
Consumer Federation of America

Testimony of

Travis Plunkett
Legislative Director
Consumer Federation of America

Before the
Subcommittee on Consumer Affairs, Insurance and Automotive Safety
of the
Senate Committee on Commerce, Science, and Transportation

# Legislative Hearing of the Consumer Product Safety Commission (CPSC) Reform Act of 2007

Russell Senate Office Building 253

October 4, 2007

Chairman Pryor, Ranking member Sununu and members of the Subcommittee, I am Travis Plunkett, Legislative Director for Consumer Federation of America (CFA). CFA is a non-profit association of approximately 300 pro-consumer groups, with a combined membership of 50 million people that was founded in 1968 to advance the consumer interest through advocacy and education. Thank you for holding this hearing and for providing us with the opportunity to speak today.

First, we must applaud you leadership on product safety issues. Your inclusion of language extending the quorum in the *Implementing Recommendations of the 9/11 Commission Act of 2007* was critical to passage of that language which has allowed the agency to operate fully for an additional six months. We also applaud your introduction of S. 2045. This far reaching and comprehensive bill will strengthen the U.S. Consumer Product Safety Commission and give it the tools it desperately needs to protect consumers from unsafe products.

The Consumer Product Safety Commission (CPSC) is the independent federal agency charged with protecting the public from hazards associated with at least 15,000 different consumer products. The Agency was created because the marketplace was not adequately policing itself: litigation and various federal laws were not sufficiently preventing death and injuries from unsafe products. CPSC's mission, as set forth in the Consumer Product Safety Act, CPSC's authorizing statute, is to "protect the public against unreasonable risks of injury associated with consumer products."[1] CPSC's statutes give the Commission the authority to set safety standards, require labeling, order recalls, ban products, collect death and injury data, inform the public about consumer product safety, and contribute to the voluntary standards setting process. CPSC was created to be an agency that acts proactively to protect consumers. Unfortunately, the CPSC's ability to be proactive has been thwarted by a shrinking budget, a lack of aggressive action by the agency, and statutory provisions that create obstacles to the effective prevention of product risks. S. 2045 takes many steps to removing several of these obstacles.

As a framework for discussing some of the most significant provisions of S. 2045, I will focus on CFA's core principles for product safety reform.

**1. Strengthen CPSC**

**A. Increase Budget**

With jurisdiction over many different products, this small agency has a monstrous task. In 1974, when CPSC was created, the agency was appropriated $34.7 million and 786 full-time employees (FTEs.) Now, 33 years later, the agency's budget has not kept up with inflation, its deteriorating infrastructure, its increasing data collection needs, or the fast-paced changes occurring in consumer product development. The CPSC budget has also not kept pace with the vast increase in the number of consumer products on the market. CPSC's staff has suffered severe and repeated cuts during the last two decades, falling from a high of 978 employees in 1980 to just 401 for the 2008 fiscal year. This is the fewest number of FTEs in the agency's 30-year history and represents a loss of almost 60 percent.

[1] Consumer Product Safety Act, 15 U.S.C. 2051, section 2(b)(1).

The President's 2008 budget would provide only $63,250,000 to operate the agency. This represents a reduction of 19 FTEs and a small increase of $880,000 from the 2007 appropriation. This increase does not provide for inflation, fails to allow CPSC to even maintain its current minimal programming, and will not allow for CPSC to invest in its research, resources and infrastructure.

Because of this historically bleak resource picture, CFA is extremely concerned about the agency's ability to effectively prevent and reduce consumer deaths and injuries from unsafe products. It is for this reason that CFA strongly supports Section 3 of S. 2045. This section, entitled, "Reauthorization" sets up an appropriations schedule for CPSC through 2015. It increases budget levels by approximately 10 percent each year, ending in 2014 at just over $140 million. Consumer Federation of America supports these gradual increases, as we believe that these increases are the most effective way to strengthen the agency. We have suggested increases of between 10 and 15 percent each year with an end goal of approximately $140 million. Adjusting CPSC's first budget of $34 million to today's dollars would result in a budget of $140 million. CFA also supports S. 2045's provision that appropriates $20 million in 2009 and 2010 for CPSC's laboratory, as well the $1 million during these two years for research with other agencies related to nanotechnology.

**B. Increase Full-Time Employees**

Section 4 of S. 2045 directs CPSC to increase FTEs to at least 500 by October 1, 2013. While we support this increase of 100 FTEs, we hope that the Subcommittee will consider increasing staffing levels even faster, given the extraordinary product safety challenges the nation is facing. We further support the bill's prohibition of burrowing by political appointees into career positions.

