from the definition of “consumer product”).

33. See E. MARLA FELCHER, UNDERSTANDING GOV’T, THE U.S. CONSUMER PRODUCT SAFETY COMMISSION: THE PAPER TIGER OF AMERICAN PRODUCT SAFETY 2 (2002), <http://understandinggov.org/reports/felcher.html> (recounting scant opposition to the CPSA).

34. *Id.*

35. See *The Consumer Product Safety Commission Reform Act of 2007: Hearing on S. 2045 Before the Subcomm. on Consumer Affairs, Insurance and Automotive Safety of the S. Comm. on Commerce, Science and Transportation*, 110th Cong. (2007) [hereinafter *CPSC Reform Act Hearing*], LEXIS, Federal News Service File (statement of Sen. Sununu, Member, S. Comm. on Commerce, Science & Transportation) (commenting on the “fairly high level of cooperation on the part of firms whose products are recalled”); see also *id.* (statement of Al Thompson, Vice President, Retail Industry Leaders Association) (noting that a close working relationship between the private sector and government is necessary for an effective consumer safety system).

*B. Regulatory Powers of the CPSC*

In order to regulate the large cross-section of products within its jurisdiction, the Act afforded the CPSC a number of enforcement mechanisms.<sup>36</sup> The legislation empowered the CPSC to set product safety standards,<sup>37</sup> ban products considered to constitute “unreasonable risk[s] of injury,”<sup>38</sup> and order product recalls.<sup>39</sup> Congress also authorized the CPSC to levy fines against businesses violating the provisions of the Act.<sup>40</sup>

1. *Mandatory and Voluntary Safety Standards.* Of these tools, Congress believed the ability to enact consumer product safety standards would be the Commission’s most effective regulatory control.<sup>41</sup> In particular, Congress expected the Commission to develop strong mandatory standards that would greatly improve consumer safety.<sup>42</sup> A democratic and open process, the method for promulgating mandatory safety standards under the CPSA involved not only the agency itself, but also input from industries and consumer groups.<sup>43</sup> Thus, while the CPSC had its genesis in safety concerns about an unregulated marketplace, from the outset industry played a substantial role in improving consumer product safety.<sup>44</sup>

For a variety of reasons, mandatory safety standards never became the panacea proponents believed them to be.<sup>45</sup> The mandatory standard system proved expensive and prone

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36. See Schwartz, *supra* note 27, at 43 (observing that Congress matched the Commission’s broad jurisdiction with a number of enforcement tools).

37. Consumer Product Safety Act of 1972, Pub. L. No. 92-573, §§ 7, 9, 86 Stat. 1207, 1212–17 (1972) (establishing procedures for promulgation of safety standards).

38. Consumer Product Safety Act of 1972, Pub. L. No. 92-573, § 8, 86 Stat. 1207, 1215 (1972).

39. See Consumer Product Safety Act of 1972, Pub. L. No. 92-573, § 15(b)–(d), 86 Stat. 1207, 1221 (1972) (authorizing recall system).

40. See Consumer Product Safety Act of 1972, Pub. L. No. 92-573, § 20, 86 Stat. 1207, 1225 (1972) (describing civil penalty fine schedule). Violators might also be subject to criminal penalties as well. Consumer Product Safety Act of 1972, Pub. L. No. 92-573, § 21, 86 Stat. 1207, 1225 (1972).

41. See Schwartz, *supra* note 27, at 34 (characterizing product safety standards as “[t]he heart of the Commission’s authority”).

42. See *id.* at 74 (noting that Congress viewed mandatory standards as the ultimate solution to product safety).

43. See *id.* at 59, 62 (reporting perception of the rulemaking process and listing parties able to participate in development of mandatory safety standards).

44. See *id.* at 59–60 (discussing outside groups’ role in propagating safety standards).

45. See Adler, *supra* note 24, at 96–97 (noting the significant resources and time needed to enact mandatory standards).

to delays.<sup>46</sup> Consequently, the CPSC began to rely more on voluntary standards.<sup>47</sup> Developed by the private sector, supporters of the new Commission initially viewed voluntary standards with suspicion and disfavor.<sup>48</sup> Regardless, the CPSC's inability to put forth viable mandatory standards led Congress to embrace voluntary standards as an effective alternative.<sup>49</sup> Largely independent from the stilted procedures of the CPSC, the development of voluntary standards proved efficient and less draining on agency resources.<sup>50</sup> Due in large part to a pervasive change in political philosophy, as well as frustration with the existing process, Congress amended the CPSA in 1981.<sup>51</sup> Of particular interest, the 1981 amendments mandated that "[t]he Commission . . . rely upon voluntary consumer product safety standards *rather* than promulgate a consumer product safety standard . . . whenever compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards."<sup>52</sup>

As a result, voluntary standards now constitute the bulk of consumer product safety standards in effect today.<sup>53</sup>

2. *CPSC Product Recall Power.* With mandatory standards failing to live up to expectations, the Commission turned to its other regulatory powers to improve consumer safety.<sup>54</sup> Somewhat surprisingly, the Commission's recall

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46. See Schwartz, *supra* note 27, at 62–64 (criticizing the mandatory standard process). Further, even those few mandatory standards that the CPSC established often proved unenforceable and were successfully challenged. *Id.* at 66 (observing that industry often successfully challenged standards in court).

47. See Adler, *supra* note 24, at 94–97 (reporting on CPSC's movement away from mandatory standards toward voluntary standards).

48. See *id.* at 93 (noting that early supporters of the CPSC viewed standards originated by industry as "inadequate").

49. See Schwartz, *supra* note 27, at 61–71 (chronicling Congress's frustrations with CPSC rule promulgation).

50. See Adler, *supra* note 24, at 95–96 (remarking on perceived benefits of voluntary standards).

51. See Schwartz, *supra* note 27, at 71 (detailing attitudes leading up to 1981 amendments).

52. Consumer Product Safety Amendments of 1981, Pub. L. 97-35, § 1202(b), 95 Stat. 703, 704 (1981) (codified at 15 U.S.C. § 2056(b) (2006)) (emphasis added).

53. See Schwartz, *supra* note 27, at 70 (noting that the ratio of voluntary to mandatory standards is 37 to 7); Elizabeth Williamson, *Industries Paid for Top Regulators' Travel*, WASH. POST, Nov. 2, 2007, at A1 (commenting on the Commission's reliance on voluntary standards).

54. See Schwartz, *supra* note 27, at 68 (reporting on the Commission's decision to use other regulatory powers).

authority proved its most effective regulatory device.<sup>55</sup> After determining that a consumer product constitutes a “substantial product hazard,” the Commission may order a manufacturer “[t]o bring such product into conformity,” “[t]o replace such product with a like or equivalent product,” or “[t]o refund the purchase price of such product.”<sup>56</sup> While the Commission issues the order, the manufacturer may elect to pursue any of the above listed remedies.<sup>57</sup> However, the manufacturer’s proposed plan must satisfy the Commission, and the manufacturer bears the full financial burden of the recall, repair, or refund.<sup>58</sup>

As with voluntary safety standards, product recalls also heavily involve manufacturers, retailers, and other members of the private sector.<sup>59</sup> The vast majority of consumer product recalls proceed on a voluntary basis after discussion between the manufacturer and the CPSC.<sup>60</sup> Generally, a manufacturer passes along serious consumer complaints about its products to the CPSC, and together the CPSC and manufacturer negotiate the terms of the product recall.<sup>61</sup> By law, a manufacturer must report any notice that its product violates an existing safety standard, “create[s] a substantial product hazard,” or poses “an unreasonable risk of serious injury or death.”<sup>62</sup> However, manufacturers and the CPSC may disagree over what constitutes an immediate danger.<sup>63</sup>

The primary purpose of a product recall is to “[get] defective products off retail shelves.”<sup>64</sup> No one disputes that in its current form, a product recall does not effectively remove *every* unit from

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55. See *id.* at 69 (discussing success of recall provision).

56. 15 U.S.C. § 2064(d)(1)–(3) (2006).

57. See 15 U.S.C. § 2064(d) (2006) (listing manufacturer’s options).

58. See 15 U.S.C. § 2064(d)–(e) (2006) (assigning financial responsibility to the manufacturer).

59. See Casey, *supra* note 15 (noting recall system’s dependence on voluntary manufacturer cooperation).

60. See Schwartz, *supra* note 27, at 69 (commenting that most recalls occur voluntarily without the need for litigation). In the rare event in which the manufacturer refuses to take corrective actions, the agency may seek an injunction in a U.S. district court. 15 U.S.C. § 2064(g)(1) (2006).

61. See M.P. McQueen & Christopher Conkey, *Congress Weighs Sweeping Overhaul of Consumer Product Commission*, WALL ST. J., Oct. 30, 2007, at A1 (observing the usual recall procedure).

62. 15 U.S.C. § 2064(b) (2006).

63. See generally Casey, *supra* note 15 (chronicling ongoing dispute between toymaker Mattel and CPSC).

64. See CPSC 2008 Budget Hearing, *supra* note 11 (statement of Nancy Nord, Acting Chairman, CPSC).

the marketplace.<sup>65</sup> The presence of recalled products on Internet sites such as eBay, for example, makes complete removal of the products extremely challenging if not impossible.<sup>66</sup> Additionally, prior to the CPSIA, parties could sell a recalled product without fear of penalty or consequence.<sup>67</sup> However, accepting the fact that no “perfect recall” exists, stakeholders still debate the overall effectiveness of the recall system.<sup>68</sup> Time and again, critics have faulted the CPSC’s apparent inability to serve notice of recalls to consumers.<sup>69</sup> Yet undeniably one of the ancillary benefits of the recall system has been its capacity to generate headlines and, as a result, more consumer awareness.<sup>70</sup> For instance, without the barrage of product recall headlines, Congress would not even have considered such a comprehensive reform of the CPSC.<sup>71</sup> In conjunction with its recall power, the CPSC also often punishes culpable businesses with civil penalties, discussed immediately below.

3. *Civil Penalties.* The Commission may impose a fine against any person or manufacturer that *knowingly* violates provisions of the CPSA.<sup>72</sup> Before passage of the CPSIA, these civil penalties could not exceed \$1.85 million per transgression.<sup>73</sup> In fiscal year 2008, the CPSC collected over \$3.5 million in civil

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65. See Eric Lipton, *Dangerous Sealer Stayed on Shelves After Recall*, N.Y. TIMES, Oct. 8, 2007, at A1 (reporting on the continued presence of a dangerous substance after an initial round of recalls).

66. See *Toy Safety Standards Hearing*, *supra* note 10, at 91–92 (exchange between Sen. Klobuchar and CPSC Chairman Nord) (discussing difficulties of tracing recalled products sold on the Internet).

67. See *CPSC Reform Act Hearing*, *supra* note 35 (statement of Nancy Nord, Acting Chairman, CPSC) (expressing her initial surprise that the selling of recalled products is not currently prohibited by law).

68. *Compare CPSC 2008 Budget Hearing*, *supra* note 11, at 8–9 (statement of Rachel Weintraub, Director of Product Safety, Consumer Federation of America) (asserting that recalls are ineffective due to insufficient communication), *with* Nancy Nord, Editorial, *We Provide Great Value*, USA TODAY, Oct. 23, 2007, at 10A (praising the efficiency and comprehensiveness of the recall system).

69. See, e.g., *CPSC 2008 Budget Hearing*, *supra* note 11, at 8–9 (statement of Rachel Weintraub, Director of Product Safety, Consumer Federation of America) (bemoaning lack of direct communication with consumers); FELCHER, *supra* note 33, (stating that recall system has failed “at reaching into homes and getting dangerous products out of use”).

70. See Nord, *supra* note 68 (welcoming additional attention from consumers in response to media attention).

71. See *CPSC Reform Act Hearing*, *supra* note 35 (statement of Sen. Richard Durbin, Chairman, Subcomm. on Financial Services and General Government) (suggesting that the spate of recalls “revealed [that] the [CPSC] need[s] to change”).

