

Total Recall:

The Need for CPSC Reform Now



A Report By

NCPIRG

— Standing Up
To Powerful Interests

Along With:

Consumer Federation of America

Consumers Union

Kids in Danger

National Research Center for Women & Families

Public Citizen

July 2008

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A report by the following non-profit, non-partisan consumer and public health organizations.

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Summary and Introduction

Summary: The year 2007 was called the year of the recall. But in 2008, recalls are up, according to Consumer Product Safety Commission (CPSC) data. Already, as these data show, more toys and children's products have been recalled in the first half of this year than in the first half of last year, a supposed "100-year-flood" period. Yet the remedial CPSC reform legislation passed overwhelmingly by both the House and Senate in response to that 2007 recall wave has yet to become law. It is stalled in conference committee, where both the toy and chemical industries seek to block, weaken or delay some of its most critical reforms. This report explains why Congress needs to enact a strong final law that includes all of these key uncompleted reforms¹ -- a new toy standard that requires mandatory safety testing for toys, a ban on toxic phthalates and whistleblower protections -- while rejecting industry's eleventh-hour demands to add new and unprecedented limits on state authority to enforce and enact product safety laws.

Introduction: Beginning in the spring of 2007, a wave of recalls of children's products and toys² sparked renewed interest in product safety reform and in reauthorizing the moribund CPSC for the first time since 1990. One year ago, the agency's budget of less than \$63 million was less than half what it would have been (\$145 million) had it simply been updated for inflation since its 1973 establishment. Its staff in 2007, at about 400 FTEs, was again less than half its peak staffing level in 1980. For much of 2007 it operated without a legal quorum; it could conduct voluntary recalls, but do little other business. Yet the tiny agency was and is nevertheless responsible for the safety of over 15,000 separate consumer products, ranging from coffee makers and home appliances to chain saws, escalators and children's products, including toys.

In response, Congress first raised the CPSC budget significantly for this and next year while it considered broader reform legislation. Both the House and Senate developed and passed comprehensive CPSC Reform Act proposals, which are now in conference committee. In June 2008, the committee announced agreement on 21 consensus provisions, including greater authority over import safety and recall authority, and an increase in civil penalty authority. On July 17, the committee met and announced agreement on nine more items, including an important new provision establishing a public database of potential hazards, a new state Attorneys General enforcement provision and another establishing new lower limits for lead exposure. Significant additional funding increases are also expected to be approved for future years, if final action is completed this year.

At this point, however, several critical reforms remain unfinished, although the conference committee may meet again formally this week. Some of these critical reforms are the subject of massive efforts by the toy industry and the chemical industry, including Exxon-Mobil, to weaken them or delete them from the conference report and the final law. This report first explains why action must take place this year and then outlines those remaining unfinished provisions and why they are critical to reform efforts.

Section 1 of the report documents the continuing rise in product recalls and why action must be taken to finalize the legislation. The remaining sections outline the critical reforms still unresolved.

Section 2: Mandatory toy testing. Section 2 of the report explains the need for incorporating industry's voluntary toy standard, known as ASTM F-963,³ as a mandatory pre-market toy testing standard. Without this provision, numerous significant toy hazards prominently highlighted in 2007 would not be subject to the new law's anticipated centerpiece provision -- its requirement that all hazards subject to mandatory CPSC rule be subject to independent third party testing and certification. **It would be an ironic and unacceptable outcome if a new CPSC reform law, which was driven by waves of toy recalls, did not expand the CPSC's authority to protect children from dangerous toy hazards.** The Senate bill includes this provision; the House bill does not.

Section 3: Ban Toxic Chemicals. Section 3 of the report explains the need to ban the class of toxic chemicals known as phthalates from children's products. California and other states have already acted. The Senate bill includes language that would ban six common phthalates, while the House bill is silent.

Section 4: No More Limits On State Authority. Section 4 of the report describes why industry's effort to prevent states from enacting additional consumer protections is unacceptable. The underlying Consumer Product Safety Act -- which the reform proposals will amend -- already generally establishes federal uniformity and preempts most state action. Where they have had the freedom to act, the fifty states have performed important product safety work on phthalates and other chemicals, lead and other chemicals, recalls, and other areas. The states are an important cop on the consumer safety beat. Industry continues, however, to demand more limits, including on the new, unproven third party testing requirement expected to become law.

Section 5 describes how adding whistleblower protections for private and public-sector workers will also add product safety protections for American families.

