

## EXPLORING CHANGE: AN ANALYSIS OF THE CONSUMER PRODUCT SAFETY COMMISSION

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### INTRODUCTION

The Consumer Product Safety Commission (“CPSC”) is a federal regulatory agency that is tasked with regulating thousands of products which pose a risk of injury or death to the public.<sup>1</sup> The effects that dangerous consumer products have on the public’s well-being are staggering, and it is estimated that the damage from these products cost more than one trillion dollars annually.<sup>2</sup> To ensure products are safe for public use, the CPSC primarily relies on voluntary standards which are developed by product manufacturers, businesses, or other organizations as opposed to being created by the CPSC itself.<sup>3</sup> This is because the legislature has made it clear that the CPSC is to primarily rely on voluntary standards as opposed to issuing its own mandatory standards.<sup>4</sup> Although the CPSC does have the authority to promulgate mandatory safety standards in the event it is necessary to prevent an unreasonable risk of injury, it generally will only do so if no feasible standard would adequately protect the public.<sup>5</sup> If the voluntary standards in place would eliminate or adequately reduce the risk of injury addressed and it is ‘likely’ that the manufacturers will

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<sup>1</sup> 15 U.S.C.A § 2051(b)(1) (West 1972).

<sup>2</sup> *About CPSC*, U.S. CONSUMER PROD. SAFETY COMM’N., <http://www.cpsc.gov/About-CPSC> (last accessed Oct. 12, 2017) [hereinafter “CPSC About Page”].

<sup>3</sup> *Contact/FAQ*, U.S. CONSUMER PROD. SAFETY COMM’N., <https://www.cpsc.gov/About-CPSC/Contact-Information> (last accessed Oct. 12, 2017) [hereinafter “FAQ Page”].

<sup>4</sup> 15 U.S.C.A § 2056(b)(1) (West 1990).

<sup>5</sup> FAQ Page, *supra* note 3.

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comply with those standards, the CPSC is to refrain from issuing safety standards of its own.<sup>6</sup>

In addition to regulating safety standards, the CPSC is also charged with issuing product recalls when products have violated a mandatory safety standard, or are otherwise defective.<sup>7</sup> The CPSC can technically issue both mandatory and voluntary recalls.<sup>8</sup> Voluntary recalls are more common and involve the CPSC working jointly with the manufacture to implement a voluntary recall of the defective product.<sup>9</sup> In contrast, mandatory recalls are rare and require the CPSC to file an action in district court against the manufacturer of a dangerous product, the product itself, or both, and show that the product is “imminently hazardous.”<sup>10</sup> In association with its claim, the CPSC can pray for such relief as a recall, repair or replacement of the product, or public notification of the risk to the product’s purchasers.<sup>11</sup>

After bringing an action in federal court, the CPSC may also order the manufacturer to cease distribution of the product or to notify all purchasers of the substantial risk the product poses.<sup>12</sup> In addition to filing such action, the CPSC must then initiate a proceeding to promulgate a consumer product safety rule applicable to the product.<sup>13</sup> In assessing whether a product poses a substantial risk, the CPSC relies on disclosures from product manufacturers, and from reports from consumers and consumer organizations.<sup>14</sup>

This Note will explore the CPSC’s effectiveness as a regulatory agency. Under current legislation, the CPSC has several inadequacies which pose problems to the public’s well-being. This Note seeks to explore these limitations and present potential solutions to address them. Part I of this Note will examine the history and founding of the CPSC. Part II will discuss the two most significant changes that have affected the CPSC throughout history. In Part III, this Note will examine the CPSC today, focusing on its

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<sup>6</sup> 15 U.S.C.A. § 2056(b)(1) (West 1990).

<sup>7</sup> FAQ Page, *supra* note 3.

<sup>8</sup> Leslie Cornell, *Product Liability and Internet Prevention: The CPSC Online Consumer Database*, 24 LOY. CONSUMER L. REV. 254, 278 (2011) [hereinafter “The CPSC Online Database”].

<sup>9</sup> *Id.* at 263.

<sup>10</sup> 15 U.S.C.A. § 2061 (West 1990).

<sup>11</sup> 15 U.S.C.A. § 2061(b)(1) (West 1990).

<sup>12</sup> 15 U.S.C.A. § 2064(c)(1) (West 1990).

<sup>13</sup> 15 U.S.C.A. § 2061(c) (West 1990).

<sup>14</sup> 15 U.S.C.A. § 2064 (West 2008).

shortcomings and the effects that these issues have on the public. Finally, in Part IV, this Note will offer proposed solutions which seek to improve the CPSC's regulatory ability.

## I. THE CREATION OF THE CPSC

### A. *Establishing the Commission*

In 1967, Congress passed a joint resolution establishing the National Commission on Product Safety ("NCPS") to conduct a comprehensive study of consumer product hazards.<sup>15</sup> In 1970, the NCPS issued its Final Report and found that consumers were excessively exposed to unreasonable products hazards, and recommended a new federal independent agency be created.<sup>16</sup> This was largely due to the fact that, at the time, consumer product safety was regulated almost exclusively at the state level, causing significant standard discrepancies amongst manufacturers.<sup>17</sup> Thus, in 1972 Congress passed the Consumer Product Safety Act (the "CPSA"), which established the CPSC as an independent regulatory agency with federal jurisdiction.<sup>18</sup>

### B. *Jurisdiction*

Under the CPSA, Congress gave the CPSC expansive jurisdiction to cover most products used by the average consumer.<sup>19</sup> The term "consumer product," of which the CPSC has authority to regulate, was defined to include any "article" produced or distrib-

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<sup>15</sup> Pub. L. 90-146, Nov. 20, 1967, 81 Stat. 466 (as amended by Pub. L. 91-51, Aug. 4, 1969, 83 Stat. 86) available at <http://uscode.house.gov/statutes/pl/90/146.pdf>.