72. See 15 U.S.C. § 2069 (2006) (establishing fine schedule for violations).

73. See Notice of Adjusted Maximum Civil Penalty Amounts, 69 Fed. Reg. 68,884–85 (Nov. 26, 2004).

penalties, fines, and fees.<sup>74</sup> Similar to product recalls, the imposition of a civil fine serves not only to punish the wrongdoer, but also to generate publicity and consumer safety awareness.<sup>75</sup> Unlike the CPSC's budget, the fine schedule adjusts for inflation,<sup>76</sup> but the maximum penalty nonetheless served as a focal point for critics.<sup>77</sup> Those critics argued that the maximum fine for a manufacturer amounted to little more than "the cost of doing business."<sup>78</sup> In response, the Senate suggested increasing the maximum to as much as \$100 million,<sup>79</sup> while others preferred to forego a cap altogether.<sup>80</sup> Although the amount remains open for debate, most stakeholders recognized the need for some increase in civil penalties.<sup>81</sup>

### C. *Evolution of the CPSC from the 1970s to Present Day*

With its range of enforcement options, expectations ran high for the new Commission.<sup>82</sup> A few years of experience with the CPSC, however, revealed a far less effective agency than Congress had envisioned.<sup>83</sup> In fact, the general perception of the CPSC "was [that] of an awkward, incompetent body that gave good intentions a bad name."<sup>84</sup> Perhaps most damning of all in

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74. U.S. CONSUMER PROD. SAFETY COMM'N, 2008 PERFORMANCE & ACCOUNTABILITY REPORT 14 n.1 (2008), available at <http://www.cpsc.gov/cpscpub/pubs/reports/2008par.pdf>.

75. See FELCHER, *supra* note 33 (recounting Chairman Brown's attempts to impress Congress). In its recent history, the Commission's ability to impose and collect fines has served as a sort of bragging point. See *id.* (reporting on Commissioner Brown's "boasts" to Congress); Nancy A. Nord, *Message from the Chairman*, U.S. CONSUMER PROD. SAFETY COMM'N, 2007 PERFORMANCE & ACCOUNTABILITY REPORT (2007), available at <http://www.cpsc.gov/cpscpub/pubs/reports/2007par.pdf> (including civil penalties collected as a 2007 performance highlight).

76. See 15 U.S.C. § 2069(a)(3)(A) (2006) (mandating inflation adjustment).

77. See *CPSC Reform Act Hearing*, *supra* note 35 (statement of Alan Korn, Safe Kids Worldwide) (complaining that a "company shouldn't be . . . thinking about that kind of economic ramification when it comes to safety").

78. *Id.* (statement of Sen. Richard Durbin, Chairman, Subcomm. on Financial Services and General Government).

79. See CPSC Reform Act of 2007, S. 2045, 110th Cong. § 17(a)(1) (2007) (adjusting maximum fine amounts).

80. See *CPSC 2008 Budget Hearing*, *supra* note 11 (statement of Rachel Weintraub, Director of Product Safety, Consumer Federation of America) (advocating the removal of the cap on fines).

81. See *CPSC Reform Act Hearing*, *supra* note 35 (statement of Nancy Nord, Acting Chairman, CPSC) (recommending a maximum fine of \$10 million).

82. See Schwartz, *supra* note 27, at 43–44 (noting the initial high hopes for the CPSC).

83. See Adler, *supra* note 24, at 70 (communicating Congress's feelings toward the CPSC).

84. *Id.* Only six years after the agency's creation, the Office of Management and Budget actually considered recommending to the President that it be abolished. *Id.* at 71.

the eyes of Congress, the CPSC managed to enact but a few safety standards.<sup>85</sup> In all likelihood, however, Congress's disillusionment with the Commission resulted from Congress's own unrealistic goals instead of incompetence or indifference on the part of the Commission.<sup>86</sup>

Many of the Commission's shortcomings were likely due to its dearth of resources.<sup>87</sup> A lack of funding and human resources "force[d] the agency to carry out [its] comprehensive mandate without investigative resources equal to the scope of the Commission's jurisdiction."<sup>88</sup> Congress had provided a comprehensive framework with little support. At the outset, in 1974, the Commission operated on a budget of \$34.7 million<sup>89</sup> and employed 786 people.<sup>90</sup> In contrast, the number of businesses subject to the Commission's jurisdiction numbered over one million.<sup>91</sup>

After its initial stumble out of the gate, the CPSC recognized some gains during the late 1970s under the Carter administration,<sup>92</sup> but those accomplishments were short lived.<sup>93</sup> During the Reagan administration, the CPSC underwent significant budget cuts that necessitated reductions in staff and a decrease in the amount of work performed by the Commission.<sup>94</sup> Further, consumer advocates viewed the Reagan-appointed commissioners as favoring *deregulation* over the promulgation of additional safety standards by the CPSC.<sup>95</sup>

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85. See *id.* at 70 (suggesting that the CPSC failed to issue safety standards expeditiously); see also *supra* Part II.B.1 (observing the criticism of the Commission's apparent inability to enact mandatory safety standards).

86. See Adler, *supra* note 24, at 71.

87. See *id.* at 73 (noting the agency's historical lack of funding and staff as compared to other agencies); Schwartz, *supra* note 27, at 44 (observing that the agency had "neither the budget nor the staff to fully exploit its powers").

88. Zick, *supra* note 30, at 411.

89. In today's dollars, this is the equivalent of \$146.6 million. ERIC LOTKE ET AL., CAMPAIGN FOR AMERICA'S FUTURE, TOXIC TRADE: GLOBALIZATION AND THE SAFETY OF THE AMERICAN CONSUMER 4 (2007), available at <http://www.ourfuture.org/files/toxic-trade.pdf>.

90. See FELCHER, *supra* note 33 (tracing CPSC resources). Its small budget and modest number of employees made the CPSC the "smallest health and safety agency in the nation." *Id.*

91. Adler, *supra* note 24, at 66.

92. See *id.* at 73 ("From the low days at the beginning of the Carter administration to the arrival of the Reagan administration, the agency regained much of its lost reputation.").

93. See *id.* at 74-76 (detailing harsh treatment of the CPSC under the Reagan administration).

94. *Id.* These cuts were less a function of budgeting than an attempt to "redirect regulatory policy." *Id.* at 75.

95. *Id.* at 76.

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Surprisingly, the budget for the CPSC actually increased during the first Bush administration.<sup>96</sup> Perhaps equally as unexpected, the Clinton administration initially cut the Commission's operating budget.<sup>97</sup> However, President Clinton also appointed a new chairman with an extensive background in consumer protection.<sup>98</sup> Under the new chairman, the CPSC quickly began publicizing its consumer protection efforts in an attempt to validate the Commission's existence in the eyes of Congress and the public.<sup>99</sup> Yet, the higher profile failed to translate into more resources.<sup>100</sup>

To many, the George W. Bush presidency heralded a return to the Reagan days in which the CPSC struggled to survive.<sup>101</sup> However, the budget for the agency increased, albeit incrementally, every year from 2001 to 2007.<sup>102</sup> Of more concern to critics, under President Bush the number of full-time employees at the CPSC dropped.<sup>103</sup> Toward the end of the Bush administration, the number of CPSC employees sat at 420, though the administration did not pinch the agency nearly as dramatically as the Reagan administration did.<sup>104</sup> Regardless, critics seized on this perceived deficient level of employees, especially in light of today's import environment.

### III. EXAMINATION OF THE CURRENT IMPORT ENVIRONMENT

As mentioned, imported goods constituted the majority of recalled consumer products in 2007.<sup>105</sup> Therefore, it proves helpful

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96. See FELCHER, *supra* note 33 (noting a 20% budget increase under the Bush administration).

97. See *id.* (commenting on Clinton's "mixed message" to the Commission).

98. See *id.* (describing Chairperson Ann Brown's qualifications).

99. *Id.*

100. *Id.*

101. See Eric Lipton, *Safety Agency Faces Scrutiny amid Changes*, N.Y. TIMES, Sept. 2, 2007, at A1 (opining on the general business-friendly attitude of Bush administration officials).

102. See CPSC MIDYEAR REVIEW MEMORANDA (2001–2005), available at <http://search.cpsc.gov/?col=pubweb&ht=0&qp=&qs=&qc=pubweb&pw=100%25&ws=0&la=en&si=1&ql=a&nh=10&lk=1&rf=0> (reporting annual appropriation amounts); see also *CPSC 2008 Budget Hearing*, *supra* note 11, at 4 (statement of Rachel Weintraub, Director of Product Safety, Consumer Federation of America) (noting that 2006 and 2007 CPSC funding was "essentially flat").

103. See Lipton, *supra* note 101.

104. See *id.* (comparing treatment of CPSC under Presidents Reagan and George W. Bush). In fact, the number of employees declined by just about 12% under Bush, while under Reagan "the work force was slashed nearly in half." *Id.*

105. See *supra* notes 9–10 and accompanying text (discussing the role of imported goods, particularly Chinese goods, in the series of product recalls).

to analyze the recent trends for imported consumer products and understand the volume of imported goods flowing into the United States.

A. *Rising Amount of International Trade and Imports*

In 1974, the year in which the CPSC opened its doors,<sup>106</sup> the United States imported roughly \$104 billion worth of goods.<sup>107</sup> In 2006, the United States imported around \$2 trillion worth of goods.<sup>108</sup> For a number of decades now, the United States has increasingly imported more goods than it has exported, resulting in a trade deficit.<sup>109</sup>

China serves as one of the main drivers of the recent trade deficit increases.<sup>110</sup> In 2001, the United States imported roughly \$102.3 billion worth of goods from China.<sup>111</sup> Only five years later in 2006, this number more than doubled to \$287.8 billion.<sup>112</sup> This amounts to over 15% of total U.S. imports.<sup>113</sup> The result has been an increasing trade imbalance with China: from \$83 billion in 2001 to \$256 billion in 2007.<sup>114</sup> Currently, China ranks as the number two U.S. trading partner (as measured by total value of trade between countries), ranked behind Canada and ahead of Mexico.<sup>115</sup> Tellingly, of the top three U.S. trading partners, China

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106. See *supra* notes 89–90 and accompanying text.

107. See *Toy Safety Standards Hearing*, *supra* note 10, at 58 (statement of Sen. Richard Durbin, Chairman, Subcomm. on Financial Services and General Government) (discussing U.S. import history).

108. See Letter from Michael O. Leavitt, Chair, Interagency Working Group on Import Safety, to President George W. Bush (Sept. 10, 2007), in INTERAGENCY WORKING GROUP ON IMPORT SAFETY, PROTECTING AMERICAN CONSUMERS EVERY STEP OF THE WAY (2007) [hereinafter INTERAGENCY WORKING GROUP] (stating the volume of U.S. imports in terms of dollars). Analysts expect the value of imported goods to triple by 2015. *Id.*

109. See J. MICHAEL DONNELLY, CONG. RESEARCH SERV., U.S.–WORLD MERCHANDISE TRADE DATA: 1948–2006, at 5–6 (2007) (compiling U.S. import and export data). From 1971 to 2006, the United States saw a positive trade balance in only 1973 and 1975. *Id.* at 5–6.

110. See Steven R. Weisman, *For 5th Year, Trade Gap Hits Record*, N.Y. TIMES, Feb. 14, 2007, at C1 (noting that U.S. trade imbalance with oil exporting countries and China significantly impacted the deficit).

111. See US–China Business Council, US–China Trade Statistics and China’s World Trade Statistics, <http://www.uschina.org/statistics/tradetable.html> (last visited Apr. 9, 2009).