**C. Restore Commission to Five Commissioners**

Section 5, "Full Commission Requirement; interim quorum," restores the Commission to five members, as was originally required in the Consumer Product Safety Act. We support this provision as we believe that additional members would result in a more robust and dynamic Commission that would strengthen and enhance the work of the Commission, thus better serving the public interest. However, we urge that the full Commission only be restored if the Commission's budget and staff are increased as proposed in this bill. We want to ensure that resources will not be taken away from the much needed product safety work conducted by the agency. This provision also includes a temporary quorum provision that would extend the current emergency quorum of two members for nine additional months after this bill is passed. This Subcommittee may wish to extend this emergency quorum to expire once there is a full complement of Commissioners.

**D. Streamline Rulemaking Procedures**

The Consumer Product Safety Act, as amended in 1981, requires CPSC to engage in a three-step rulemaking process that is unnecessarily time-consuming. Section 8, "Rulemaking," makes the Advanced Notice of Proposed Rulemaking (ANPR) process under CPSA voluntary

rather than mandatory. We support this provision as it allows the ANPR process when justified but would also permit expedited rulemaking when necessary. The Subcommittee should consider requiring rulemaking "benchmarks" that require the CPSC to complete the rulemaking process within particular timeframes, or to submit an explanation to Congress as to why these benchmarks cannot be met. Such requirements could expedite the CPSC's glacial rulemaking process, while allowing the agency to exceed recommended benchmarks when justified, as well as provide notice to the public about the time limits for each stage of rulemaking.

**2. Require Independent Third-Party Testing**

To make sure that products are safe when they enter the American and global stream-of-commerce, safety must be infused into the earliest stages of the supply chain. For this reason, independent third-party testing of components, as well as final products, must be required. Third-party testing entities must be independent from and have no financial relationship with the manufacturer producing the product. Testing must be conducted to identify design flaws as well as violations of existing regulations, such as those governing the use of lead paint. Components and final products must be tested at numerous stages of production and tests must be conducted randomly throughout the manufacturing process. Products should also be certified that they meet the appropriate standards and should bear a label indicating that they are certified.

Section 10 of S. 2045, "Third party certification of children's products," amends section 14(a) of CPSA and applies to any manufacturer or private labeler of a children's product that is subject to: 1) product safety standard under CPSA; or 2) or a rule under any act declaring a product a banned hazardous product. This would require testing by non-governmental independent third parties qualified to perform tests and would require that certificates be issued certifying conformity to the applicable safety standard or certifying that the product is not a banned hazardous product. While CFA supports this provision, we believe it is a reasonable compromise to require that products also be certified for compliance with all voluntary standards as well. Further, children's products are defined narrowly, as those designed or intended for use by children under seven years-old. However, recognized authorities such as the American Academy of Pediatrics have recommended that children's products be defined as those intended for children under twelve years-old.

We support the provision in S. 2045 that creates a role for CPSC to play in ensuring that testing laboratories meet a minimum criteria and test to the highest standards. The CPSC is limited by its current budget, staff, expertise, and distance from off-shore manufacturing to engage in product-testing at the earliest stages of the supply chain. However, we believe that a publicly accountable entity should regulate these third-party overseers to set consistent and high standards. Ultimately the responsibility falls on the manufacturers and or importers, many of which are based in the United States, to be more fully engaged in testing and policing the component parts that make up their products, as well as their final products.

**3. Hold Manufacturers, Retailers, and Importers Accountable and Responsible**

Global and American manufacturers, retailers and importers need to take responsibility and be held accountable for safety at every stage of the supply chain. As our economy is becoming increasingly global and the supply chain is becoming more complex with transactions becoming more arms-length, our priority must be that safety never falls through the cracks. Safety should never be "lost in translation" or compromised for a better price.

However, global manufacturers have not been able to comply with existing laws and regulations, such as those banning lead in paint up to .06 percent of weight. While CFA agrees that additional legislation is necessary, such as Senator Pryor's bill requiring independent third-party testing and expanding the ban on lead in all children's products, enforcement mechanisms must be in place to ensure compliance with these laws. Currently, limited enforcement mechanisms are in place. Very low caps exist on the amount of civil penalties the CPSC can assess against an entity in **knowing** violation of its statutes. The current civil penalty is capped at $7,000 for each violation, up to a total of $1.83 million. A "knowing violation" occurs when the importer, manufacturer, distributor or retailer has actual knowledge or is presumed to have the knowledge a reasonable person would have or should have if the person acted reasonably to determine the truth. Knowing violations often involve a company's awareness of serious injury or death associated with its product.

CFA supports completely eliminating this cap on the amount of civil penalties that CPSC can assess. However, we support the reasonable compromise set forth in Section 17 of S. 2045, which increases the cap to $250,000 for each such violation up to a total of $100 million. These new guidelines will encourage manufactures to recall products faster and to comply with CPSC's statutes in a more aggressive way. Importantly, these new civil penalty limits will act as a meaningful deterrent to non-compliance with CPSC's regulations.