<sup>16</sup> Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 *Geo. Wash. L. Rev.* 32, 36 (1982). (Specifically, the NCPS found that around twenty million people were injured every year as a result of incidents in and around the home, at a cost of over \$5.5 billion) [hereinafter "A Flawed Product"].

<sup>17</sup> Michelle Boyer, *Consumer Product Safety Commission CPSC History*, US RECALL NEWS (May 30, 2008), <https://www.usrecall-news.com/us-consumer-product-safety-commission-cpsc/>.

<sup>18</sup> 15 U.S.C.A. § 2051 (West 1972).

<sup>19</sup> Pub. L. 92-573, Oct. 27, 1972, 86 Stat. 1207 § 3(a)(1) [hereinafter "The Consumer Product Safety Act"] *current version at* 15 U.S.C.A. § 2052(a)(5) (West 2008).

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uted for sale to a consumer for use in a home, school, or for recreation, personal use, or enjoyment.<sup>20</sup> The CPSA also gave the CPSC the authority to enforce existing safety standards which regulated, among other things, hazardous substances, children's toys, and flammable fabrics.<sup>21</sup> With this expansive coverage, it was estimated that ten thousand consumer products and over one million producers and sellers of such products, fell under the CPSC's jurisdiction.<sup>22</sup>

Despite the broad definition of "consumer products," the jurisdiction of the CPSC was not limitless. The CPSA laid out specific products which were excluded from CPSC jurisdiction, including food, drugs, cars, tobacco, and firearms.<sup>23</sup> Most of the excluded products were already regulated by sister agencies, such as the Food and Drug Administration, the Bureau of Alcohol, Tobacco, Firearms, and Explosives,<sup>24</sup> and the Environmental Protection Agency.<sup>25</sup> Additionally, other excluded products were already the subject of heavy federal regulation.<sup>26</sup>

### *C. Organization and Structure*

The CPSC was designed to be run by five Commissioners, one of which headed the agency as the Chairman.<sup>27</sup> All of the Commissioners were to be appointed by the President with the advice and consent of the Senate.<sup>28</sup> Further, the CPSA disallowed the

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<sup>20</sup> *Id.* (By defining it in this all-encompassing manner, the CPSA placed thousands of products under the jurisdiction of the CPSC.).

<sup>21</sup> A Flawed Product, *supra* note 16, at 42-43.

<sup>22</sup> *Id.* at 43.

<sup>23</sup> *Id.*

<sup>24</sup> See *ATF History Timeline*, ATF.GOV., <https://www.atf.gov/our-history/atf-history-timeline> (last accessed Oct. 20, 2017). (The Bureau of Alcohol, Tobacco, Firearms and Explosives was, at that time, just the Bureau of Alcohol, Tobacco, and Firearms. In 2003 the Bureau updated the name to include Explosives.).

<sup>25</sup> A Flawed Product, *supra* note 16, at 43. For a current list of items outside of the CPSC jurisdiction, see *Products Under the Jurisdiction of Other Federal Agencies and Federal Links*, US CONSUMER PROD. SAFETY COMM'N, <https://www.cpsc.gov/Regulations-Laws--Standards/Products-Outside-CPSCs-Jurisdiction/> (last accessed Oct. 20, 2017).

<sup>26</sup> *Id.*

<sup>27</sup> The Consumer Product Safety Act, *supra* note 19 § at 4(a). *Current version* at 15 U.S.C.A. § 2053(a) (West 2011).

<sup>28</sup> *Id.*

CPSC from having more than three Commissioners from the same political party and mandated that a Commissioner may not engage in any other business or employment.<sup>29</sup> The Chairman was to be the principal executive officer of the CPSC, entrusted with total executive power regarding the use and expenditure of funds, the supervision of personnel, and the distribution of business among personnel.<sup>30</sup>

Once elected, the Chairman was given the authority to appoint a variety of officers to join the Commission.<sup>31</sup> The officer positions include the Executive Director, General Counsel, Director of Engineering Services, and Director of Information.<sup>32</sup> Additionally, the Chairman could appoint Associate Executive Directors to head the CPSC's various departments, including Administration, Field Operations, and Administrative Litigation.<sup>33</sup> The Chairman's appointments for these positions were subject to the approval of the Commission.<sup>34</sup> In addition to these personnel, Congress also allowed for a staff of 786 persons with a budget of \$34.7 million.<sup>35</sup> Despite many changes to the CPSC, this organizational structure has remained largely intact throughout the years and will be examined in Part III below.

#### *D. Regulatory Duties and Powers*

At its conception, the CPSC was equipped with a multitude of regulatory duties and powers.<sup>36</sup> It was required to collect and maintain data relating to injuries and deaths associated with consumer products.<sup>37</sup> It was also given the authority to conduct re-

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<sup>29</sup> See *Id.* § 4(c) *current version at* 15 U.S.C.A. § 2053(c) (West 2011).

<sup>30</sup> See *Id.* § 4(f)(1) *current version at* 15 U.S.C.A. § 2053 (West 2011).

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

<sup>32</sup> *Id.* § 4(g)(1).

<sup>33</sup> *Id.* § 4(g)(2).

<sup>34</sup> *Id.* § 4(g)(1).