112. *Id.*

113. U.S. CENSUS BUREAU, TOP TRADING PARTNERS—TOTAL TRADE, EXPORTS, IMPORTS: YEAR-TO-DATE DEC. 2006, available at <http://www.census.gov/foreign-trade/statistics/highlights/top/top0612.html>.

114. See U.S. CENSUS BUREAU, TRADE IN GOODS (IMPORTS, EXPORTS AND TRADE BALANCE) WITH CHINA, <http://www.census.gov/foreign-trade/balance/c5700.html> (last visited Apr. 9, 2009).

115. U.S. CENSUS BUREAU, TOP TRADING PARTNERS: YEAR TO DATE DEC. 2008,

is the only country that does not share a border with the United States.

Quite apart from any current feelings toward China due to its export of unsafe products, the value, volume, and importance of U.S. trade with China has itself generated a wide array of criticism and worry.<sup>116</sup> Critics have blamed the continuing trade imbalance for the elimination of 1.8 million jobs in the United States from 2001 through 2006.<sup>117</sup> There is also worry that the trade imbalance with China “has morphed into a powerful weapon to hold off any effective U.S. response to China’s unfair trade practices.”<sup>118</sup> Such views reflect a rising “protectionist” movement driven by what is seen as China’s increasingly one-sided economic policy.<sup>119</sup> U.S. lawmakers have at times echoed this theme.<sup>120</sup> During a hearing on consumer product safety, Senator Sam Brownback called China’s economic policies, specifically the valuation of its currency, “a systematic, systemic danger to the U.S. economy, if not to the international financial system.”<sup>121</sup> This caustic rhetoric occurred after members of the Senate proposed increasing tariffs on Chinese imports unless China revalued its currency.<sup>122</sup> Both instances demonstrate Congress’s frustration with Chinese international economic policy. In addition to Congress, other arms of the federal government stepped up action in retaliation against perceived

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available at <http://www.census.gov/foreign-trade/statistics/highlights/top/top0812yr.html>.

116. See, e.g., Peter Navarro, *Watch Your Flanks, America!*, CHRISTIAN SCI. MONITOR, Feb. 26, 2007, at 9 (presenting dangerous consequences of U.S. trade imbalance with China); Editorial, *Slouching Toward a Trade War*, CHI. TRIB., May 2, 2007, § 1, at 26. (advocating vigilance, but also caution, in dealing with U.S.–China trade relations).

117. ROBERT E. SCOTT, ECON. POLICY INST., THE WAL-MART EFFECT: ITS CHINESE IMPORTS HAVE DISPLACED NEARLY 200,000 U.S. JOBS 1 (2007), available at <http://www.epi.org/publications/entry/ib235>.

118. Navarro, *supra* note 116.

119. See JOINT ECON. COMM., 110TH CONG., CHINESE ECONOMY NEEDS REFORM, NO. 110-13, at 4–5 (Oct. 2007), available at <http://www.house.gov/jec/Research%20Reports/2007/rr110-13.pdf> (cautioning that China’s current economic policies may have undesirable consequences).

120. See *Toy Safety Standards Hearing*, *supra* note 10, at 64 (statement of Sen. Brownback) (repudiating China’s foreign economic policy).

121. *Id.* This statement is perhaps viewed with a certain amount of skepticism given the U.S. role in the 2008–2009 worldwide financial crisis. See David E. Sanger & Mark Landler, *Obama Faces Calls for Rules on Finances*, N.Y. TIMES, Apr. 2, 2009, at A1 (reporting on other nation’s attitudes toward U.S. financial regulations); *The Better Part of Valour*, ECONOMIST, Mar. 14, 2009, available at [http://www.economist.com/opinion/displaystory.cfm?story\\_id=13278163](http://www.economist.com/opinion/displaystory.cfm?story_id=13278163) (pointing out that the Asian financial community places blame on the United States and United Kingdom for stoking the crisis).

122. See Peter S. Goodman, *Paulson Gets Promise Only of Dialogue with China*, WASH. POST, Sept. 21, 2006, at D1 (discussing proposed legislation by Senators Graham and Schumer).

unfair Chinese trade activities. In 2006, at the urging of the United States, China and the United States announced the formation of the U.S.–China Strategic Economic Dialogue (SED).<sup>123</sup> Ostensibly, China and the United States established the SED to facilitate economic cooperation between the countries,<sup>124</sup> though critics derided the announcement as a symbolic yet feeble gesture likely to accomplish little.<sup>125</sup> Combined, these governmental efforts demonstrate discontent with China's trade policies if not an emerging and pervasive anti-Chinese sentiment.<sup>126</sup>

Interestingly, the worldwide financial crisis of 2008 demonstrated the importance of the U.S.–China trade relationship to China's economy.<sup>127</sup> By one account, “[t]he slowdown in exports contributed to the closing of *at least 67,000* factories across China.”<sup>128</sup> The resulting joblessness and civil discontent caused by the economic slowdown, the slowdown of exports in particular, created critical problems for Chinese society and the Chinese government.<sup>129</sup> In short, the worldwide slowdown demonstrated the importance of the U.S. market to China. When the United States stopped purchasing Chinese goods, in this case as a result of the 2008 recession-like conditions, China suffered. This leads to the inevitable conclusion that the United States can use its economic position to affect Chinese policy and Chinese trade, a fact that is often ignored by critics who favor the blunt instrument of regulation.

### *B. Challenges Caused by Number of Imported Products*

Regardless of the economic impact of the U.S.–China trade imbalance, on the ground U.S. consumers' appetite for cheap

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123. Press Release, U.S. Dep't of Treasury, Joint Statement Between the United States of America and The People's Republic of China on the Inauguration of the U.S.–China Strategic Economic Dialogue (Sept. 20, 2006), *available at* <http://www.ustreas.gov/press/releases/hp105.htm> (announcing establishment of bilateral talks).

124. *See id.* (outlining purposes of the SED).

125. *See* Goodman, *supra* note 122 (relaying concerns of U.S. manufacturers that the SED lacked any teeth).

126. *See* Zachary Karabell, Editorial, *Watch Out for the China Bashers*, WALL ST. J., Sept. 5, 2007, at A17 (questioning the wisdom of overzealously targeting China as the source of all product safety concerns).

127. *See* Norihiko Shirouzu, *Chinese Toy Firm Becomes Casualty of Global Crisis*, WALL ST. J., Oct. 18, 2008, at A10 (describing the effect of decreased U.S. consumption on Chinese exports).

128. Edward Wong, *Factories Shut, China Workers Are Suffering*, N.Y. TIMES, Nov. 14, 2008, at A1 (emphasis added).

129. John Foley & Aliza Rosenbaum, *China Walks a Fine Line*, N.Y. TIMES, Dec. 23, 2008, at B2 (noting increased unemployment and economic volatility in China).

merchandise has resulted in a tidal wave of imported goods.<sup>130</sup> The number of imported shipments has increased steadily over a relatively short period of time.<sup>131</sup> At present, on a given day the U.S. Customs and Border Protection (CBP) agency processes approximately 70,500 containers of goods.<sup>132</sup> This large number of imported shipments has placed a strain on the resources of those government agencies and employees charged with border security and safety.<sup>133</sup> The CBP oversees 327 ports of entry, a figure that does not include the Border Patrol stations also within the agency's scope of responsibility.<sup>134</sup> The highly-publicized pet food and toy recalls magnified the problems of the current U.S. import infrastructure and "highlighted the need for [the] present import system to keep pace with this changing world and to continue meeting the expectations of the American people."<sup>135</sup>

Presently, the CBP meets all commercial cargo prior to the cargo's arrival in the United States.<sup>136</sup> CBP agents process imported cargo prior to authorizing its release into the U.S. stream of commerce.<sup>137</sup> At this point in the import process, CPSC workers may or may not provide assistance to CBP agents.<sup>138</sup> More often than not, however, it seems that the CPSC entrusts its inspection responsibilities to other federal agents, presumably CBP employees.<sup>139</sup> In late 2007, near the height of the recall frenzy, the CBP performed this exact function.<sup>140</sup> Seattle CBP

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130. See U.S. Customs and Border Protection, On a Typical Day During Fiscal Year 2008, [http://www.cbp.gov/xp/cgov/about/accomplish/fy08\\_typical\\_day.xml](http://www.cbp.gov/xp/cgov/about/accomplish/fy08_typical_day.xml) (last visited Apr. 9, 2009) (noting that on a typical day in 2008, the U.S. Customs and Border Protection Agency processed 70,451 containers).

131. See INTERAGENCY WORKING GROUP, *supra* note 108, at 4 (detailing 33% increase in import shipments between 2000 and 2006).

132. See *supra* note 130.

133. See INTERAGENCY WORKING GROUP, *supra* note 108, at 5 (reporting that "[border] officials must manage larger volumes of imports from countries which often have less-developed regulatory systems").

134. U.S. Customs and Border Protection, *supra* note 130.

135. INTERAGENCY WORKING GROUP, *supra* note 108, at 2.

136. See *id.* at 7–8 (providing an overview of the import process).

137. INTERAGENCY WORKING GROUP ON IMPORT SAFETY, ACTION PLAN FOR IMPORT SAFETY 27 (2007), available at <http://www.importsafety.gov/report/actionplan.pdf>.

138. See Lipton, *supra* note 101 (reporting that CPSC employees at ports of entry have a difficult time inspecting all imported consumer products).

139. See *id.* (noting that the CPSC must rely on agents from other federal agencies for port inspection).

140. See generally Press Release, U.S. Customs and Border Protection, Seattle CBP Officers Seize Aqua Dots; Potentially Dangerous Toys Stopped at Seaport (Dec. 21, 2007), available at [http://www.cbp.gov/xp/cgov/newsroom/news\\_releases/archives/2007\\_news\\_releases/122007/12212007\\_2.xml](http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2007_news_releases/122007/12212007_2.xml) (relating CBP's confiscation of a dangerous product).

officers seized shipments of the infamous Aqua Dots toys<sup>141</sup> after the CPSC issued a recall for the product.<sup>142</sup>

As part of the chain of government agencies responsible for import safety, the CPSC too has experienced pressure due to the mounting number of imports.<sup>143</sup> In Los Angeles, for example, area ports handle 15 million truck-sized cargo shipments per year, but only one CPSC employee performs “spot-checks” at all area ports.<sup>144</sup> Fellow CPSC employees describe the Los Angeles situation as “all but hopeless.”<sup>145</sup> However, one might just as well describe the entire port security situation as “hopeless”; realistically, the United States cannot effectively screen the vast majority of imported cargo in U.S. ports.<sup>146</sup> In the wake of September 11th and the Dubai Ports controversy, Congress passed the SAFE Port Act in 2006 to enhance port security and screening.<sup>147</sup> Yet even supporters of the legislation recognized that the United States cannot possibly screen *every* cargo container that arrives on its shores.<sup>148</sup> Further, as proponents of the SAFE Port Act have made clear, improvements in port screening and security will come via technology and not manpower.<sup>149</sup>

Regardless of the situation in U.S. ports, the 2007 recalls serve as evidence that unsafe products can and will evade scrutiny and enter the stream of commerce. As discussed below, the number of unsafe Chinese-made consumer products that ended up on store shelves amplified concerns about the ability of the CPSC to operate effectively without reform and additional resources.

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141. See generally Keith Bradsher, *China Confirms Poison Was on Toy Beads*, N.Y. TIMES, Nov. 11, 2007, § 1, at 14 (describing a toy that contained a precursor to GHB, commonly known as a “date rape drug”).

142. U.S. Customs and Border Protection, *supra* note 140.

143. See Lipton, *supra* note 101 (stating that agency workers are “overwhelmed” at ports).

144. *Id.*

145. *Id.*

146. Cf. Editorial, *Safe Ports*, WASH. POST, Sept. 12, 2006, at A22 (explaining the difficulty of attempting to inspect each and every cargo container that enters U.S. ports).

