

U.S. Consumer Product Safety Commission



New Actions to Strengthen Oversight of Imported Products

**Response to Recommendations Contained in the
U.S. Government Accountability Office (GAO) Report 09-803,
*Consumer Safety: Better Information and Planning Would
Strengthen CPSC's Oversight of Imported Products*
(August 14, 2009)**

**Report to Congress
*October 2009***

1. Introduction

Section 225 of the Consumer Product Safety Improvement Act of 2008 (CPSIA) directed the U.S. Government Accountability Office (GAO) to conduct a study assessing the effectiveness of the U.S. Consumer Product Safety Commission's authorities over imported products. GAO's objectives were to:

- determine what is known about CPSC's effectiveness in using these authorities;
- compare CPSC's authorities with those of selected U.S. agencies and international entities; and
- evaluate CPSC's plans to prevent the entry of unsafe consumer products.

The GAO completed its study and issued a final report of its findings, *Consumer Safety: Better Information and Planning Would Strengthen CPSC's Oversight of Imported Products*, on August 14, 2009. At the request of CPSC's Chairman, GAO also briefed the full Commission on its findings on October 7, 2009.

GAO recognized that CPSC's presence at the U.S. ports of entry is very small in comparison with agencies such as the U.S. Food & Drug Administration (FDA) and the U.S. Department of Agriculture (USDA). Given that these other agencies have more staff at the ports than CPSC has in its entire agency, it is not surprising that they have more robust border surveillance activities. By the same token, these other agencies have more highly developed risk management programs that are well integrated with their other information technology systems. CPSC, by contrast, has only in the last few weeks obtained funding to begin designing and building an integrated risk management system. Consequently, CPSC has relied heavily on the U.S. Customs and Border Protection (CBP) to help identify and deal with unsafe imports and intends to continue strengthening that partnership.

As a result of its study, GAO made three recommendations for CPSC action:

- ensure expeditious implementation of key CPSIA provisions;
- strengthen CPSC's ability to target shipments of unsafe consumer products; and
- develop a long-term plan for ensuring the safety of consumer products entering the United States, including long-term plans for international engagement.

CPSC fully agrees with these recommendations. We are submitting this report to Congress to outline the activities that the Commission is undertaking to address the recommendations in the GAO report. Under the requirements of 31 U.S.C. § 720, the head of a federal agency must submit a written statement of the actions taken on GAO's recommendations to (i) the Senate Committee on Homeland Security and Governmental Affairs and the House Committee on Oversight and Government Reform not later than 60 calendar days from the date of the report, and (ii) the House and Senate Committees on Appropriations with the agency's first request for appropriations made more than 60 calendar days after that date.

2. GAO Recommendation: Implement Key CPSIA Provisions

GAO recognized that in recent years, CPSC staff and resources have become progressively smaller while the number of imported consumer products has increased dramatically. In August 2008, Congress acted to reverse this trend with a major overhaul of CPSC's organic statute. The Consumer Product Safety Improvement Act (CPSIA) gave CPSC many new authorities to deal with unsafe consumer products, including imports. Congress also authorized a sizeable budget increase to add staff and begin implementation of the new law; however, the Fiscal Year (FY) 2009 appropriation did not become available until more than halfway into the fiscal year. This delay created a major challenge for CPSC as it attempted to meet the first wave of deadlines in the new law without any increase in staff over FY 2008.

The recommendations in the GAO report indicated a need to ensure expeditious implementation of key CPSIA provisions. Specifically, GAO recommended:

- ✓ To ensure that CPSC is able to exercise its full authority to prevent the entry of unsafe consumer products into the United States, we recommend that CPSC ensure expeditious implementation of key provisions of CPSIA, including establishing the substantial product hazard list and implementing testing and certification requirements that are subject to stay of enforcement until February 2010, and complete its rulemaking as required under the act.

2.1. CPSC Actions to Implement Key Provisions of CPSIA

GAO highlighted two key provisions of the Consumer Product Safety Act in its recommendation for expeditious implementation. The first of these was the "substantial product hazard" list. The second was the requirement for testing and certification to mandatory standards. We discuss each of these in turn below, giving the status of implementation.

Substantial Product Hazard List

CPSIA section 223(a) added a new subsection (j) to section 15 of the Consumer Product Safety Act. See 15 U.S.C. § 2064(j). This provision allows the Commission to adopt rules defining either the presence or absence of certain types of product characteristics as a defect that constitutes a "substantial product hazard" for an entire class of products. Such rules must be based on a "readily observable" characteristic that has already been addressed by voluntary standards, and there must be substantial compliance with those standards.