<sup>35</sup> Katrina Knutson, *Lead in Their Shoes?: The Impact of the Consumer Product Safety Improvement Act on Chinese/American Trade Negotiations*, 31 *HAMLIN J. PUB. L. & POL'Y* 705, 706 (2010) [hereinafter "Lead In Their Shoes"].

<sup>36</sup> The Consumer Product Safety Act, *supra* note 19.

<sup>37</sup> *Id.* § 5(a)(1) *current version at* 15 U.S.C.A. § 2054(a) (West 2008).

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search, studies, and testing regarding the safety of consumer products.<sup>38</sup> Further, the CPSC was given the authority to both recall, and impose safety standards for, its regulated products.<sup>39</sup>

At the onset of the CPSA, the promulgation of mandatory product safety standards appeared to be one of its major functions.<sup>40</sup> In making these standards, the CPSA required the CPSC to utilize persons outside of the agency to develop the initial safety standards.<sup>41</sup> Although this allowed a self-interested manufacturer to create their own proposed safety standard, the CPSC could simultaneously develop its own proposed standard to ensure the safety measures were adequate.<sup>42</sup> This served the dual purpose of allowing businesses to self-regulate legitimately safe products, while conserving regulatory power in the event the voluntary standard was insufficient.<sup>43</sup>

## II. AMENDING THE CPSA

Since its creation, the CPSA has undergone several amendments. Some of the most significant changes were those enacted under the budget cutting Reagan administration in 1981, and in response to large increases of recalled products in 2008.<sup>44</sup> The 1981 amendments brought several limitations to the CPSC, and caused a major shift in the CPSC by forcing it to rely on voluntary standards as opposed to issuing its own.<sup>45</sup> In contrast, when Congress

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<sup>38</sup> *Id.* § 5(b).

<sup>39</sup> *Id.* § 7(a).

<sup>40</sup> Geraint Howells, *The Relationship Between Product Liability and Product Safety—Understanding a Necessary Element in European Product Liability Through a Comparison with the U.S. Position*, 39 WASHBURN L.J. 305, 309 (2000) (providing a general explanation as to the significance of mandatory standards in the conception of CPSC power).

<sup>41</sup> Elliot Klayman, *Standard Setting Under the Consumer Product Safety Amendments of 1981 – A Shift in Regulatory Philosophy*, 51 GEO. WASH. L. REV. 96, 101 (1982) [hereinafter “Standard Setting”].

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

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 98-99 (finding that the 1981 Amendments took away the authority and flexibility the CPSC originally possessed). See also Eileen Flaherty, *Safety First: The Consumer Safety Improvement Act of 2008*, 21 LOY. CONSUMER L. REV. 372, 390 (2009) [hereinafter “Safety First”].

<sup>45</sup> See Pub. L. 97-35, August 13, 1981, 95 Stat. 703, § 7(b) [hereinafter “The 1981 Amendments”] *current version* at 15 U.S.C.A. § 2056 (West 1990).

passed the Consumer Product Safety Improvement Act of 2008, they sought to increase the regulatory effectiveness of the CPSC.<sup>46</sup>

### A. 1981 Amendments

In 1981, Congress passed the Consumer Product Safety Amendments of 1981 (the “Amendments”).<sup>47</sup> These Amendments brought many changes to the CPSC, starting with a significant decrease in size and budget.<sup>48</sup> The Amendments mandated that the CPSC was to rely on voluntary product safety standards and issue mandatory standards only if the CPSC concluded that any proposals to develop voluntary standards would not adequately reduce risk of injury.<sup>49</sup> This new mandate significantly curtailed the CPSC’s ability to issue mandatory product safety standards, which appeared to be the heart of the original Act.<sup>50</sup>

Under the Amendments, the CPSC was forced to rely on voluntary standards or wait lengthy amounts of time for voluntary standard proposals before imposing its own mandatory rule.<sup>51</sup> This allowed manufacturers to simply prolong negotiations with the CPSC, or delay imposition of a voluntary standard to avoid cutting costs.<sup>52</sup> In its final report, the NCPS denounced voluntary standards as an unrealistic solution to the problem of product hazards in the market.<sup>53</sup> This shift was criticized for taking away significant power from the CPSC.<sup>54</sup> It is important to note that prior to these Amendments, the CPSC had long encouraged voluntary industry

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<sup>46</sup> Safety First, *supra* note 44, at 372.

<sup>47</sup> The 1981 Amendments, *supra* note 45, current *version* at 15 U.S.C.A. § 2053 (West 2008). *Cf.* 15 U.S.C.A. § 2053 (West 1972) *supra* note 30.

<sup>48</sup> Barry Meier, *Product Safety Commission is Criticized as Too Slow to Act*, N.Y. TIMES (Sep. 21, 1991), <http://www.ny-times.com/1991/09/21/news/product-safety-commission-is-criticized-as-too-slow-to-act.html?pagewanted=all>. (Under Reagan Administration the CPSC’s budget was sharply cut. In 1991, the fiscal budget was \$37 million, down from \$43.9 million in 1979) [hereinafter “Too Slow to Act”].

<sup>49</sup> Standard Setting, *supra* note 41, at 100.

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

<sup>51</sup> *Id.* at 102 (finding that some manufacturers will likely attempt to delay or prolong negotiations to avoid heightened product costs).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 99. *See also* Pub. L. 90-146, *supra* note 15.

<sup>54</sup> *Id.* at 98.