147. See generally Security and Accountability for Every Port Act, 6 U.S.C. §§ 901–1003 (2006) (detailing the enhanced port security implemented by Congress).

148. Cf. *Safe Ports*, *supra* note 146.

149. See Press Release, Sen. Ted Stevens, The SAFE Port Act: Using the Latest Technology to Secure Our Ports (Nov. 21, 2006), available at [http://commerce.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease\\_id=ce258e4d-7984-4493-a785-29e840b4bd22&Month=11&Year=2006](http://commerce.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=ce258e4d-7984-4493-a785-29e840b4bd22&Month=11&Year=2006) (“Technology, combined with sophisticated data analysis, will lead the way in improving the security of our ports.”).

*C. Recalls by the Numbers*<sup>150</sup>

The 2007 recalls of Chinese-manufactured consumer products did little to assuage U.S. criticism of Chinese trade practices<sup>151</sup> and less still to encourage any public confidence in the federal government's ability to protect citizens from unsafe products.<sup>152</sup> Further, the 2007 product recalls occurred directly after high profile Chinese import controversies involving tainted pet food<sup>153</sup> and contaminated toothpaste.<sup>154</sup> As a result, lawmakers,<sup>155</sup> consumer advocacy groups,<sup>156</sup> and the CPSC itself<sup>157</sup> focused on the role of imports, Chinese imports in particular, in the recall controversy.

In actuality, from 2004 to 2007, the role of imported goods in consumer product recalls appears not to have changed too dramatically. Of the approximately 290 recalls performed by the CPSC in calendar year 2004, roughly 75% involved imported products.<sup>158</sup> For the next three years, this increased about 5% per year, resulting in approximately 87% of the 442 CPSC recalls in 2007 involving imported consumer products.<sup>159</sup>

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150. Unless otherwise noted, the data contained in this Part was pulled from the CPSC website. The CPSC publishes information on recalls at <http://www.cpsc.gov/cpsc/pub/prere/ prere.html>. Information may be sorted according to month and year, among other options. The figures in this Comment are based upon the recalls listed under calendar years 2004 to 2008. For this Comment, the Author gathered recall information from the CPSC website and inserted that data into spreadsheets, which are on file with the Houston Law Review.

151. See Steven R. Weisman, *China Stand on Imports Upsets U.S.*, N.Y. TIMES, Nov. 16, 2007, at C1 (“[T]he recent furor over the safety of Chinese food, toys, toothpaste and other products has taken its toll in the economic relationship . . .”).

152. See *CPSC Reform Act Hearing*, *supra* note 35 (statement of Sen. Richard Durbin, Chairman, Subcomm. on Financial Services and General Government) (considering the effect of the recalls upon the confidence of American consumers).

153. See generally David Barboza, *China Yields to Inquiry on Pet Food*, N.Y. TIMES, Apr. 24, 2007, at C1 (recounting the massive tainted pet food recall).

154. See generally Walt Bogdanich & Renwick McLean, *Poisoned Toothpaste in Panama Is Believed to Be From China*, N.Y. TIMES, May 19, 2007, at A3 (reporting on potentially hazardous toothpaste believed to be exported from China).

155. See 153 CONG. REC. S15088-89 (daily ed. Dec. 11, 2007) (statement of Sen. Pryor) (reviewing the recall crisis of 2007 including the role of imported products).

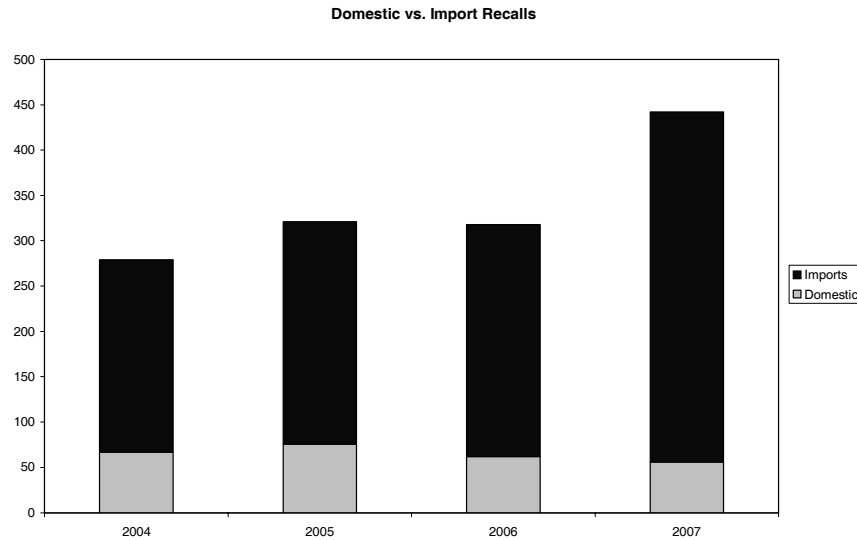
156. See *Toy Safety Standards Hearing*, *supra* note 10, at 106 (statement of Sally Greenberg, Senior Product Safety Council, Consumer's Union) (expressing concern about the danger posed by toys imported from China).

157. See Nord, *supra* note 75 (highlighting agency's work to address unsafe imports and concerns regarding quality of Chinese-made goods).

158. CPSC Recalls & Product Safety News, <http://www.cpsc.gov/cpsc/pub/prere/ prere.html> (last visited Apr. 9, 2009). For the purposes of this Comment, “imported products” includes any product that the CPSC indicates on its website was wholly or partially manufactured in another country.

159. *Id.*

The below chart traces the gradual increase over the past four years.<sup>160</sup>



As demonstrated in the above chart, the rising role of imported products in consumer product recalls did not occur overnight. It is therefore unlikely that this steady increase in imported product recalls alone suddenly provoked lawmakers to reform the CPSC.<sup>161</sup>

While imported goods garnered much attention, many focused specifically on the role of Chinese-manufactured goods in the 2007 wave of consumer product recalls.<sup>162</sup> In calendar year 2007, Chinese-made goods constituted well over 50% of CPSC consumer product recalls.<sup>163</sup> In contrast, only 20% of “consumer products for sale in the [United States] today are Chinese-made.”<sup>164</sup> Chinese-manufactured consumer product recalls increased 20% from 2004 to 2007.<sup>165</sup> The graph below illustrates

160. The data for this chart comes from CPSC Recalls & Product Safety News, *supra* note 158. The Author gathered information on country of origin and the reason for the recall and inputted this data into spreadsheets to produce this chart. The spreadsheets are on file with the Houston Law Review.

161. See Lipton, *supra* note 101 (reporting that new CPSC lawmaking initiatives were “[s]purred by the recalls of flawed Chinese-made products” (emphasis added)).

162. See *supra* notes 155–57 and accompanying text (noting different groups’ concerns with apparent danger of imported consumer products).

163. See *supra* note 9 and accompanying text (noting CPSC data that indicates that Chinese-made products constituted 87% of recalled consumer products in 2007).

164. Lipton, *supra* note 101.

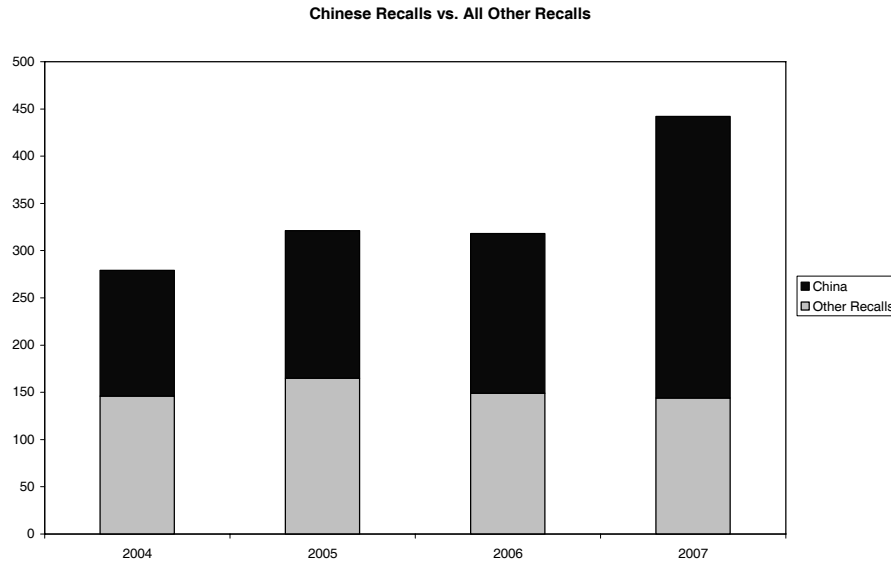
165. See *infra* note 166 and accompanying chart (demonstrating the gradual increase on recalled Chinese products from 2004 to 2007). For the purposes of this Comment, Chinese-manufactured products include any product that CPSC indicates was in whole or

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the growth in Chinese products recalled by the CPSC in the last four years.<sup>166</sup>



As shown, the ratio of recalls of Chinese-made products to total product recalls jumped noticeably from 2006 to 2007. In 2006, Chinese consumer products made up about 53% of total recalls, while in 2007 that number grew to nearly 68%.<sup>167</sup>

Of all the issues surrounding the 2007 recalls, the most charged and high profile topic was lead contamination.<sup>168</sup> Much as the number of Chinese recalls swelled in 2007, the number of lead recalls also increased dramatically.<sup>169</sup>

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in part manufactured in China.

166. See *supra* note 160 (explaining the Author's methodology for producing charts in this Part).

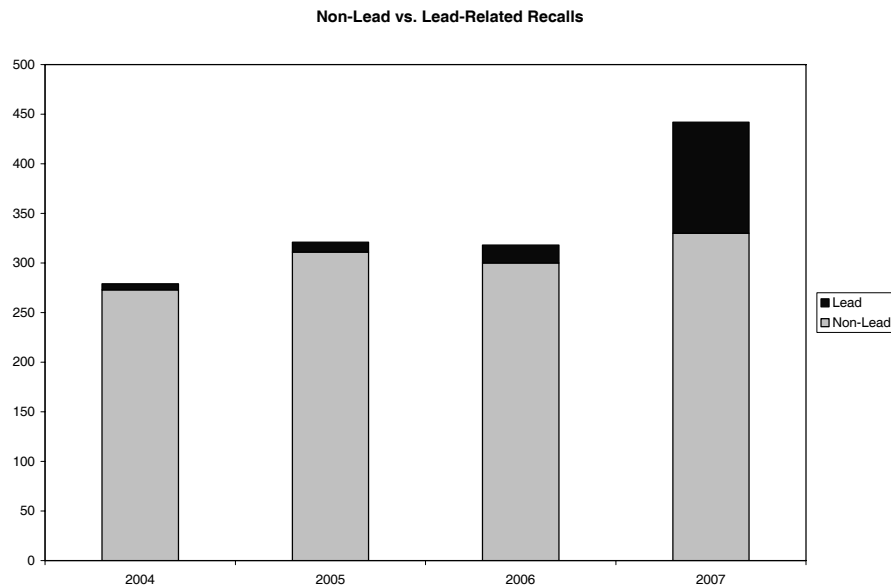
167. See *supra* note 166 and accompanying chart (illustrating the percentage of Chinese recalls that made up total recalls in 2006 and 2007).

168. See LOTKE ET AL., *supra* note 89, at 8–9 (summarizing toy recalls due to lead); Letter from William Vaughan, Senior Policy Analyst, Consumers Union & Ron Pollack, Executive Dir., Families USA, to Senators Max Baucus & Charles Grassley (Sept. 18, 2007), available at <http://www.consumersunion.org/pub/Lead%20letter%20to%20Senators%20for%20web.pdf> (highlighting lead as an urgent concern); see also Casey, *supra* note 11 (reporting that as of September 2007, lead remained the area of interest despite the fact that more recalls occurred due to failures of tiny magnets).