The importance of such "generic defect" rules for import safety is that they streamline CPSC's ability to deal with products that are not subject to a mandatory standard. An importer whose product is stopped at the port is generally entitled to a full, trial-type administrative hearing on whether the product has a defect that presents a "substantial product hazard." In the usual case, this process might take months or even years. But once the Commission has promulgated a "generic defect" rule under section 15(j), the importer cannot attack the validity of the generic defect rule itself (see 15 U.S.C. § 2060(g)(1)(A), added by CPSIA section 236); rather, the primary issue would be whether the rule actually applies to the particular product in question—generally a much easier proposition to establish.

In this regard, a generic defect rule is somewhat like a mandatory standard, which seldom is challenged on the merits in an enforcement proceeding. On the other hand, whereas the Consumer Product Safety Act makes it impossible to adopt a new mandatory standard when there is an effective voluntary standard being complied with, see 15 U.S.C. § 2058(b), the existence of a voluntary standard is no impediment to adoption of a generic defect rule; to the contrary, the defect must be defined by reference to an existing voluntary standard. So, the new provision complements the Commission's existing authority in several ways.

Early this year, the CPSC staff identified a number of promising candidates for generic defect rules. Given the scarcity of staff resources, however, it was concluded that this deserving project had to give way to others that were subject to statutory deadlines. Now that the Commission has dealt with the first wave of CPSIA deadlines, it is planning to take up the first generic defect rules. As reflected in the regulatory agenda, CPSC contemplates proposing generic defect rules for hairdryers and drawstrings within the next six months.

Certification and Testing Provisions

CPSIA section 102 greatly expanded the range of consumer products subject to the certification provisions of the Consumer Product Safety Act. Under prior law, CPSA section 14 required certification only in the case of standards adopted under that Act. There was no parallel requirement for certification to CPSA bans (such as the ban on lead in paint) or to standards or bans under other statutes administered by the CPSC (such as the "small parts" ban adopted under the authority of the Federal Hazardous Substances Act). As amended, section 14(a)(1) requires certification for most products that are subject to a standard or ban under any of the statutes we administer. 15 U.S.C. § 2063(a)(1). In addition, in the case of children's products, the new law specifies that certification must be based on testing by an accredited third-party conformity assessment body. 15 U.S.C. § 2063(a)(2).

The expanded certification provisions create potentially enormous benefits for import safety. Under the old paradigm, when a toy was offered for import, CPSC staff would have to obtain samples of the product and test them to determine whether the product complies with all applicable standards and bans. Plainly, this process is constrained by scarce staff resources, not only at the ports but also at the CPSC laboratory and elsewhere in the agency. The certification provision shifts some of this burden to manufacturers and importers, who must conduct their own testing to support certification or in the case of children's products, pay third-party test labs to do so. If the product has not been properly certified, the new law allows CPSC staff to refuse importation *on that basis alone*, without even sampling and testing the product.

Although the certification provisions have great potential to promote safety, the Commission concluded that the CPSC staff needed more time to address some fundamental questions before certification requirements were enforced with respect to the CPSIA's new lead and phthalate limits, among others. The Commission therefore granted a stay of enforcement applicable to some, but not all, new certification requirements until February 10, 2010, at which time a vote will be taken to terminate the stay.

3. GAO Recommendation: Strengthen Targeting of Imports

In February 2007, CPSC became a Participating Government Agency in the International Trade Data System (ITDS), which is operated by U.S. Customs and Border Protection. Since that time, more than 20 CPSC staff have been granted access to data available in the ITDS Automated Commercial Environment (ACE). Access to this data, which requires extra security clearance, has already improved CPSC's ability to deal with imported products in a number of ways. It allows CPSC employees to see "entry" and "entry summary" data for any shipment of products as soon as the data becomes available.

Useful as this data is, it has a major limitation for targeting in that it is generally not available before a shipment has arrived (and the "entry summary" data is often not available until after a product has already left the port). For advance targeting, an even more valuable source of information is "manifest" data, which must be provided to CBP even before a product arrives. GAO recognized that access to this data, through the Automated Targeting System (ATS), would improve CPSC's ability to identify shipments for detention and review.

Specifically, GAO recommended:

- ✓ To strengthen CPSC's ability to prevent the entry of unsafe products into the United States, we recommend that the Chairman and commissioners of CPSC take several actions to improve the agency's ability to target shipments for further screening and review at U.S. ports of entry as follows:
 1. To ensure that it has appropriate data and procedures to prevent entry of unsafe products into the United States, we recommend that CPSC update agreements with CBP to clarify each agency's roles and to resolve issues for obtaining access to advance shipment data; and
 2. To improve its targeting decisions and build its risk-analysis capability, we recommend that CPSC
 - a. work with CBP, as directed under CPSIA through the planned targeting center for health and safety issues, to develop the capacity to analyze advance shipment data; and
 - b. link data CPSC gathers from surveillance activities and from international education and outreach activities to further target incoming shipments.