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standards as the most effective means of consumer protection.<sup>55</sup> However, before the Amendments, the possibility of issuing mandatory standards incentivized manufacturers to both offer legitimate proposals of voluntary standards and to comply with those standards.<sup>56</sup>

After these substantial changes, the CPSC faced a twofold problem: (1) that an industry may propose inadequate voluntary standards, or (2) that an industry would simply ignore these standards.<sup>57</sup> The effects of these changes were significant: between 1978 and 1982, the rate of injuries per 100,000 Americans declined by 24%; but between 1982 and 1988 it only declined a mere 9%.<sup>58</sup> Thus, by slashing the CPSC's budget, staff, and regulatory powers, the Amendments severely diminished the CPSC's effectiveness, allowing many dangerous products to enter the public stream of commerce.<sup>59</sup>

*B. Consumer Product Improvement Act of 2008*

In 2008, in response to rising consumer hazards, Congress passed the Consumer Product Improvement Act of 2008 (the "CPSIA").<sup>60</sup> This was largely in response to an especially burdensome recall year in 2007, which some dubbed "the year of the recall."<sup>61</sup> In 2007, there were a record 473 recalls by the CPSC alone, with an estimated 30 million potentially hazardous children's toys pulled from the stream of commerce.<sup>62</sup> Interestingly, unlike most prior years, in 2007 the products recalled included both inexpensive products and high-end brands alike.<sup>63</sup> Many of these toys came from China,<sup>64</sup> implicating international concerns which will be addressed in Part III below.

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<sup>55</sup> *Id.* at 101.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 100.

<sup>58</sup> Too Slow to Act, *supra* note 48.

<sup>59</sup> *See Id.*

<sup>60</sup> *The Consumer Product Safety Improvement Act (CPSIA)*, U.S. CONSUMER PROD. SAFETY COMM'N., <https://www.cpsc.gov/Regulations-Laws--Standards/Statutes/The-Consumer-Product-Safety-Improvement-Act/> (last accessed Oct. 20, 2017).

<sup>61</sup> Lead In Their Shoes, *supra* note 35, at 380.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*



When these hazards began garnering national attention, Congress responded by passing the CPSIA, in a bipartisan effort.<sup>65</sup> The CPSIA was designed to overhaul the CPSC by releasing safer products for consumers, particularly children's products.<sup>66</sup> This overhaul created new regulatory duties, expanded on prior powers, and increased both the staff size and budget of the CPSC.<sup>67</sup> In order to foster public outreach, the CPSIA created an online database which allowed consumers to access reports of injuries and deaths associated with consumer products.<sup>68</sup> This database was useful as it provided consumers, particularly parents, with a simple way to determine whether a product or toy they purchased was potentially hazardous.<sup>69</sup>

Another significant change was to expand the CPSC's authority to ban products from the stream of commerce. After the CPSIA, when the CPSC was confronted with a substantially hazardous product, the CPSC could order the manufacturer to cease distribution of the product, notify all sellers to cease distribution, or notify each known purchaser of the substantial risk.<sup>70</sup> The CPSC would first have to afford the parties a hearing before issuing an order.<sup>71</sup> Nevertheless, this expansion of authority was crucial, as it allowed the CPSC to ban products from public consumption after they were identified to be substantially risky, or to otherwise notify consumers so they could take proper action, as opposed to issuing a mandatory recall.<sup>72</sup> This was of particular importance, as issuing a mandatory recall required the CPSC to first file an action in district court against the manufacturer or product.<sup>73</sup>

The CPSC was also given expanded powers when regulating products deemed to be "imminently hazardous," which were

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<sup>65</sup> Safety First, *supra* note 44, at 372.

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

<sup>67</sup> *Id.* at 386.

<sup>68</sup> 15 U.S.C.A. § 2055(a) (West 2008) *current version* at 15 U.S.C.A. § 2055(a) (West 2011).

<sup>69</sup> The CPSC Online Database, *supra* note 8, at 260.

<sup>70</sup> International Quarterly, *Requirements Under the CPSIA*, 22 No. 4 INTL. QUARTERLY ART 2010 [hereinafter "International Quarterly"]. (the CPSIA expanded the definition of "substantial product hazard" to include failing to comply with a similar rule under any CPSC enforced act). *See also* 15 U.S.C.A. § 2064(c)(1) (West 2008).

<sup>71</sup> 15 U.S.C.A. § 2064(f) (West 2008).

<sup>72</sup> 15 U.S.C.A. § 2064(c)(1) (West 2008).

<sup>73</sup> § 2061, *supra* note 10.

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reaffirmed under the CPSIA.<sup>74</sup> The legislature defined an imminently hazardous product as “a consumer product which presents imminent and unreasonable risk of death, serious illness, or severe personal injury,” thus providing the CPSC with heightened authority to regulate products that are especially dangerous and not merely risky.<sup>75</sup> When a product is determined to be imminently hazardous, the CPSC can file an action against the manufacturer and seek a variety of judicial orders.<sup>76</sup> Similar to its ability to regulate substantial risks, the CPSC can pray for judicial relief in the form of notifying purchasers or the public of the product risk, repairing or replacing the product, refunding the product, or recalling the product.<sup>77</sup> Therefore, the CPSC was given the authority to constrain sales of substantially risky products, and had the ability to seek judicial approval for a mandatory product recall in the event those products were determined to be imminently hazardous.<sup>78</sup>

The CPSIA also provided a variety of other changes which would prove beneficial. The bill authorized CPSC funding, nearly doubling the funding it received prior to the bill’s passing.<sup>79</sup> Additionally, the CPSC could require a manufacturer of a substantially risky product to repair the product or issue a refund to those who purchased it.<sup>80</sup> Similar to the CPSC’s power to ban products, this requirement can only be imposed after affording an opportunity for a hearing.<sup>81</sup> The CPSA also required manufacturers of children’s toys to certify that their toys were tested by a credible third party, in compliance with the applicable standards.<sup>82</sup> All of these changes remain largely in effect today.