169. See CPSC Recalls & Product Safety News, *supra* note 158 (providing lead recall data from Oct. 1, 2001 to present). For the purposes of this Comment, a lead recall consists of any recall involving potential lead poisoning, which is listed on the CPSC website as a "lead" hazard type. *Id.*

Lead poisoning presents a particularly heinous hazard to young children.<sup>170</sup> Even low exposure to lead can result in severe developmental problems.<sup>171</sup> Today, many Americans find the very idea of lead contamination unfathomable.<sup>172</sup> After all, the United States banned the use of lead-based paint on toys in 1978, almost 30 years prior to the 2007 recalls.<sup>173</sup>

According to the CPSC, from 2004 to 2006, lead contamination made up only a fraction of consumer product recalls.<sup>174</sup> In 2007, this changed significantly.<sup>175</sup> Of the 442 consumer product recalls in 2007, more than 25% involved lead tainted products.<sup>176</sup> The chart below depicts this jump.<sup>177</sup>



170. See Lead Poisoning, National Safety Council, [http://www.nsc.org/resources/factsheets/environment/lead\\_poisoning.aspx](http://www.nsc.org/resources/factsheets/environment/lead_poisoning.aspx) (last visited Apr. 9, 2009) (warning of the dangers of lead exposure).

171. *Id.*

172. See Lipton & Barboza, *supra* note 8 (quoting a father who asked, "Lead paint in this day and age?").

173. See LOTKE ET AL., *supra* note 89, at 8 (tracing the history of lead ban).

174. See *infra* note 177 and accompanying chart (illustrating non-lead vs. lead recalls from 2004 to 2007).

175. From 2004 to 2006, the percentage of recalls due to lead concerns did not top 6%. See *infra* note 177 and accompanying chart.

176. See *infra* note 177 and accompanying chart.

177. See *supra* note 160 (explaining the Author's methodology for producing charts in this Part).

News of the recalls due to lead contamination created headlines around the world.<sup>178</sup> Consumer advocacy groups seized this momentum to lobby for CPSC reform.<sup>179</sup> This high publicity surrounding the Chinese-manufactured goods recalls and the lead recalls, more than any other factor, caused lawmakers to press for more regulations.<sup>180</sup>

#### D. 2008 Recall Data

If the recall numbers of 2007 describe a troubling development in imported product safety, the 2008 recall data puts the significance of that development in perspective. The numbers decreased across the board. The total number of recalls and the number of imported product recalls decreased.<sup>181</sup> Also telling, the number of Chinese-manufactured recalls dropped from approximately 300 recalls in 2007 to about 227 recalls in 2008.<sup>182</sup> The decrease in lead recalls from 2007 and 2008 also showed significant change: from approximately 112 to 71.<sup>183</sup> The

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178. See, e.g., Carolyn Churchill, *Fisher-Price Toys Are Recalled amid Fears over Lead Levels*, THE HERALD (Glasgow), Aug. 3, 2007, at 5 (reporting on the Fisher-Price recall of toys due to concerns of lead contamination); Matt Hartley, *Lead Scare Shunts Thomas Off Track*, THE GLOBE & MAIL (Canada), June 15, 2007, at A3 (describing the Thomas the Tank Engine recall); Holly Ife, *Worldwide Alarm over Lead Paint*, HERALD SUN (Australia), Aug. 3, 2007, at 3 (reporting on lead paint recalls in Australia); Shari Rudavsky & John Russell, *Lead Poisoning Fears Send Families to Clinics*, THE INDIANAPOLIS STAR, Aug. 15, 2007, at 1 (documenting parents' reactions to toy recalls). In fact, the stigma of lead contamination has continued to haunt China well into 2009. See *The Tonight Show: Episode 3740* (NBC television broadcast Apr. 1, 2009) ("China says it wants to replace the U.S. dollar with a new global currency. They want to move from a gold-based standard to a lead-based standard.").

179. See, e.g., *Toy Safety Standards Hearing*, *supra* note 10, at 106 (statement of Sally Greenberg, Senior Product Safety Council, Consumer's Union) (citing recent toxicity concerns in her testimony for stronger regulations); Press Release, Consumers Union, *China Action on Lead Paint in Toys Long Overdue* (Sept. 11, 2007), available at [http://www.consumersunion.org/pub/core\\_product\\_safety/004876.html](http://www.consumersunion.org/pub/core_product_safety/004876.html) (discussing the issue of lead paint on Chinese toys and lobbying for a stronger CPSC).

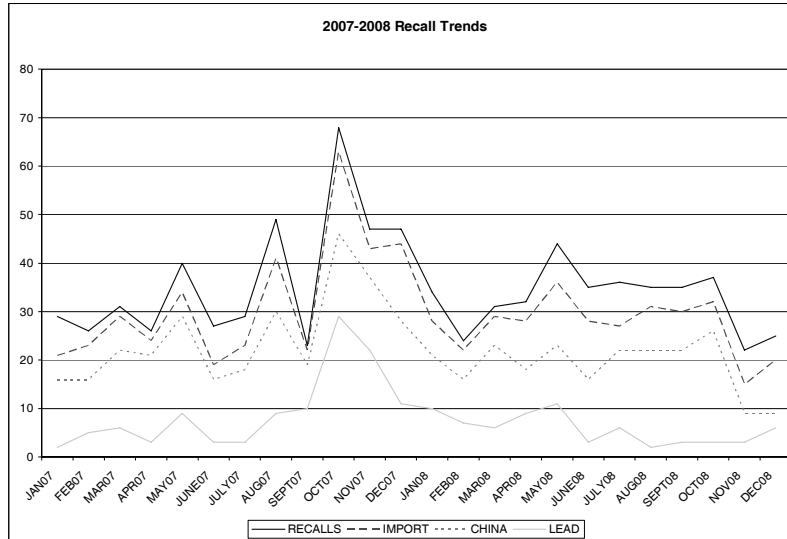
180. See *CPSC Reform Act Hearing*, *supra* note 35 (statement of Sen. Klobuchar) (commenting on a lead incident that prompted her to draft legislation); see also *Toy Safety Standards Hearing*, *supra* note 10, at 25–26 (exchange between Sen. Durbin and Chairman Nord) (questioning Chairman Nord about the lead issue at the beginning of question and answer period); *id.* at 81–82 (statement of Comm'r Thomas Moore) (advocating the importance of continuing legislation on lead regulations in children's products); *id.* at 96–97 (exchange between Sen. Klobuchar and Chairman Nord) (questioning Chairman Nord about the enforcement of a proposed regulation of lead in children's toys). See generally *Protecting Children Hearing*, *supra* note 3 (initiating inquiry into lead contamination in Chinese-made toys).

181. See *CPSC Recalls & Product Safety News*, *supra* note 158. The Author compared all data available for 2007 and 2008 recalls.

182. *Id.*

183. *Id.*

accompanying chart clearly displays the spike of recalls in late 2007 and the subsequent decrease in 2008.



Many of the CPSIA provisions were not scheduled to take effect until this year.<sup>184</sup> For instance, the new limitations on lead content in children's products, detailed *infra*, did not take effect until February 2009.<sup>185</sup> Yet as discussed, the number of lead recalls had already dropped precipitously from 2007 to 2008.<sup>186</sup> CPSC officials and consumer advocate groups have credited retailers and manufacturers for contributing to the overall drop in product recalls.<sup>187</sup> Consumer groups specifically praised big-box retailers Toys“R”Us and Wal-Mart for exerting pressure on their suppliers.<sup>188</sup> All of this occurred without the implementation of new, Congress-created regulations.

#### IV. EVALUATION OF GOVERNMENT RESPONSE

##### A. *The Consumer Product Safety Improvement Act of 2008*

During the recall crisis, the House and Senate both put forward pieces of legislation addressing the apparent defects of

184. See, e.g., Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 101(a)(2)(A), 122 Stat. 3016, 3017 (2008) (listing effective date as 180 days after enactment of the CPSIA).

185. *Id.*

186. See *supra* note 183 and accompanying text (discussing the dramatic change in lead recalls from 2007 to 2008).

187. Anny Shin, *Toy Recalls Drop 46 Percent*, WASH. POST, Nov. 13, 2008, at D2.

188. *Id.*

the CPSC.<sup>189</sup> For its part, the Senate set out to fashion a “very significant, very comprehensive” piece of legislation to address the 2007 consumer product recalls.<sup>190</sup> The bill aimed to do no less than revamp the entire CPSC.<sup>191</sup> The House bill generally addressed the issue in a more conservative manner.<sup>192</sup> Where the Senate bill aspired for far-reaching reform,<sup>193</sup> the House bill proposed incremental, targeted change.<sup>194</sup> In the end, the House bill served as the template for the CPSIA.<sup>195</sup> This Part seeks to analyze, evaluate, and compare the most pertinent parts of the CPSIA as those provisions relate to the above discussion of the CPSC and imported consumer products.

1. *Budget Increase.* The recent funding levels for the CPSC evoked sharp criticism, much of it leveled at the Bush administration<sup>196</sup> despite the fact that the agency’s budget has essentially decreased since the CPSC’s inception.<sup>197</sup> To address the perceived lack of funding, the CPSIA authorizes a budget of \$118,200,000 for 2010,<sup>198</sup> almost double the budget in 2007.<sup>199</sup> The budget increases continue through 2014, culminating with an operating budget of \$136,409,000.<sup>200</sup>

During debate on the legislation, the contemplated budget increases generally did not serve as a lightning rod for criticism. Both current CPSC commissioners indicated a desire for more resources.<sup>201</sup> Additionally, industry leaders supported the notion

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189. See generally Consumer Product Safety Modernization Act, H.R. 4040, 110th Cong. (2007); CPSC Reform Act of 2007, S. 2045, 110th Cong. (2007).

190. 153 CONG. REC. S15,088 (daily ed. Dec. 11, 2007) (statement of Sen. Pryor).

191. See *id.* at S15,089 (outlining the sweeping goals of S. 2045).

192. See generally M.P. McQueen, *House Votes to Raise Safety-Agency Funding*, WALL ST. J., Dec. 20, 2007, at D4 (comparing the Senate and House bills).

193. See *id.* (describing the numerous, substantive changes contained in the Senate bill).

194. See H.R. REP. NO. 110-501, at 17 (2007) (stating that the goals of H.R. 4040 are “to strengthen and modernize the consumer product safety system”).

195. A comparison of the tables of contents of the House bill and the CPSIA is illustrative. Compare Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016, 3016 (2008) (providing a table of contents), with H.R. 4040, 110th Cong. (2008) (providing a table of contents substantially similar to that provided in the CPSIA).

196. Lipton, *supra* note 101.

197. See *supra* Part II.C (exploring the history of CPSC resources).

198. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 201(a), 122 Stat. 3016, 3039 (2008).

199. See Lipton, *supra* note 101 (reporting that agency operated on \$62 million budget in 2007).

200. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 201(a), 122 Stat. 3016, 3039 (2008).

201. See *CPSC Reform Act Hearing*, *supra* note 35 (statement of Nancy Nord, Acting

of a better-funded Commission.<sup>202</sup> Yet one questions the wisdom of essentially doubling the funding for the CPSC. This is not the first time the country (and the global community) has faced a recall controversy.<sup>203</sup> Further, if the 2008 recall trends continue, Congress has doubled CPSC funding in response to what amounts to a temporary spike in consumer product recalls.<sup>204</sup> Had Congress postponed immediate passage of the legislation in order to fully examine the transitory nature of the 2007 recalls, the CPSIA might have contained a more conservative budget.