Section 17 also deletes one of the more counterintuitive provisions of the CPSA, which requires "receipt of notice of noncompliance" from the Commission before any person could be fined under the criminal penalty provision. Those who violate the law in a criminal manner should not get a free pass for a first violation. We support the removal of this clause and also support the inclusion of jail time for anyone who knowingly commits a prohibited act as defined by CPSC's statutes, as well as the removal of the "willfully" standard for those who authorize any prohibited act, and the inclusion of asset forfeiture as a criminal penalty. Criminal violators of CPSC's regulations must be punished in a meaningful way for criminal behavior as such behavior compromises the health and safety of our nation.

Finally, CFA supports the inclusion of Section 15, **"**Repeated importation offenses," which allows the Commission to identify a repeat offender (after notice and hearing) and to recommend to Customs and Border Protection (CPB) that their import license be terminated. This is a positive step forward; however, this provision could be strengthened by requiring CBP to follow any CPSC recommendations. Further, "multiple violations" should be defined.

**4. Disclosure of Product Safety Information to the Public**

For many years, CFA and other consumer groups have urged Congress to eliminate section 6(b) of the CPSA. This section of the Act restricts CPSC's ability to communicate safety information to the public. Currently, CPSC is required to give a company an opportunity to comment on a proposed disclosure of information. If the company has concerns about the wording or the substance of the disclosure they can object. CPSC must accommodate the company's concerns or inform them that they plan to disclose the information over their objections. The company can then sue the Commission seeking to enjoin them from disclosing the information. Thus, this provision creates a time-consuming process between CPSC and the affected company, often serving to delay or deny any potential disclosure.

Section 7 of S. 2045 regarding "Public disclosure of information" does not delete section 6(b), but rather amends it in numerous ways. This amendment requires that any industry response to the CPSC in these circumstances be provided within 15 days and eliminates the ability of a company to institute a court proceeding to enjoin release of the information CPSC may also attach the manufacturer or other entity's comments as an addendum to the release of public safety information. This section of S. 2045 takes an important step forward by instituting a reasonable time frame for companies to respond to CPSC requests for disclosing information and minimizes the possibility of lengthy and resource-intensive litigation.

However, we would recommend several changes to this provision to make it more effective. First, the new language should apply to prohibited acts under all of CPSC's statutes, not merely the CPSA, so that products and relevant information regulated under different statutes are treated equally. Second, the new language appears to eliminate an existing exception to 6(b) that allows for the disclosure of information relevant to ongoing rulemaking proceedings.

CFA also supports the provision set forth in section 6 of S. 2045, "Submission of copy of certain documents to Congress." CFA, other consumer groups, and members of Congress have been hindered from having access to CPSC's budget requests to the Office of Management and Budget (OMB). Thus, reinstating Section 27(k) of the CPSA which requires the Commission to simultaneously submit budget requests and legislative recommendations to both OMB and to Congress will illuminate what budget the Commission actually requests.

**5. Ban Lead from Children's Products**

As you are well aware, lead has increasingly been found in children's products, including toys, jewelry, lunch boxes, bibs, cribs and other items. Lead has been found in products made by large manufacturers as well as in those made by smaller companies. CFA supports a ban on lead in all children's products, which currently does not exist. While lead in the paint used in children's products is limited to .06 percent by weight of lead (a standard set in the 1970s), there is no mandatory law prohibiting the use of lead in children's jewelry or in other children's products. CFA supports a full ban on the use of lead in children's products other than trace amounts. This is because experts confirm that there is no safe level of lead exposure. Serious, acute and irreversible harm can come to children as a result of exposure to lead. Finally, there is

no justifiable reason why such a dangerous additive should be used in children's products, as safer alternatives almost always exist.

Section 23 of S. 2045 requires that any product not in compliance with this rule is considered a banned hazardous substance, whether or not the lead is accessible to a child. Section 23 defines the ban on lead in three ways: (1) for toy jewelry, any lead content greater than .02 percent by weight violates the standard; (2) for other children's products, anything greater than .04 percent by weight is in violation; and (3) the current ban on lead in paint is changed from .06 percent to .009 percent. For consumer electronics, the bill directs the Commission to promulgate a rule to reduce exposure to and the accessibility of lead in electronic devices. The day after this act takes effect, CPSC is required to begin rulemaking for all products that are covered, to determine whether there should be lower limits for lead than required in the act.

CFA views this provision as a positive improvement over the status quo. However, we note again that experts maintain that there is no safe level of lead. The American Academy of Pediatrics supports a limit of .004 percent by weight of lead for all children's products. We hope to work with the Subcommittee to reduce the acceptable levels of lead even further.