Last week, the conference committee met and approved one of our other remaining priority reforms. It established a public right-to-know database of potential hazards reported to the CPSC by consumers, first responders, doctors and others. Both the Food and Drug Administration (FDA) and the National Highway Traffic Safety Administration (NHTSA) have had similar databases online already. While the Consumer Product Safety Act still allows manufacturers too much control over public release of information they have provided about their products (generally, no information can be released to the public until and unless an actual recall or other remedial action is announced), the new database will aggregate information about potential hazards obtained from doctors, hospitals, firefighters and consumers themselves (but not from company reports). These incident reports will be available to the public in a searchable database. We are pleased to see the addition of this provision in the final legislation.

SECTION 1. Recalls Continue In 2008: Time For Action Is Now

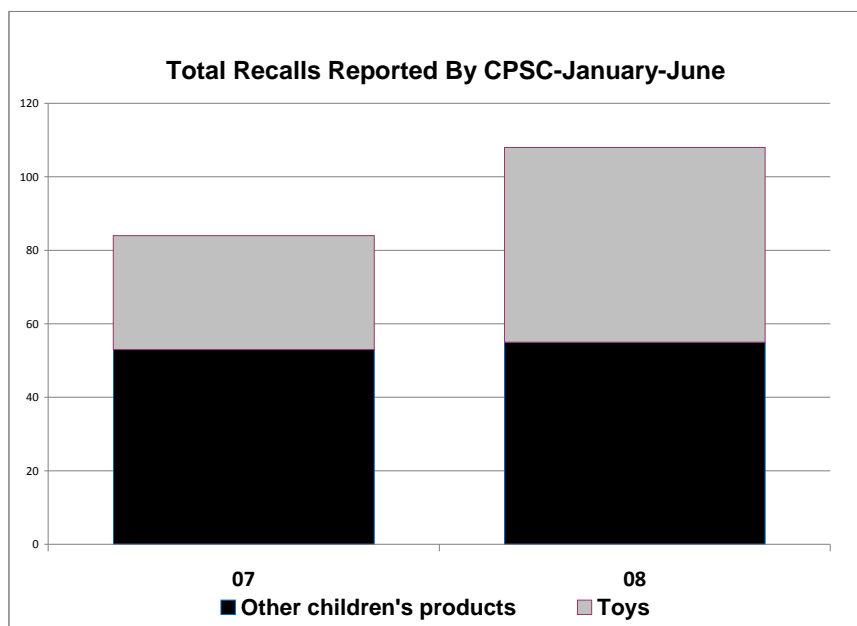
In 2007, child product recalls reached an all time high with 231 recalls of 45 million toys and other children's products.⁴ Twelve of the recalls involved over one million units, causing the media to dub 2007 the Year of the Recall. Over 30 million of the recalled units were toys. Popular toy manufacturers, such as Mattel, were forced to recall millions of units due to problems associated with their products' lead paint violations or dangerous small magnets.

While last year's toy recalls provoked Congress to begin steps to reauthorize and strengthen the CPSC, new data suggest that the toy problem has not abated.

We looked at the most recent data for this report. In the first six months of 2008, according to our analysis of available CPSC recall notices, 108 children's products were recalled, including 45 for lead contamination and 10 for hazardous magnets. Of those 108 products, fifty-three toys have been recalled this year already, totaling 6.2 million units. Last year by June, there had been only 84 children's product recalls, which included 31 toy recalls.

The increase suggests strongly that what the toy industry called "last year's problem" remains very much **today's** problem, and points to the urgent need for Congress to finish action on the CPSC Reform Act.

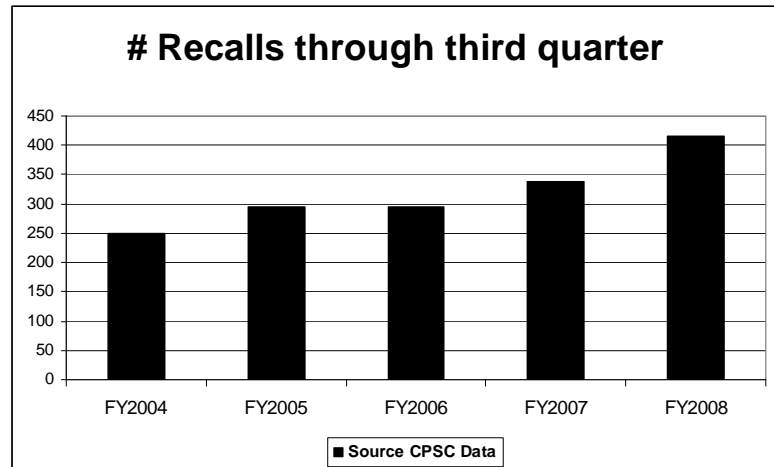
Other data show the same upward trend. According to a recent report by Consumers Union, for example, at the current rate, the CPSC will issue more than 800 recalls in its 2008 fiscal year, a 70 percent increase over last year.⁵



In addition, the CPSC recently released its quarterly historical summary of all recalls.⁶ (See chart on next page). Since data for FY 2008 are only available through the third quarter (June), Figure 2 shows the last five annual totals after the third quarter. Through the end of June 2008, the CPSC has already recorded 415 total recalls of all products, or a 22% increase in recalls over FY 2007.