Prior to the finalization of the CPSIA, both the Senate and House versions set aside additional monies for modernization and upgrades to existing CPSC facilities.<sup>205</sup> Legislators directed much energy to condemning existing CPSC facilities, particularly its toy testing laboratory.<sup>206</sup> These policymakers also roundly criticized the simple “drop testing” performed on toys in the laboratory.<sup>207</sup> The test involves dropping a toy from a prescribed height and determining the toy’s ability to remain intact.<sup>208</sup> In response to the criticism, the CPSC Chairman pointed out that the simple “drop test” performed in toy testing would not change with a new backdrop.<sup>209</sup> In fact, the “drop test” is *the* test for small parts.<sup>210</sup> Congress’s misplaced focus on the “drop test” demonstrated its misperceptions about the day-to-day operations of the CPSC. Wisely, the CPSIA does not contain congressional mandates regarding capital improvements to CPSC facilities or testing procedures.<sup>211</sup> The lack of explicit congressional direction

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Chairman, CPSC) (indicating additional funds would be put to good use); *Toy Safety Standards Hearing*, *supra* note 10, at 80–81 (statement of Comm’r Thomas Moore) (acknowledging the need for additional funding and resources).

202. *See Toy Safety Standards Hearing*, *supra* note 10, at 24 (statement of Jerry Storch, CEO of Toys“R”Us) (approving a well-financed regulatory commission).

203. *See* Karabell, *supra* note 126 (recounting the Firestone tire recalls and the 1990 recall of Perrier water due to fear of benzene poisoning).

204. *See* Part III.D (concluding that product recalls decreased markedly from 2007 to 2008). This is not to suggest that the recalled products did not present serious hazards. This is merely to question the advisability of throwing money at a problem that may have resulted from a mere historical aberration.

205. *See* CPSC Reform Act of 2007, S. 2045, 110th Cong. § 3(c) (2007) (authorizing \$40 million for facilities upgrades); Consumer Product Safety Modernization Act, H.R. 4040, 110th Cong. (2007) (authorizing \$20 million).

206. *See CPSC Reform Act Hearing*, *supra* note 35 (statement of Sen. Richard Durbin, Chairman, Subcomm. on Financial Services and General Government) (chastising CPSC’s toy testing lab).

207. *See id.* (calling the test “absolutely unacceptable”).

208. *See id.* (scorning the apparently primitive drop test).

209. *See id.* (statement of Nancy Nord, Acting Chairman, CPSC).

210. *See id.* (explaining that the “test is used around the world in order to determine [the danger of] small parts”).

211. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314,

allows the agency to budget according to its own needs and priorities. As discussed immediately below, this is not to say that Congress has entirely ceded the purse strings to the CPSC.

2. *Staff Level Increases.* The CPSIA mandates an increase in CPSC employees from its present 420 employees<sup>212</sup> to “at least 500” by 2013.<sup>213</sup> During debate on the legislation, lawmakers compared present staffing levels to historic staffing levels in an attempt to point out the need for a staff increase.<sup>214</sup> While an attention-grabbing exercise, changes in technology have erased the need for employees across the spectrum of industries, including public service. Funds marked for employee salaries might be better spent on improving the agency’s technological and communications abilities.

The legislation also directs the Commission to provide a CPSC presence at various U.S. ports of entry “or to inspect overseas manufacturing facilities.”<sup>215</sup> This legislative directive dovetails with the CPSC’s own port inspection initiative.<sup>216</sup> The port inspection program “marks the first permanent, full-time presence of CPSC investigators at key” U.S. ports.<sup>217</sup> As discussed previously, technology, not manpower, is most likely the best method for improving at-port screening.<sup>218</sup> Recognizing this, the CPSC port initiative aims to provide port employees with technology to assist with screening.<sup>219</sup> However, the agency must make sure it is not simply throwing warm bodies at points of entry in a symbolic but half-hearted attempt to address the import problem. The Customs and Border Patrol agency already staffs U.S. ports and has demonstrated the ability to intercept dangerous consumer products if given adequate information and opportunity.<sup>220</sup> Instead of supplying its own employees, the CPSC

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§ 201(a), 122 Stat. 3016, 3038–39 (2008). At most, the law contains suggestions for spending in the form of reports to Congress. *Id.*

212. Lipton, *supra* note 101.

213. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 202(c), 122 Stat. 3016, 3040 (2008).

214. See 153 CONG. REC. S11,511 (daily ed. Sept. 12, 2007) (statement of Sen. Pryor).

215. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 202(c), 122 Stat. 3016, 3040 (2008).

216. See U.S. CONSUMER PROD. SAFETY COMM’N, *supra* note 74, at 21 (describing the CPSC’s Import Safety Initiative).

217. *Id.*

218. See *supra* notes 146–49 and accompanying text (discussing congressional efforts at improving port security).

219. Nord, *supra* note 75.

220. See *supra* Part III.B (examining CBP capabilities and relaying an account of CBP’s seizure of unsafe children’s toys).

might better spend funds on improving its communication and relationship with Customs and Border Patrol. This is not to suggest that CPSC staff do not have a role in U.S. ports; CPSC should merely ensure it gets the most out of its budget.

Perhaps more useful is the CPSIA proposal of staffing *foreign* manufacturing facilities with CPSC compliance staff.<sup>221</sup> Placing CPSC employees on site promotes dialogue and understanding with the parties ultimately responsible for the design and production of the imported goods.<sup>222</sup> The problems with Chinese goods have resulted from Chinese manufacturers' lower production standards, but this is not necessarily a surprise given China's relatively recent economic ascendancy.<sup>223</sup> Educating Chinese manufacturers on best practices and U.S. standards would serve all parties better than posturing. Cooperation between the CPSC and foreign manufacturers can help eliminate dangerous conditions before products enter the marketplace.

3. *Third Party Certification and Tracking.* The CPSIA mandates that any children's product subject to a CPSC safety standard receive certification of compliance from a third party laboratory.<sup>224</sup> In contrast, the manufacturer of a consumer product not classified as a "children's product" may self-certify that the product meets all relevant CPSC standards.<sup>225</sup> The higher standard for children's products reflects the importance that society puts on child safety as compared to overall consumer safety. Indeed, many of the most eye-grabbing headlines concerned recalled children's products.<sup>226</sup> Again, this demonstrates Congress's responsiveness to media-driven concerns.<sup>227</sup>

There is little question that the overall goal of certifying children's products as "safe" is agreeable.<sup>228</sup> Requiring manufacturers to meet certain standards before marketing their

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221. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 202(c)(2), 122 Stat. 3016, 3040 (2008).

222. See U.S. CONSUMER PROD. SAFETY COMM'N, *supra* note 74, at 4 (explaining CPSC international initiatives).

223. See Karabell, *supra* note 126.

224. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 102(a)(2), 122 Stat. 3016, 3022 (2008).

225. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 102(a)(1), 122 Stat. 3016, 3022 (2008).

226. *Supra* notes 4–6.

227. See *supra* notes 178–80 and accompanying text (concluding that the volume and character of recall headlines spurred Congress to act).

228. See *CPSC Reform Act Hearing*, *supra* note 35 (statement of Nancy Nord, Acting Chairman, CPSC) (concurring with the usefulness of certification programs).

products may help keep unsafe products out of the hands of consumers in the first place.<sup>229</sup> Inevitably, consumers bear the cost of such a program, which imposes “significant” expenses on the manufacturers.<sup>230</sup> For instance, Mattel has indicated that the cost of safety testing now accounts for “about 1.5% of the cost of goods sold.”<sup>231</sup> Unlike Mattel, a company able to pass costs to consumers, smaller toy companies have voiced concerns that the mandatory third party certification costs will drive the companies out of business entirely.<sup>232</sup> Many of these smaller toy companies manufacture “natural” or “handmade” toys that are not thought to present potential safety hazards.<sup>233</sup> This suggests that the third party certification requirement, while perhaps appropriate for manufacturers of “high risk” children’s products, sweeps too broadly and imposes unnecessary costs on “mom-and-pop” companies.<sup>234</sup>

Ahead of the legislation, a number of manufacturers and retailers, including Mattel, voluntarily enacted enhanced product testing.<sup>235</sup> The companies began this additional testing regimen in response to the recall controversy and prior to passage of the CPSIA.<sup>236</sup> In other words, the law merely codifies an activity that manufacturers and retailers adopted voluntarily. However, this also means that product prices may have been subject to price increases regardless of government-mandated testing.

As a complement to children’s product certification, the CPSIA requires manufacturers to “brand” children’s products with certain information that will assist both the retailer and the ultimate consumer in identifying the product and ascertaining its source.<sup>237</sup> Congress envisioned such information facilitating the recall process.<sup>238</sup> Members of industry likewise recognized the

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229. See INTERAGENCY WORKING GROUP ON IMPORT SAFETY, *supra* note 137, at 15 (listing certification as a tool to prevent unsafe products from reaching the market).

230. See CONG. BUDGET OFFICE, COST ESTIMATE: S.2045 CPSC REFORM ACT OF 2007 5 (2007) (discussing costs of certification for manufacturers).

231. Melanie Trottman, *Lawmakers Clinch Deal to Overhaul Product Safety*, WALL ST. J., July 29, 2008, at A1.

232. Marcus Wohlsen, *Toy Makers May Win Test Exemption*, HOUSTON CHRON., Dec. 25, 2008, at A4.

233. *Id.*

234. See *id.* (relating cost estimates for smaller toy operations).

235. See, e.g., Eckert, *supra* note 3 (describing the implementation of new safety testing).

236. Cf. *id.* (describing Mattel’s safety testing implemented prior to the 2008 passage of the CPSIA).

237. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 103, 122 Stat. 3016, 3028 (2008).

238. See *Toy Safety Standards Hearing*, *supra* note 10, at 92 (statement of Nancy Nord, Acting Chairman, CPSC) (“Anything that provides traceability is very helpful.”).

benefit of enhanced traceability.<sup>239</sup> Such traceability serves to reinforce the main purpose of recalls: to remove unsafe products from the stream of commerce.<sup>240</sup> Again, this imposes additional costs on manufacturers and consumers, but as long as the CPSC continues issuing product recalls, it makes sense to ensure that the recalls occur effectively.

4. *Prohibiting the Sale of Recalled Products.* The CPSIA closes a significant loophole in the recall process by banning the sale of a product subject to a voluntary or mandatory recall.<sup>241</sup> As with improved traceability, the prohibition of the sale of previously recalled consumer products strengthens the recall process as a whole.<sup>242</sup> Post-recall sales will inevitably still occur,<sup>243</sup> but the legislation punishes those sales in which the seller or manufacturer “knew or should have known” about the CPSC corrective action.<sup>244</sup>

The Congressional Budget Office estimates such a prohibition will translate into a “relatively small” cost increase to retailers.<sup>245</sup> Such costs are likely to affect smaller retailers and online retailers the most.<sup>246</sup> Larger retailers already have systems in place that quickly remove recalled items from store shelves.<sup>247</sup> Even with a prohibition in place, smaller retailers and the myriad of online retailers make the recall process exceedingly difficult.<sup>248</sup> This prohibition would give the CPSC another enforcement tool to enhance the effectiveness of a product recall without imposing considerable cost. It also closes a rather large, unseemly gap in the recall system.

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239. See *CPSC Reform Act Hearing*, *supra* note 35 (statements of Al Thompson, Vice President, Retail Industry Leaders Association and Joseph McGuire, President, Association of Home Appliance Manufacturers) (supporting the idea of identifying marks on children’s products).

240. *Id.* at 42 (statement of Ed Meirzwinski, Program Director, Public Interest Research Groups) (endorsing enhanced traceability as a means to more effective recalls).

241. See Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 216, 122 Stat. 3016, 3056–57 (2008).

242. See Lipton, *supra* note 65 (discussing the prevalence of unsafe products offered for sale in spite of a recall).

243. See *id.* (relating the story of a recalled product that repeatedly appeared on the shelves of a major retailer).

244. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 216, 122 Stat. 3016, 3057 (2008).