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<sup>74</sup> 15 U.S.C.A. § 2061 (West 1990), *cf.* 15 U.S.C.A. § 2064 (West 2008).

<sup>75</sup> 15 U.S.C.A. § 2061(a) (West 1990).

<sup>76</sup> *Id.* § 2061(b).

<sup>77</sup> *Id.* § 2061(b)(1).

<sup>78</sup> The CPSC Online Database, *supra* note 8, at 257.

<sup>79</sup> The CPSC Online Database, *supra* note 8, at 260.

<sup>80</sup> 15 U.S.C.A. § 2064(d)(1) (West 2008).

<sup>81</sup> *International Quarterly*, *supra* note 70.

<sup>82</sup> 15 U.S.C.A. § 2063(a)(2) (West 2008). This does not confer authority to the CPSC to test these products.

## III. CPSC TODAY – LIMITATIONS, EFFECTS AND CRITICISMS

A. *The CPSC Today*

Today, the CPSC's commission consists of Chairman Ann Buerkle and Commissioners Robert Adler, Marietta Robinson, Elliott Kaye, and Joseph Mohorovic.<sup>83</sup> It is headquartered in Bethesda, Maryland, and has regional offices in Chicago, New York, Washington D.C. and California.<sup>84</sup> According to the CPSC's most recent census employee survey, the staff size is currently 491 persons.<sup>85</sup> In 2016, Congress appropriated \$125 million to the CPSC's budget.<sup>86</sup> Although the staff size has increased since 2008, this amount is still significantly less than the 786 employees initially provided for by Congress in passing the CPSA in 1972.<sup>87</sup>

Under the CPSIA, the penalties for violating the CPSA increased from a maximum of \$8,000 to \$100,000 for an individual violation.<sup>88</sup> Additionally, these fines were raised for manufacturers who commit a series of violations, with a maximum civil penalty of \$15 million.<sup>89</sup> Today, the CPSC can impose broader penalties on manufacturers who violate safety standards, thereby deterring noncompliance with such standards. In terms of public outreach, the CPSC has expanded its capabilities with the creation of its online database and use of the Internet and social media to inform

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<sup>83</sup> *Commissioner Biographies*, U.S. CONSUMER PROD. SAFETY COMM'N, <https://www.cpsc.gov/About-CPSC/Commissioners> (last accessed Oct. 19, 2017); *See also Chairman*, U.S. CONSUMER PROD. SAFETY COMM'N, <https://www.cpsc.gov/About-CPSC/Chairman/Buerkle-Biography> (last accessed Oct. 12, 2017).

<sup>84</sup> *Consumer Product Safety Commission (CPSC)*, CONSUMER SERVICES GUIDE, [http://www.consumerservicesguide.org/articles/csg\\_consumer\\_product\\_safety\\_commission\\_cpsc](http://www.consumerservicesguide.org/articles/csg_consumer_product_safety_commission_cpsc) (last accessed Oct. 12, 2017).

<sup>85</sup> *2017 Federal Employee Viewpoint Survey*, U.S. CONSUMER PROD. SAFETY COMM'N, <https://www.cpsc.gov/s3fs-public/2017FederalEmployeeViewpointSurveyResults.pdf.pdf?JuEQ2qNr2V2cUcfKreF4GskRXg52f8eq>.

<sup>86</sup> *Agency Financial Report*, U.S. CONSUMER PROD. SAFETY COMM'N, <https://www.cpsc.gov/s3fs-public/2016AgencyFinancialReport-Final1.pdf>. (Nov. 15, 2016).

<sup>87</sup> *Id.*

<sup>88</sup> *International Quarterly*, *supra* note 70.

<sup>89</sup> *See Id.* (this was a significant raise from the prior amount of \$1.825 million).

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consumers of high-risk products.<sup>90</sup> Despite these advances, the CPSC is still plagued with many shortcomings which hinder its ability to advance its mission.

*B. Improper Reliance on Voluntary Standards*

The CPSC still relies on voluntary standards, as first prescribed under the 1981 Amendments.<sup>91</sup> This reliance is contrary to the findings of the NCPS, which led to the establishment of the CPSC.<sup>92</sup> The CPSC has taken the position that voluntary standards are faster and cheaper than mandatory standards, while offering similar protections.<sup>93</sup> However, reliance on these standards poses several issues.

First, as a practical matter, reliance on voluntary standards gives the self-interested manufacturer the power to control the quality and extent of a product's safety features, as they are the ones primarily tasked with developing the voluntary standard.<sup>94</sup> Although the CPSC has to approve voluntary standards, this still places the manufacturer in a better position to circumvent safety measures in lieu of lower costs.<sup>95</sup> Furthermore, developing these standards typically involves a lengthy process that can take months or even years.<sup>96</sup> However, until a safety standard is in existence, the CPSC is unable to impose a mandatory standard unless it determines that compliance with a voluntary standard would not eliminate or adequately reduce the risk of injury.<sup>97</sup> This approach renders the CPSC virtually powerless until such time as the proposed voluntary standard comes into fruition.<sup>98</sup>

It is true that the CPSC may promulgate a mandatory ban on certain products that are deemed hazardous, even in the absence of a standard.<sup>99</sup> Yet this power is only operational in the event the product is so dangerous that no feasible voluntary or

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<sup>90</sup> *Recall Handbook*, U.S. CONSUMER PROD. SAFETY COMM'N, at 18-19 (Mar. 2012), <https://www.cpsc.gov/s3fs-public/8002.pdf>.