The increase suggests strongly that what the toy industry called "last year's problem" remains a big problem, and underscores the urgent need for Congress to finish action on a strong CPSC Reform Act before August recess of this year.

Recalls are a solution of last resort. Once products are in consumers' homes, few consumers hear about the recall or are able to take the products out of their homes. The better solution is to ensure that products are safe before they reach our stores and our shores. Section 2 addresses just how to achieve this better solution.



Section 2: Test Toys For All Relevant Hazards

Currently, toys and other children's products on U.S. shelves are not subject to pre-market testing requirements. Toys are not tested by the government, and while manufacturers are supposed to comply with existing safety standards, there is no requirement that these products are subject to tests for compliance. A centerpiece of the CPSC Reform Act is its provision requiring independent third party testing and certification of imported toys and children's products.

The new third party testing regime only applies, however, to toys subject to mandatory CPSC rules and standards. There are currently very few existing mandatory CPSC toy rules and standards. Many toy hazards are subject only to a voluntary industry standard known as ASTM F-963.

The CPSC itself has not adopted a new mandatory toy standard in almost a decade. Consequently, many unsafe products end up in children's hands. While both the House and Senate have already agreed on provisions that make voluntary industry standards for infant and toddler durable products such as cribs, high chairs and strollers into mandatory enforceable standards, there has not yet been agreement about adding the ASTM F-963 toy standard into the final conference report.

The ASTM standard is based upon documented incident data and targets emerging hazards as well as those already established. ASTM works with manufacturers, testing laboratories, safety consultants and consumers; it only establishes standards of toy safety measures, it does not otherwise regulate product design.

The ASTM F-963 standards were created to strengthen children's products and reduce the number of dangerous toys on the market, thereby providing consumers the safety in children's products that they expect and deserve. The following chart (next page) lists this year's recalls that violated ASTM F-963 but will not be subject to independent third party testing unless the voluntary ASTM standard is made a mandatory one.

2008 recalls that involve hazards addressed in ASTM F-963-07 but NOT in current mandatory standards		
Section of 963	Recall	Number of Units
Section 4.15 Stability and Overload	eStyle Toy Kitchens for tipover	65
	Sears & Kmart Play Stoves for tipover	17,000 (one injury reported)
	Tek Nek Rocker Toy for fall	122,000 (ten injuries)
Section 4.25: Battery Operated Toys	Cinderella battery operated cars for fire and burn	64,000
	RC Helicopter at Walgreens for fire and burn	102,000
	RC Helicopter by Westminster for fire and burn	15,000
	RC Helicopter by Soft Air for fire and burn	152,000 (one injury reported)
Section 4.27: Toy Chests	Bayside Furnishings Youth Bed Toy Chests for strangulation	9,350 (one death reported)
Section 4.39: Magnets	Magnetic Dart Boards by Henry Gordy	250,000
	Magtastick and Magnetix Jr.	1,100,000 (one injury reported)
	Magnaman by Mega Brands	1,300,000
	Battat magnetic construction sets	125,000
	Family Dollar Magnetic Dart Boards ⁷	870,000
	Battat magnetic Construction sets	7,000

If Congress fails to make the ASTM standard mandatory, toys with small magnets, elastic cords (i.e. yo-yo water balls), toxic heavy metals, and spherical shaped ends, as well as those that emit noise, project, and/or fold will not be tested for safety.

Section 3: Ban Toxic Phthalate Chemicals From Children's Products.

For the first time, Congress is considering banning certain kinds of chemicals, called phthalates, from children's toys and some other products. The Senate version of the bill includes a ban on six phthalates similar to the ban that is currently in effect in the States of California and Washington and the European Union.

Infants are typically exposed to phthalates through toys, teethingers, and health care products. Research on infant boys indicates that exposure to phthalates can result in undescended testicles, which in turn increases the risk of cancer of the testicles when those babies are teenagers and young adults. Research on men shows that phthalates can cause damage to sperm. These study results are consistent with research on animals that report smaller penises and other genital changes in males exposed to phthalates.