245. CONG. BUDGET OFFICE, *supra* note 230, at 5.

246. *Id.*

247. See *CPSC Reform Act Hearing*, *supra* note 35 (statement of Al Thompson, Vice President, Retail Industry Leaders Association) (describing computer systems in place at larger retailers).

248. See *id.* (statement of Nancy Nord, Acting Chairman, CPSC) (noting difficulties faced in the Internet Age).

5. *Increased Civil Penalties.* The CPSIA increases the maximum civil penalty from \$1,825,000 to \$15 million.<sup>249</sup> Prior to the passage of the legislation, some legislators and consumer industry representatives expressed concern that a steep escalation in penalties would undermine the spirit of cooperation that drives most CPSC activities.<sup>250</sup> However, the \$15 million maximum is a far cry from the proposed \$100 million maximum in the Senate's original iteration of the bill.<sup>251</sup> Instead, the \$15 million maximum reflects the more conservative approach contained in the House version of the bill.<sup>252</sup>

The CPSIA maximum may not satisfy consumer advocates who generally favored the Senate approach or promoted an altogether uncapped penalty schedule.<sup>253</sup> Consumer groups argued that in the face of an outsized fine a "company [would not] be put in [a] place where they're thinking about that kind of economic ramification when it comes to safety."<sup>254</sup> This sort of criticism ignores the fact that any deterrent, no matter the magnitude, must by nature enter somewhere into the cost-benefit analysis. It also overlooks the fact that manufacturers already have a significant incentive to ensure product safety: sales.<sup>255</sup>

A \$100 million fine would have been counterproductive. In the face of a \$100 million fine, companies might choose to spend money to litigate the matter instead of working with the CPSC.<sup>256</sup> Alternatively, a \$100 million penalty may encourage companies to flood the Commission with any and all consumer complaints regardless of the importance or significance of the complaints.<sup>257</sup> Such inundation could overwhelm the Commission, turning it

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249. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 217, 122 Stat. 3016, 3058 (2008).

250. *CPSC Reform Act Hearing*, *supra* note 35 (statement of Sen. Sununu) (cautioning a conservative approach with respect to penalties and fines).

251. CPSC Reform Act of 2007, S. 2045, 110th Cong. § 17 (2007).

252. *See* Consumer Product Safety Modernization Act, H.R. 4040, 110th Cong. § 215 (2007) (suggesting an increase in maximum civil penalties from \$1.25 million to \$10 million).

253. *See CPSC Reform Act Hearing*, *supra* note 35 (statement of Alan Korn, Safe Kids Worldwide) (championing increased penalties); *id.* (statement of Travis Plunkett, Legislative Director, Consumer Federation of America) (preferring no cap).

254. *Id.* at 33 (statement of Alan Korn, Safe Kids Worldwide).

255. *See* Editorial, *Tinkering with Toys*, WALL ST. J., Nov. 9, 2007, at A18 (recounting Mattel's effort to promote its safety record after recalls).

256. *See id.* (warning of the potential for increased litigation).

257. *See CPSC Reform Act Hearing*, *supra* note 35 (statement of Nancy Nord, Acting Chairman, CPSC) (expressing concern about the proposed increase in penalties).

into an information clearinghouse instead of an investigatory consumer watchdog.<sup>258</sup>

The CPSIA offers a more sensible, balanced approach by raising the civil penalty maximum to \$15 million. This significantly boosts the current maximum without posing the menacing threat of a \$100 million fine. All proponents of an increased fine desire a meaningful deterrent that will grab the attention of the manufacturers.<sup>259</sup> For a company such as RC2, a manufacturer that initiated a number of product recalls in 2007 and historically has quarterly income of around \$10 million,<sup>260</sup> a potential \$15 million fine no doubt garners attention. Additionally, the recall process itself, with its inherent costs to manufacturers, serves as a financial incentive to avoid product safety problems.<sup>261</sup>

6. *Creation of Data Clearinghouse.* The legislation mandates that the CPSC create and maintain a publicly accessible “Consumer Product Safety Information Database.”<sup>262</sup> The database, available online, will include product safety submissions by consumers, federal and local governments, public safety entities, and others.<sup>263</sup> Congress included this provision under the belief that a free flow of information best “serves the well-being of consumers” by disseminating *potentially* useful product safety information without manufacturer involvement.<sup>264</sup>

Fearing the release and publication of inaccurate or incomplete information,<sup>265</sup> manufacturers and their representatives lobbied against this feature of the legislation.<sup>266</sup> There is no doubt that inaccurate, irresponsible information can

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258. See *id.* (statement of Nancy Nord, Acting Chairman, CPSC) (stating that such a consequence “may well overwhelm” agency resources).

259. See, e.g., *Toy Safety Standards Hearing, supra* note 10, at 61 (statement of Sen. Richard Durbin, Chairman, Subcomm. on Financial Services and General Government) (arguing in favor of a fine that will have a meaningful impact on a manufacturer).

260. See Press Release, RC2 Corp., RC2 Reports 2007 Third Quarter Operating Results (Oct. 24, 2007), available at [http://www.rc2.com/investor/financial/2007/Release\\_q3\\_07\\_final.pdf](http://www.rc2.com/investor/financial/2007/Release_q3_07_final.pdf) (reporting quarterly income of \$10.8 million and the two rounds of recalls made during 2007).

261. See *id.* (disclosing approximately \$14 million in expected recall costs during 2007).

262. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 212, 122 Stat. 3016, 3048–49 (2008).

263. *Id.*

264. H.R. Rep. No. 110-501, at 37–38 (2007).

265. See *CPSC Reform Act Hearing, supra* note 35 (statement of Joseph McGuire, Association of Home Appliance Manufacturers) (voicing industry concerns).

266. See, e.g., *id.* (disagreeing with disclosure requirements).

damage a company.<sup>267</sup> Such a risk may cause the companies themselves to think twice prior to sending consumer complaints to the CPSC for fear of an immediate public release without the benefit of a thorough investigation.<sup>268</sup>

The effect of the provision may be tempered somewhat by the ability of manufacturers to respond to reports submitted to the database.<sup>269</sup> After a posting about a product, the CPSC must notify the manufacturer and offer the manufacturer an opportunity to respond.<sup>270</sup> The manufacturer may then request that its response be posted in the database.<sup>271</sup> Additionally, in the event that the database contains erroneous or inaccurate information about a product, the CPSC must take corrective action.<sup>272</sup> In such an instance, the CPSC must remove *or* correct the information.<sup>273</sup> After the publication of incorrect and potentially damaging product information, the responsible step is to correct the misinformation in the same manner. The CPSC should not have the choice to remove the offending report without taking additional steps to rectify any misperceptions.

Despite these provisions to guard against the publication of faulty information, this provision of the CPSIA essentially puts the government in the business of running an Internet blog. While submitters of information cannot hide behind anonymity,<sup>274</sup> there are few mechanisms in place to verify the accuracy of a submission.<sup>275</sup> Indeed, the CPSIA mandates the inclusion of a “conspicuous notice to users of the database that the Commission does not guarantee the accuracy, completeness, or adequacy of the contents of the database.”<sup>276</sup> At best, this provision forces the CPSC to offer a service already offered by a handful of consumer groups and Internet websites.<sup>277</sup> At worst, this information

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267. See *2 Plead Guilty in Wendy's Finger Case*, CHI. TRIB., Sept. 10, 2005, § 1, at 13 (reporting damage done to fast food chain sales after a highly publicized hoax).

268. See *CPSC Reform Act Hearing*, *supra* note 35 (statement of Joseph McGuire, Association of Home Appliance Manufacturers) (concluding that instantaneous disclosure may affect companies' attitudes toward sharing data).

269. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 212, 122 Stat. 3016, 3048–52 (2008).

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. See *id.* (mandating inclusion of certain types of information).

275. See *id.* (instructing the CPSC to conduct a cursory examination of the submission prior to publication in the database).

276. *Id.*

277. See, e.g., ConsumerReports.org, Blog: Consumer Reports on Safety, <http://blogs.consumerreports.org/safety> (last visited Apr. 9, 2009); U.S. PIRG, U.S. PIRG

clearinghouse undermines the cooperation between the public and private sectors that has historically benefited the American consumer by boosting the overall effectiveness of the product safety infrastructure.<sup>278</sup>

7. *Lowering Trace Lead Amounts.* As discussed, the issue of lead contamination often took center stage in the debate to reform the CPSC. Indeed, the first major provision of the CPSIA concerns reducing the acceptable amounts of lead found in children's products.<sup>279</sup> The law contains a step-down provision with an eventual lead limit of 100 parts per million (ppm) taking effect three years after the law's enactment.<sup>280</sup> The feasibility of achieving these lower limits remains an open question. For instance, the Fashion Jewelry Trade Association contends that its members cannot manufacture metal jewelry with a lead content of 200 ppm or less.<sup>281</sup> The law addresses some of these concerns by exempting certain product categories from adhering to the limit if the 100 ppm limit is "not technologically feasible."<sup>282</sup>

Setting feasibility and costs aside, most people certainly favor an absence of lead in children's products. It is hoped that in combination with the increased civil penalty schedule in the CPSIA, the new lead limits will result in lower amounts of lead in children's products. The particular difficulty with establishing new limits lies in determining whether a heightened standard will actually translate into safer products. Many of the recent lead violations have not merely flirted with the current trace amounts limit, but rather have dramatically exceeded it.<sup>283</sup> While it is clear that the lower lead limits will impose additional

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Consumer Blog, <http://static.uspirg.org/consumer> (last visited Apr. 9, 2009).

278. See *CPSC Reform Act Hearing*, *supra* note 35 (statement of Sen. Sununu) (emphasizing the importance of a partnership between the CPSC and manufacturers).

279. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 101(a), 122 Stat. 3016, 3017-18 (2008).

280. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 101(a)(2), 122 Stat. 3016, 3017-18 (2008). Prior to the 100 parts per million limit, the law requires an initial limit of 600 parts per million and then a 300 parts per million limit. *Id.*

281. See CONG. BUDGET OFFICE, *supra* note 230, at 6 (reporting difficulties of manufacturing at a lower lead limit). Excessive lead levels in children's jewelry presents an obvious and potent danger. Not only is the jewelry often small enough to be accidentally ingested, but it sits on the skin of the wearer. Because of this, manufacturers of children's jewelry are unlikely to garner much sympathy.

282. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 101(a)(2), 122 Stat. 3016, 3018 (2008).

283. See Goodman & Lifsher, *supra* note 5 (reporting that lead violations approached 1,700 parts per million); see also *Toy Safety Standards Hearing*, *supra* note 10, at 72-73 (statement of Sen. Klobuchar) (relaying story about lead poisoning involving a lead charm consisting of 99% lead).

manufacturing costs,<sup>284</sup> it is not clear that they will deter the most brazen (or unintentional) violators. Additionally, it should be noted that the amount of lead-related recalls dropped precipitously in late 2008 without the addition of new limits.<sup>285</sup> This suggests that the heightened attention and publicity surrounding the lead-related recalls of 2007 acted as an independent deterrent to unsafe manufacturing practices. However, like the publicity, the new strict lead limitation does serve to broadcast U.S. intolerance of lead contamination from children's products.

8. *Involvement of State Attorneys General.* In addition, the CPSIA contains a provision enabling every state attorney general to bring a cause of action under the CPSC statutes.<sup>286</sup> This feature elicited cheers from consumer advocates<sup>287</sup> and displeasure from industry representatives.<sup>288</sup> Consumer groups contend that more product watchdogs will translate into a more effective product safety system.<sup>289</sup> However, nothing currently prevents a state attorney general from pursuing a maker of unsafe products under applicable state statutes.<sup>290</sup> Further, allowing states to decide whether to bring an action under CPSC statutes will result in inconsistent standards from state to state.<sup>291</sup> The state attorney general may enforce CPSC standards according to his own interpretation or belief.<sup>292</sup> This undermines the goal of uniformity, which has been a desire of the CPSC from

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284. See CONG. BUDGET OFFICE, *supra* note 230, at 6 (reporting difficulties of manufacturing at a lower lead limit).