<sup>91</sup> Too Slow to Act, *supra* note 48.

<sup>92</sup> Standard Setting, *supra* note 41.

<sup>93</sup> The CPSC Online Database, *supra* note 8, at 263.

<sup>94</sup> Standard Setting, *supra* note 41, at 101.

<sup>95</sup> *Id.*

<sup>96</sup> The CPSC Online Database, *supra* note 8, at 264.

<sup>97</sup> 15 U.S.C.A. § 2056 (West 1990).

<sup>98</sup> Standard Setting, *supra* note 41.

<sup>99</sup> 15 U.S.C.A. § 2057 (West 1981).

mandatory standard would adequately protect the public from an unreasonable risk of injury.<sup>100</sup> Consequently, many potentially hazardous products may still be sold to consumers while awaiting voluntary standard development, many of which are moderately risky and could feasibly become safer with the issuance of a voluntary or mandatory safety standard.<sup>101</sup> Moreover, while the CPSC still retains the ability to ban products that are “substantially”<sup>102</sup> or “imminently”<sup>103</sup> hazardous, this retrospective power still allows for hazardous products to slip through the cracks and into the hands of consumers.<sup>104</sup> These shortcomings have led some scholars to view the regulatory state of products liability as being, “treated with kid gloves.”<sup>105</sup>

### C. International Concerns

Perhaps the most challenging issue of the CPSC today lies in the international concerns involving foreign manufacturers, particularly those in China. In 2008, when the CPSC documented a record 563 voluntary recalls, 85% of these products were imported, with a majority of the imports coming from China.<sup>106</sup> As one scholar wrote, “without question, the CPSIA owes its very existence to the failures of American toy designers, Chinese toy man-

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> 15 U.S.C.A. § 2064 (West 2008).

<sup>103</sup> 15 U.S.C.A. § 2061 (West 1990).

<sup>104</sup> *CPSC Sues Star Networks USA Over Hazardous, High-Powered Magnetic Balls and Cubes*, U.S. CONSUMER PROD. SAFETY COMM’N, <https://www.cpsc.gov/content/cpsc-sues-star-networks-usa-over-hazardous-high-powered-magnetic-balls-and-cubes> (last accessed Nov. 5, 2017) [hereinafter “CPSC Sues Star Networks”]. (In 2012 for example, the CPSC sued several manufacturers of children’s magnets seeking a mandatory recall after repeated children’s injuries. One manufacturer previously agreed to issue a voluntary recall, but then reversed its decision and refused to comply with the CPSC’s voluntary request.)

<sup>105</sup> John C.P. Goldberg & Benjamin C. Zipursky, *The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell*, 123 HARV. L. REV. 1919 (2010).

<sup>106</sup> Scott D. McBride, *Something Wicked This Way Comes: The United States Government’s Response to Unsafe Imported Chinese Toys and Subsidized Chinese Exports*, 45 TEX. INT’L. L.J. 233, 237 (2009) [hereinafter “Something Wicked This Way Comes”].

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ufacturers, and to a certain extent, the Chinese government's ineffective enforcement of its laws.<sup>107</sup> It is important to note that the CPSC is not the only agency that struggles with these international concerns.<sup>108</sup>

One issue affecting the CPSC regarding Chinese manufacturing is the simple fact that the CPSC has no statutory authority to force Chinese factories to open their doors to U.S. inspectors.<sup>109</sup> Without being able to physically inspect the premises, it is almost impossible to effectively regulate these products, as it is unknown whether or not the products were made in compliance with the applicable voluntary or mandatory safety standards.<sup>110</sup> In essence, absent some sort of physical, overseas presence, it is simply impossible to provide the same level of risk management that could be provided from a U.S. manufacturer.<sup>111</sup>

Another issue is that the CPSC lacks the manpower to staff permanent, full-time inspectors at all U.S. ports receiving foreign consumer imports.<sup>112</sup> Notably, in 2009 the CPSC only had a presence inspecting imported consumer products at nine out of 326 ports granting entry to products into the U.S.<sup>113</sup> The CPSC does not independently test these imports as they come in, which means the consumer must essentially rely on good-faith assurances from foreign manufacturers that the products being imported were produced under applicable safety standards. This belief is based on limited assurances of actual proof.<sup>114</sup> Because of the mass amounts of imports coming in from foreign manufacturers, particularly China, this poses a demonstrable problem to the CPSC's mission. Without more proactive measures, the CPSC is only able to effectively regulate hazardous foreign products after they are already in the stream of commerce.

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<sup>107</sup> *Id.* at 236.

<sup>108</sup> Kayla Webley, *List of Problem Chinese Imports Grows*, NPR.ORG. (Jul. 10, 2007), <http://www.npr.org/templates/story/story.php?storyId=11656278>. (At this time the FDA had a similar Chinese-product recall experience, recalling among other things, certain fish, pet food, and toothpaste.)

<sup>109</sup> Something Wicked This Way Comes, *supra* note 106, at 236.

<sup>110</sup> *Id.* at 246.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 247.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (Although for children's toys the CPSC now requires mandatory third-party testing, it still does not provide for independent testing. *See id.* at 251-252.)