**6. Recall Effectiveness**

**A. Direct-to-Consumer Notification of Recalls**

The ability of CPSC to conduct effective recalls of unsafe products is critical to protecting the public from unreasonable risks associated with consumer products. CFA supports requiring that manufacturers (or distributors, retailers, or importers) of products intended for use by children provide with every product a Consumer Safety Registration Card that allows the purchaser to register information through the mail or electronically. Such information should be used by a recalling company solely to contact the purchaser in the event of a recall or potential product safety hazard. Product Registration Cards are required to be attached to car seats to provide a mechanism to directly notify consumers who purchased a recalled car seat. These methods would be more effective than the current approach, which relies on the media to convey the news of the recall.

Consumers who do not hear of product recalls are at greater risk of tragic consequences, including death or injury. By being dependent upon the media and generic forms of notice to broadly communicate notification of recalls to the public, CPSC and the companies involved are missing an opportunity to communicate directly with the most critical population -- those who actually purchased the potentially dangerous product. Consumer Safety Registration Cards or a similar electronic system would provide consumers the opportunity to provide manufacturers their contact information enabling manufacturers to directly notify consumers about a product recall.

To improve recall effectiveness, CFA recommends that S. 2045 include a provision that amends section 15 of the CPSA to require manufacturers to provide a means of directly communicating information about recalls to consumers through a registration card, electronically or by other means of technology. Manufacturers, retailers, and importers should be required to

report the existence of the recall to retailers and all commercial customers within 24-hours after issuing the recall or warning. All entities within the stream of commerce should be required to post the recall to web sites, if in existence, within 24-hours of the issuance of a recall. We suggest that manufacturers, retailers, distributors, and importers be required to communicate notice of the recall to all known consumers. Retailers, after receiving notice of the recall, should be required to remove the recalled product from their shelves and web site within three business days or by the time of a CPSC recall announcement, whichever is shorter, and to conspicuously post notice of the recall in their stores for at least 120-days after issuance of the recall.

CFA also supports the concept of section 16 of S. 2045, which allows the Commission to prohibit the export of products if they do not comply with any safety standard, are banned as hazardous, or are the subject of a voluntary recall or other corrective action. CFA supports not merely "allowing" the Commission to prohibit export in these circumstances but rather, urges the Subcommittee to "require" the Commission to prohibit the export of such products The export of recalled and hazardous products to other countries should simply be prohibited.

Section 13 of S. 2045, "Corrective Action Plans," requires Commission approval of corrective action plans and defines a standard for what type of plan is in the public interest. We support this provision as it will strengthen CPSC's ability to obtain a recall remedy that is effective and safe.

**B. Bonding**

This summer's recall of tires from an overseas importer highlighted a serious problem: some importers may not be able to afford the costs of conducting a recall if safety hazards exist. If a company is benefiting from the sale of their products in the United States, they must be able to prove that they can cover the costs of a recall. All product sellers, including importers, must be required to post a bond or something equivalent to ensure that recalls could be effectively conducted. CFA supports section 20 of S. 2045, which directs the Commission to promulgate a rule to require manufacturers and others involved in the distribution of a consumer product to post a bond (or something similar that is acceptable to the Commission) to cover the costs of a potential "effective recall," holding the product at port, and or the destruction of the product.

**7. Traceability**

When the product safety net fails and an unsafe product enters the market, it can be difficult to isolate the source of the problem. For example, a problem may have occurred at the manufacturing phase by a subcontractor of a subcontractor. Tracking this down can be incredibly time-consuming and can delay a meaningful corrective action plan. Further, more than one manufacturer may have used the same subcontractor so knowing the source of the safety failure is critical to isolating the problem. Thus, products should contain some type of label, mark or number on a product that would directly indicate the source, date and production group.

Section 14 of S. 2045, "Identification of manufacturer imports, retailers, and distributors," requires manufacturers to submit to CPSC any identifying information, such as the retailer or distributor and all subcontractors. This will help CPSC to more readily identify all of

the segments of the supply chain. In addition, section 11, "Tracking labels for durable products for children," requires indications on product or packaging that enables a consumer to ascertain the source, date, and cohort. This will be useful for consumers as they attempt to identify whether the product they own may be subject to a recall. CFA suggests improving this provision by requiring this information on both the product and the packaging, as packaging materials are often discarded.

**8. Preemption**

In February of 2006, the Draft Final Rule for Flammability of Mattress Sets ("Draft Final Rule") was made available to the public. Consumer groups opposed this Draft Final Rule not because of its substantive requirements but because of the novel language added to the preamble after the notice and comment periods expired that purported to preempt state common law remedies. CFA, therefore supports the concept that Congress should clarify the reach of CPSC's authority to prevent the Commission from usurping well established state regulatory authority and common law claims.

In conclusion, we support the introduction of this legislation as it represents a number of crucial steps forward in improving and strengthening CPSC's ability to protect the public from harmful products. We look forward to working with the Subcommittee to make this bill law.