The most common phthalate in plastic toys and pacifiers is DINP, which children ingest when they suck and chew on pacifiers and toys containing phthalates. Phthalates from toys and products may also leach into bath water and be absorbed through the skin, and may be inhaled by children and adults in the form of tiny particles in the air in their homes, daycare centers, and schools.

The Centers for Disease Control and Prevention has reported nine phthalate metabolites in most American men, women, and children. Congress should ban phthalates in children's products and toys as part of the CPSC Reform Act. Safer alternatives to phthalates, such as polyethylene, ethylene vinyl acetate and DINCH, are available and are used in Europe today.

Banning these six phthalates from children's toys and products that children are likely to suck and chew will help prevent harm to boys throughout the United States. Reducing exposure to phthalates could reduce the chances of boys having smaller genitals and reduce the likelihood of developing cancer of the testicles as teenagers and adults.

Section 4: Do Not Deny States The Power To Protect Their Residents

State governments often play a valuable role in identifying emerging hazards and moving to remove them from the marketplace. Further, it is the job of each state Attorney General to enforce that state's consumer protection laws and prosecute violators.

Throughout the year-long battle for CPSC reform, industry lobbyists have repeatedly attempted to limit state authority to pass stronger laws and also tie the hands of state Attorneys General by limiting their ability to enforce consumer protection laws. Although the conferees have granted state attorneys general modest authority to enforce the federal product safety laws, industry continues to seek to narrow states' authority to protect their residents. The latest threat has

emerged in conference negotiations, with industry working behind closed doors to win a sweeping curtailment of state safety protections. Not only would this harm consumers; it is something that neither the House nor the Senate bill provides and therefore is inappropriate for the conference committee to consider.

The toy industry and other manufacturers are now demanding that limits on state authority be expanded to one of the anticipated centerpiece provisions of the new law, its House and Senate passed provisions establishing that children's products be subject to third party testing.

Neither the House nor Senate even discussed, let alone approved, a provision placing limits on state authority regarding testing. While our organizations view preemption as often problematic, it is especially wrong to bar states from protecting their residents from emerging hazards that Congress cannot anticipate or to limit the possibility of state action in emerging areas of the law, where new threats could arise that were not anticipated nor protected against by the Congress.

The states have a demonstrable track record of acting quickly to respond to new threats or gaps in federal law. This year alone, several states passed new product safety laws; others have brought important enforcement actions against firms that have violated state consumer laws. These actions have served as an important bulwark against unsafe products.

Conversely, Congress has not reauthorized the CPSC since 1990 and has not significantly amended its power since 1994; then, its action was in response to a new state law. Also the CPSC's rulemaking procedures are more cumbersome than those of other agencies, making it difficult for the CPSC to enact new safety rules. In the past, this has meant that the agency has allowed industry to self-regulate. Subjecting the new, unproven, untested third party testing regime to a broad preemption scheme risks consumer safety by taking away the power of states to react more quickly and nimbly than the Congress or the CPSC to new threats.

The notion that even a strengthened CPSC would be capable of protecting everyone from every hazard is unrealistic. But more troubling would be the permanent lockdown on any state action in this emerging and unproven area of third party testing. Further, industry's claims about the compliance cost of "50 different laws" are unsubstantiated. Our nation's state structure is predicated on the assumption that states will and should pass different laws, and most industries operate comfortably within this framework. If new hazards arise, it is entirely appropriate to leave the states the authority to act further.

In May 2008, 50 state and territorial Attorneys General wrote to the product safety conference managers, saying, "We do not believe that Congress intends to deprive states of the traditional tools needed to protect the health and safety of their citizens." Indeed, Congress should maximize the consumer protections available to children and families, which includes allowing states to enforce strong product safety laws.

The existing Consumer Product Safety Act limits state authority in many ways.⁸ Those limits should not be expanded. Preemption of third party testing must be rejected.

Section 5. New Whistleblower Protections Will Help Protect Consumers Too

Whistleblower protections for employees are essential to ensure that unsafe products come to the attention of the CPSC as soon as possible. Such protections mean that employees can alert the CPSC about product defects before they harm the public, preventing deaths and injuries. We know that whistleblowers within the agency and in the private sector have been blocked from alerting the public to their safety concerns. Here are some examples:

- When Robin Ingle, a hazards statistician at the Consumer Product Safety Commission, finished her report on the increasing dangers of All Terrain Vehicles, a political appointee at the agency tried to intimidate her into changing her conclusions. When that didn't work, he sat on the report for three months. It wasn't until after Ingle left the agency—and retained a lawyer to help her navigate the non-disclosure agreement that all departing staffers are required to sign—that she felt she could discuss her experience in public.