*D. Public Risk and Effects*

Products regulated by the CPSC pose significant effects on the public. For example, the CPSC estimates that the deaths, injuries and property damage associated with consumer products cost the nation over \$1 trillion per year.<sup>115</sup> Every year since 1985, the number of deaths associated with consumer products reaches the thousands.<sup>116</sup> Between October of 2014 and September of 2015, there was an estimated 11.6 million people who received emergency medical treatment for injuries associated with the use of consumer products.<sup>117</sup> These statistics do not necessarily mean that the injuries or deaths were caused by defective or hazardous products, but nonetheless illustrate the significance that consumer products have on the public's well-being.<sup>118</sup>

The number of products that have been recalled remains consistently high. In 2016, for example, the CPSC effectuated 428 recalls,<sup>119</sup> 100% of which were voluntarily completed by the manufacturers in cooperation with the CPSC.<sup>120</sup> This finding suggests that while mandatory recalls are an important power, in most cases manufacturers are willing to comply with the CPSC and issue a voluntary recall if a product has a legitimate defect or otherwise presents a substantial risk to the public. With the implementation of increased penalties, manufacturers are more likely to cooperate with the CPSC.<sup>121</sup> However, it is important to note that in the fu-

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<sup>115</sup> CPSC About Page, *supra* note 2.

<sup>116</sup> 2016 Annual Report to the President and Congress, U.S. CONSUMER PROD. SAFETY COMM'N (2016), at 3, [https://www.cpsc.gov/s3fs-public/CPSC\\_FY16\\_Annual\\_Report.pdf?DsHsl4ravzs3IcO8aSlqcVEda06m7d\\_X](https://www.cpsc.gov/s3fs-public/CPSC_FY16_Annual_Report.pdf?DsHsl4ravzs3IcO8aSlqcVEda06m7d_X). [hereinafter "Final Report"]. (According to the CPSC's Annual Report to Congress, in 2013 there were 3,990 deaths related to consumer products.) See *Consumer Product-Related Injuries and Deaths in the United States: Estimated Injuries Occurring in 2010 and Estimated Deaths Occurring in 2008*, U.S. CONSUMER PROD. SAFETY COMM'N (Feb. 2012), at 7, <https://www.cpsc.gov/PageFiles/134720/2010injury.pdf>

<sup>117</sup> Final Report, *supra* note 116, at 6.

<sup>118</sup> *Id.* (The Final Report is based on injuries associated with product liability, not necessarily caused by them.).

<sup>119</sup> *Id.* at 18.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 20. (The CPSC also accepted four civil penalty settlements

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ture, manufacturers may still refuse to implement voluntary recalls, which could result in lengthy judicial battles to determine whether the product(s) should be recalled.<sup>122</sup>

#### IV. PROPOSED SOLUTIONS

The effects of dangerous consumer products entering the stream of commerce are significant. In order to effectively regulate consumer products, the CPSC must be given appropriate tools and authority to achieve its mission. Similarly, the CPSC must also be given an increased staff and budget in order to properly maintain a safe consumer market.

##### *A. Reliance on Mandatory Standards*

This Note proposes a solution to grant the CPSC the authority to impose mandatory safety standards, subject to certain distinctions. First, the same organizations and manufacturers who develop voluntary product standards today will still be afforded the opportunity to present such standards to the CPSC. However, in order to avoid lengthy proposals, cost-cutting, or other potential limitations, the CPSC should have the authority to propose its own mandatory rule before a voluntary standard is developed. In preparing these mandatory rules, the CPSC should rely on assistance from outside organizations and manufacturers. However, it should be clear that the CPSC does not need to rely on these voluntary proposals, and should have the independent authority to promulgate its own rules. This was a crucial function of the CPSC under the findings of the NPSC which led to its founding and it should be restored to its original purpose.<sup>123</sup>

In order to maintain a proper balance between regulatory authority and economic growth, manufacturers should have the right to petition the CPSC and present their own voluntary standards. These voluntary standards could then replace the CPSC's own standards in the event the CPSC determined them to be sufficiently safe. Under this arrangement, manufacturers would retain the ability to implement cost-saving measures regarding their products, while ensuring that the products are safe for the public.

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from manufacturers in 2016, totaling roughly \$28 million).

<sup>122</sup> CPSC Sues Star Networks, *supra* note 104.

<sup>123</sup> Standard Setting, *supra* note 41, at 99.



In the event the CPSC found the voluntary standard to be insufficient, or if the manufacturer believed a CPSC standard to be overbearing or excessive, the legislature could provide an avenue for the manufacturer to file an action in federal court to seek judicial review. Then, the judiciary would have the ability to assess whether the voluntary standard presented by the manufacturer was adequately safe such that it could replace the CPSC's standard. Alternatively, the judiciary could determine whether a CPSC standard was overbearing in light of other, more efficient standards that have been proposed by the industry. In either case, the goals of the regulatory scheme are being fulfilled: the products are ensured safe, and the businesses may still implement cost-saving strategies. The distinction is that this regulatory balance correctly places the burden on the manufacturer rather than the regulatory agency.<sup>124</sup>

### *B. Foreign Inspections in Major Chinese Factories*

As discussed above, a major shortcoming associated with consumer products liability in the United States is a result of foreign imports, such as China.<sup>125</sup> To combat this issue, this Note proposes two changes. The first is for Congress to grant the CPSC the authority to inspect certain Chinese manufacturers or factories. The second is to adequately staff personnel at ports which receive imports of consumer products from foreign nations.

By allowing the CPSC to conduct testing of Chinese factories, it is likely that the number of recalls would decrease significantly. Due to the international jurisdictional concerns, a measure of this magnitude would likely need to be implemented in conjunction with the Chinese government.<sup>126</sup> This would require Congress or the Executive Branch to work with China in implementing this measure, as it would necessarily involve CPSC personnel gaining entry onto Chinese soil, and specific manufacturer's facilities. It would also undoubtedly require coordination and agreement between both governments as to the number of authorized personnel allowed for inspection, the limits of the inspector's authority and scope of their entry, and a scheme for determining which factories

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<sup>124</sup> *Id.*

<sup>125</sup> Something Wicked This Way Comes, *supra* note 106, at 237.