285. See *supra* Part III.D (noting the significant decrease in lead recalls from 112 in 2007 to 71 in 2008).

286. Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 218, 122 Stat. 3016, 3060–62 (2008).

287. See *CPSC Reform Act Hearing*, *supra* note 35 (statement of Ed Mierzwinski, U.S. Public Interest Research Group) (characterizing the provision as providing “51 consumer cops”).

288. See *id.* (statement of Joseph McGuire, Association of Home Appliance Manufacturers) (opposing state attorneys general involvement).

289. See *id.* at 31 (statement of Travis Plunkett, Legislative Director, Consumer Federation of America) (endorsing enforcement by state attorneys general).

290. See, e.g., 430 ILL. COMP. STAT. ANN. 125/17 (LexisNexis 2006) (allowing a state attorney general to bring an action in state court in response to a dangerous children's consumer product); N.Y. GEN. BUS. LAW § 396-k (McKinney 1996) (same).

291. See *Tinkering with Toys*, *supra* note 255 (decrying “a jigsaw system of conflicting standards across the country”).

292. See OFFICE OF MGMT. & BUDGET, STATEMENT OF ADMINISTRATION POLICY: S. 2663—CPSC REFORM ACT 1 (2008), available at <http://www.whitehouse.gov/omb/legislative/sap/110-2/saps2663-s.pdf> (criticizing a state attorney enforcement provision in the Senate's version of the reform bill).

its inception.<sup>293</sup> The CPSC's creators designed the agency "to minimize conflicting State and local regulations."<sup>294</sup> Such disparity necessarily hurts the efforts of an agency dedicated to promulgating clear, uncompromising safety standards. Introducing a complex interstate system of enforcement hinders efforts to ensure product safety by breeding further confusion among leading manufacturers and trading partners. In an age of increasing foreign trade, the CPSC, and the CPSC alone, should communicate America's consumer product safety standards.

*B. Was the CPSIA Legislation Rushed?*

Clearly, there existed a desire for Congress to act in response to the high profile headlines regarding unsafe and lead-contaminated children's toys.<sup>295</sup> One Senator repeatedly told the story of a young constituent's sad and unfortunate death due to lead poisoning after ingesting a tainted charm.<sup>296</sup> That event, and similar instances, prompted responsive and compassionate legislators to act.

However, the 2007 product recalls must be placed in the appropriate context. The media and consumer advocacy frenzy blew the problem out of proportion. For instance, at the height of the lead-related recalls, one reporter engaged in his own toy-testing experiment in an attempt to gauge the pervasiveness of the problem.<sup>297</sup> Of the fifty toys the reporter purchased at a local big-box retailer, exactly *zero* tested positive for dangerous levels of lead.<sup>298</sup>

Undoubtedly, manufacturers have a vested interest in their products' safety. Affected companies went to great lengths to apologize to the American public,<sup>299</sup> and companies vowed stricter scrutiny of their products and operations.<sup>300</sup> On the heels of the

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293. See *supra* note 22 and accompanying text (explaining that the CPSC came into existence to bring order to the various state and federal product safety regulations).

294. 15 U.S.C. § 2051(b)(3) (2006).

295. See *Tinkering with Toys*, *supra* note 255 (observing that "[Congress] can claim to be doing something to protect children").

296. See *Toy Safety Standards Hearing*, *supra* note 10, at 72–73 (statement of Sen. Klobuchar) (relating the story of a four-year old's death); *CPSC Reform Act Hearing*, *supra* note 35 (repeating the same story).

297. See David Leonhardt, *Lessons Thomas Still Could Learn*, N.Y. TIMES, Oct. 24, 2007, at C1.

298. *Id.*

299. See Eckert, *supra* note 3 (apologizing to the public via an editorial in a major national newspaper).

300. See Press Release, RC2 Corp., RC2 Recalls Five Additional Thomas & Friends Wooden Railway Items (Sept. 26, 2007), available at [http://www.rc2.com/press/2007/Release\\_TWR\\_recall\\_0907.pdf](http://www.rc2.com/press/2007/Release_TWR_recall_0907.pdf) (discussing new testing procedures).

recall announcements, businesses, both manufacturers and retailers, reacted by creating more stringent safety procedures.<sup>301</sup> For example, after failures with its operations in China, Mattel fired a number of subcontractors and took pains to reevaluate other vendors.<sup>302</sup>

China too reacted to the rash of unsafe exported products, both consumer products and other types of goods.<sup>303</sup> The Chinese government arrested hundreds of individuals believed to be involved in the production of shoddy goods.<sup>304</sup> The government implemented new product safety programs to address growing concerns of worldwide consumers.<sup>305</sup> Additionally, China has recommitted itself to international dialogue on product safety.<sup>306</sup>

Both China and the troubled manufacturers understand the importance of restoring consumer confidence. The fruits of such efforts may not be immediately obvious, but the data thus far suggests that the combined efforts of foreign countries, manufacturers, federal government agencies, and consumer advocate groups have succeeded in at least reducing lead-related and Chinese-related recalls.<sup>307</sup> This shows that the market, in cooperation with the government, can force companies,<sup>308</sup> and even countries,<sup>309</sup> to take action to reinforce product safety. Before Congress passed bill one, the marketplace reacted positively and aggressively to improve product safety.<sup>310</sup>

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301. See Eckert, *supra* note 3 (noting enhanced safety measures); M.P. McQueen, *Retailers Face the Test of Testing*, WALL ST. J., Nov. 26, 2007, at A6 (relating increased safety measures taken by retailers).

302. See Louise Story, *Putting Playthings to the Test*, N.Y. TIMES, Aug. 29, 2007, at C1 (recounting Mattel's actions after recalls).

303. See generally Nicholas Zamiska, *China Sets Arrests over Product Safety*, WALL ST. J., Oct. 30, 2007, at A8 (reporting on steps taken by the Chinese government after recalls of exported products).

304. *Id.* Notably, one Chinese factory owner hanged himself after news implicated his factory's role in the recalls. Don Lee & Mark Magnier, *Safety Problems Bear Down on Chinese Manufacturer*, L.A. TIMES, Aug. 24, 2007, at C1.

305. See Wu Yi, Vice Premier of China, Editorial, *China Stands for Quality*, WALL ST. J., Dec. 11, 2007, at A27 (explaining China's strategy in addressing the problem of poorly made products).

306. See *id.* (discussing an ongoing dialogue between China and other countries, particularly the United States). Note that this editorial itself serves as an effort to restore American confidence in Chinese products.

307. See *supra* Part III.D.

308. See McQueen, *supra* note 301 (reporting on retailers' response to consumer concern over recalls).

309. See Wu Yi, *supra* note 305 (asserting China's consideration for consumers and consumer safety).

310. A strong argument can be made that the reaction is due to a fear of increased regulation. See McQueen, *supra* note 301 (asserting that the enhanced safety efforts by retailers stemmed, at least in part, from a desire to "head off lawsuits and legislation that

## V. CONCLUSION

The multitude of consumer product recalls exposed a consumer product safety system in need of some change. Reacting to four months of negative press about the nation's safety agency, Congress held hearings, quickly drafted, and passed comprehensive legislation. The CPSIA goes further than addressing the obvious problems with the Commission, such as its limited budget and lack of a "true recall" system. Instead, the CPSIA amounts to a wide-ranging reform of the entire agency and its related enforcement capabilities.

A handful of the features in the CPSIA will bring needed improvements. In order to meet the goals of a product recall, the recall system itself unquestionably needs more teeth. The Commission, the subject of numerous staff and budget cuts, can certainly use additional resources, though increased manpower should not occur at the expense of improved technology. Further, in light of increased industry testing and certification, codifying such processes effectively merges the ongoing goals of the private and public sectors. The increased civil penalty amount, moderate in comparison to the Senate's original proposal,<sup>311</sup> also seems workable and appropriate.

Other portions of the CPSIA, however, appear excessive and heavy-handed. First, the historic record of cooperation between the CPSC and the industries that it regulates should not be undermined through disclosure of unsubstantiated product information. The creation of the public database will also needlessly burden the CPSC. Finally, instead of farming the responsibility out to state attorneys general, federal consumer product safety regulations should remain the exclusive province of the CPSC. This reinforces the bond between the Commission and its industries and also limits confusion.

Consumer safety, especially children's safety, remains a commendable objective, and it is an objective shared by the government and product manufacturers alike. Congress deserves praise for addressing the situation and identifying areas for improvement. However, the establishment of the CPSC did not occur overnight. While the deluge of news reports and consumer advocate press releases may portend otherwise, the rise in the number of recalled imported consumer products occurred gradually as well. Further, most of the lead recalls, which generated the most publicity, occurred primarily from September

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could hurt their business").

311. CPSC Reform Act of 2007, S. 2045, 110th Cong. § 17 (2007).

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to December 2007. From the beginning of 2008, lead-related recalls have steadily decreased. In essence, Congress radically revamped the CPSC in response to events that transpired over a period of four months. While the 2007 recall crisis was temporary, the new web of product safety regulations is here to stay, for better or worse.<sup>312</sup>

*Russell T. Gips*

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312. In the early part of 2009, the scheduled implementation of the CPSIA had already hit its first major roadblock. In response to the business community's concerns about testing procedures, costs, and feasibility, the CPSC stayed enforcement of certain third-party testing and certification requirements. Notice of Stay of Enforcement of Testing and Certification Requirements, 74 Fed. Reg. 6396, 6396-99 (Feb. 9, 2009). Additionally, the Commission's strict interpretation of the CPSIA has placed unexpected burdens on ATV manufacturers and America's libraries. With respect to the ATV industry, the new lead regulations in the CPSIA mandate that youth ATV manufacturers reduce the amount of lead in various ATV components though the risk of exposure to such components is minimal. All-Terrain Vehicle Association, Federal Consumer Product Safety Commission Staff Recommends Against Exempting Children's Dirt Bikes and ATVs from Strict Anti-Lead Law (Apr. 2, 2009), <http://www.atvaonline.com/news/story.asp?id=771>. The components affected by the lead regulations include the engine, breaks, and suspension, objects that do not present an imminent danger for exposure. *Id.* The CPSC has reluctantly decided to enforce the CPSIA against youth model ATVs, though the Commission is concerned that such an action might result in the temporary or permanent removal of youth ATVs from the market. See Press Release, Statement of Acting Chairman Nancy Nord on the Request for Exclusions from the Lead Content Limits of the Consumer Product Safety Improvement Act of 2008 (Apr. 3, 2009), available at <http://www.cpsc.gov/pr/nord040309exclusions.pdf> (noting that eliminating youth model ATVs may "result[ ] in children riding the far more dangerous adult-sized ATVs"). With regard to libraries, the CPSC has interpreted the CPSIA as requiring the enforcement of lead standards against children's books. Letter from Cheryl A. Falvey, General Counsel, Consumer Prod. Safety Comm'n, to Allan R. Adler, Vice President for Legal & Gov't Affairs, Ass'n of Am. Publishers (Jan. 15, 2009), available at <http://www.cpsc.gov/library/foia/advisory/323.pdf> ("[A]ny children's book must comply with the new lead limits . . ."). According to the American Library Association, such enforcement could force libraries "to consider barring children from accessing children's books and other print materials." Letter from Nathan A. Brown, Outside Counsel to the Am. Library Ass'n, to Office of the Sec'y, Consumer Prod. Safety Comm'n (Jan. 26, 2009), available at [http://www.wo.ala.org/districtdispatch/wp-content/uploads/2009/01/ala\\_comments.pdf](http://www.wo.ala.org/districtdispatch/wp-content/uploads/2009/01/ala_comments.pdf).