The few private-sector whistleblowers who have tried to protect the public from unsafe products allege that they have been punished by their bosses, court records show.

- In 1998, a product engineer for Kidde-Fenwel Inc. in Massachusetts alerted the CPSC to faulty home furnace ignition devices that his company continued to market, despite the fact that the device had caused at least one home fire. Over the next four years, the employee was harassed, threatened with termination, transferred to inferior assignments, and ultimately fired because of what the company claimed was “insufficient workload.”
- In 2002, a product designer at U.S. Traffic Corp. in California blew the whistle on his company, contending that it manufactured lighting products that violated federal and state safety standards. The company fired him. Its reason? Excessive tardiness.
- In 2005, Scott Behm, a quality control manager at Progress Plastic Products Inc. in Bellevue, Ohio, was concerned about the safety of a part for Evenflo's “ExerSaucer”, a device in which a young child sits suspended, surrounded by toys. After investigation, Behm was worried that the pad rings that his company made for the ExerSaucer were too brittle, and could snap and injure a child. “I was afraid somebody could get hurt,” Behm said in his deposition. When he tried to alert his bosses to the problems with the pad rings, Behm said he was threatened with termination if he did not stop his investigation. A month later, Behm lost his job, reportedly as part of a layoff.
- In 1995, an administrative staffer at James Monroe Wire & Cable Corp. blew the whistle on defective wire for use in fire alarms in homes, hotels and high-rises. The employee stated that he was asked to stop reporting product defects to a UL inspector, and promised a raise if he did so. When the employee refused, he was fired for insubordination.

Congress Has Consistently Supported Whistleblower Protections That Have Not Imposed Burdens On Industry

Since 2002, Congress has passed four laws to protect private-sector whistleblowers: Sarbanes-Oxley (publicly-traded corporations); Pipeline Products Safety Act; Energy Policy Act (nuclear power and nuclear weapons industry); and the 9/11 law (ground transportation workers).

To prove their case, whistleblowers must prove retaliation, and the employer will win even then by showing it had other, independent, reasons for firing, or reassigning the employee.

Given these legal hurdles, industries now covered by whistleblower laws have not experienced problems firing employees. For example, only 3 percent of Sarbanes-Oxley lawsuits ended with the whistleblower winning his or her case. And whistleblower laws have not prompted thousands of employees to file whistleblower complaints. In the first 3 years after Sarbanes-Oxley was passed, only 491 employees out of 42 million employees working at publicly-traded corporations even filed a case.

Conclusion

The conference committee, in the last several months, has taken historic and important steps to improve consumer safety. But the remaining unfinished provisions are among its most critical and necessary. Congress should reject special interest demands to block or weaken these provisions and must finish action on the CPSC Reform Act before the August recess.

Endnotes

¹ On a positive note, the committee has tentatively discussed holding a meeting to consider some or all of these items this week.

² Some of the 2007 recalls, including tainted pet food, tainted toothpaste, meat, and automobile tires, were not of CPSC-regulated products.

³ ASTM International, formerly the American Society for Testing and Materials, is a voluntary standards development organization that includes members from industry, government and consumer groups.

⁴ See the report “2007: The Year of the Recall,” Kids In Danger, February 2008, available at http://www.kidsindanger.org/publications/reports/2008_Year_of_the_recall.pdf (last visited 16 July 2008).

⁵ See the report “Still Not Safe,” by Consumers Union, 15 May 2008, available at <http://www.consumersunion.org/pdf/StillNotSafe.pdf> (last visited 16 July 2008).

⁶ One page quarterly CPSC recall chart for use by CPSC Office of Information and Public Affairs, states at top “last updated 7/7/2008,” on file with authors.

⁷ Information on the Family Dollar Magnetic Dart Boards was provided to the CPSC in the 22nd annual “Trouble In Toyland” report, November 2007, U.S. PIRG. The Henry Gordy Magnetic Dart Boards listed above are a similar product sold in the same stores. In addition, the PIRG report identified hazardous “Super Magnets” by MTC, which were recalled on 22 December 2007 (2,800 units). Trouble In Toyland is available at <http://www.toysafety.net> (last visited 16 July 2008).

⁸ For example, under existing law, any time that Congress establishes a mandatory standard, such as the new law’s limit on lead exposure, those limits become a preemptive federal standard. But this preemption has *never* extended to state testing regimes.