<sup>126</sup> Lead in Their Shoes, *supra* note 35, at 732. (The US government must determine the best course of action to invite Chinese cooperation to resolve the problem of harmful foreign consumer products.).

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to inspect. However, given that such a large number of recalls involve Chinese products, there is no reason to not undertake this effort.<sup>127</sup>

Another concern is the fact that it would be impossible for the CPSC to visit every single foreign manufacturing facility.<sup>128</sup> With this in mind, it would be sensible to base inspections on a manufacturer's prior product defects, the number of units entering the stream of commerce from that factory, or particularly risky products such as children's toys.<sup>129</sup> It is interesting that the CPSIA was passed largely in response to hazardous Chinese toys, and yet the legislature failed to adequately address the specific issue of foreign manufacturers in their overhaul.<sup>130</sup> Although the overhaul required third-party testing for children's toys, it still did not provide for independent testing which gives manufacturers considerable leeway in achieving compliance.<sup>131</sup> What is more interesting is that imports from Chinese manufacturers actually increased in 2008.<sup>132</sup> By maintaining a general, or even minimal presence in Chinese factories, it would incentivize compliance with standards, as non-compliance could otherwise result in strict penalties.<sup>133</sup> In short, an overseas presence would make foreign manufacturer's compliance with CPSC standards cheaper, more convenient, or both.

*C. Sample Testing at Port*

The second important solution is to increase CPSC personnel at ports which receive foreign shipments of consumer products. Before allowing these products into the stream of commerce, certain reasonable testing should be applied at port to prevent such basic and hazardous issues like lead paint on children's toys.<sup>134</sup> This is not to suggest that testing should be mandatory on every single shipment of goods, however, reasonable sample testing

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 265.

<sup>129</sup> *Id.*

<sup>130</sup> *Lead In Their Shoes*, *supra* note 35, at 734. (“[A] domestic law has little impact overseas without an agreement to enforce its provisions.”).

<sup>131</sup> 15 U.S.C.A. § 2063(a)(2) (West 2008). (Testing of children's toys requires a third party to issue a certificate that the product conforms to all applicable rules.).

<sup>132</sup> *Id.* at 271.

<sup>133</sup> *International Quarterly*, *supra* note 70.

<sup>134</sup> *Something Wicked This Way Comes*, *supra* note 106, at 239.

would ensure a minimal degree of safety, while simultaneously incentivizing manufacturers to comply with the enacted standards.<sup>135</sup> If they failed the inspection, the goods would have to be sent back or could be halted at port until a more thorough examination could be conducted depending on the results of the inspection.

Reasonable sample testing of foreign products would likely decrease the number of manufacturing defects that enter the U.S. consumer market. Many of the product recalls from foreign countries are the result of a manufacturing defect, as opposed to a design flaw.<sup>136</sup> Thus the hazardous products which have historically entered our consumer market could have theoretically been detected beforehand with sample testing, which would send a clear message to manufacturers to stop trying to outwit the system and instead produce safe products.<sup>137</sup>

#### *D. Increase Staff and Budget*

The final, and perhaps most crucial solution, is to further increase the staff and budget of the CPSC in order to carry out the aforementioned changes. When founded, the CPSC had a staff that was roughly one and a half times larger than that of today. Thus, despite the CPSIA overhaul, the limited budget and staff concerns that were implemented in the 1981 Amendments still appear to be alive today. Simply put, in order to effectively regulate the consumer market, the CPSC needs more staff.

The CPSC regulates over 15,000 products.<sup>138</sup> Yet with a staff of roughly 500, the agency is unable to adequately address all of these products.<sup>139</sup> The same budgetary and personnel issues have plagued the CPSC throughout its history.<sup>140</sup> Between regulating their website, responding to consumer and manufacturer reports,

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<sup>135</sup> *Id.*

<sup>136</sup> *See Id.* (A manufacturing defect generally means the product is defective because of the way in which it was produced. A design defect on the other hand, means the product is defective because of the way in which it is designed.).

<sup>137</sup> *Id.* at 241.

<sup>138</sup> The CPSC Online Database, *supra* note 8, at 257.

<sup>139</sup> *See Id.* at 258 (Quoting former Chariman Inez Tenenbaum as saying “the continued lack of sufficient funding and staff was beginning to make it nearly impossible for the [CPSC] to accomplish even the minimum that is required of a health and safety agency.”).

<sup>140</sup> *Id.*

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assessing and imposing recalls, working with manufacturers to develop voluntary standards, and their other various duties, the CPSC does not have the ability to adequately regulate the consumer market.

#### CONCLUSION

Over time, the CPSC has proved itself an invaluable public agency for detecting and removing dangerous products from public use. Despite the apparent increases in power granted in the CPSIA of 2008, the CPSC is still inundated with many issues that legislation simply has not addressed. Particularly troubling is the CPSC's forced reliance on voluntary standards as opposed to mandatory standards. Furthermore, the hazards from risky products coming from foreign manufacturers have increased with little potential for adequate change under the current regulatory scheme. Absent additional powers, the CPSC is limited to a reactive approach in dealing with these risky products, which causes risk of injury or death to the U.S. consumer. In short, the CPSC is a necessary and beneficial agency. Congress should simply give it the tools it needs to effectively regulate the consumer market.