3.1. CPSC's Actions to Strengthen Targeting in Coordination with CBP

Since enactment of the CPSIA, CPSC staff has met with CBP staff on a frequent basis (usually once a week or more often) to address the details of our cooperation under the new law. The following sections give the status of our efforts to date.

Data MOU. To govern the terms of our access to the ACE data, CPSC staff has drafted a Memorandum of Understanding (MOU), the latest version of which was sent to CBP in June 2009.

Operational MOU. The CPSIA will change some aspects of how we work with CBP at the ports. The CPSC draft of the operational MOU was sent to CBP in August 2009.

TECS MOU. Access to the ATS data requires a separate agreement relating to the Treasury Enforcement Computer System (TECS). For that purpose, CPSC has drafted a third MOU, which was sent to CBP in the middle of September 2009.

CTAC. In late August 2008, CPB notified CPSC that it would grant us access to the ATS manifest data at a new import safety center, called the Commercial Targeting Analysis Center (CTAC), which is expected to become operational on October 1, 2009. CPSC will hire a new employee to fill this position, and has posted a vacancy announcement. In the meantime, CPSC staff will work in conjunction with CBP to establish the office space at the downtown location. Access to ATS will give CPSC the ability to investigate manifest information prior to the arrival of goods at the port and improve our ability to catch problem shipments before they leave there.

Linking CPSC Data to CBP for Targeting. CPSC's 2011 budget request identifies a need for planning funds to address data sharing between CPSC's risk management system and CBP's systems.

4. GAO Recommendation: Long-term Planning

The recommendations in the GAO report indicated a need to develop a long-term plan for ensuring the safety of consumer products entering the United States, including long-term plans for international engagement. Specifically, GAO recommended:

- ✓ To provide better long-term planning for its import safety work and to account for new authorities granted in CPSIA, we recommend that CPSC expeditiously update its agencywide Strategic Plan. In updating its Strategic Plan, we recommend that CPSC consider the impact of its enhanced surveillance of the marketplace and at U.S. ports as discussed above and determine whether requisite analytical and laboratory staff are in place to support any increased activity that may occur at U.S. ports. Furthermore, we recommend that CPSC's Strategic Plan include a comprehensive plan for the Office of International Programs and Intergovernmental Affairs to work with foreign governments in bilateral and multilateral environments to
 1. educate foreign manufacturers about U.S. product safety standards and best practices, and
 2. coordinate on development of effective international frameworks for consumer product safety.

4.1. Long-term Strategies for Safer Imported Products

CPSC plans to revise its Strategic Plan in 2010. One of the reasons that it is urgent for us to have a new Strategic Plan is to reflect the impact of the changing marketplace for consumer products. The production of consumer goods has migrated from the United States to locations all around the world, often in less regulated environments. Enhanced surveillance of the

marketplace and at U.S. ports is essential to stop hazardous products from entering the United States. This enhanced surveillance must be well planned so that as staff increases at the ports, the infrastructure is in place to support the testing and analysis of more samples and the resources are available to follow up on hazardous products.

CPSC's Office of International Programs and Intergovernmental Affairs coordinates regulatory development at the international level. The Office also conducts activities and creates strategies aimed at ensuring greater compliance with U.S. product safety requirements by foreign manufacturers. A key emphasis of this program is encouraging foreign manufacturers to establish product safety best practices as an integral part of manufacturing. The role of this Office in educating foreign manufacturers about U.S. product safety standards and best practices and in coordinating the development of effective international frameworks for consumer product safety is anticipated to be a significant focus of the revised Strategic Plan.

The Office has been responsible for coordinating the biennial U.S.-Sino Product Safety Summit. The next summit is scheduled for October 2009. The goal of the summit is to institutionalize a culture of product safety among Chinese consumer product exporters.

CPSC's 2005 Action Plan on Consumer Product Safety with the General Administration for Quality Supervision, Inspection, and Quarantine (AQSIQ), CPSC's Chinese counterpart agency, outlines specific cooperative actions (training, technical assistance, consultation, and the creation of several working groups) to be taken by CPSC and AQSIQ to improve the safety of consumer products. Working group product areas include toys, cigarette lighters, electrical products, and fireworks. In 2009, two new priority areas – all-terrain vehicles and lead in children's products – were added to respond to CPSIA requirements.

The China program plan was originally developed in 2005 as a way of managing CPSC's various China-related activities and as the basis for an overall strategy to promote safety and compliance of Chinese consumer products exported to the United States. The plan is reviewed and updated annually to ensure that it takes into account changing conditions and new opportunities for progress.

CPSC is on track to establish its first overseas presence during 2009, at the U.S. Embassy in Beijing. This enables CPSC to promote compliance with U.S. product safety requirements among Asian (especially Chinese) exporters and to coordinate with product safety regulators in the region. CPSC will facilitate safety efforts with one of the largest exporters of consumer products to the United States.

5. Conclusion

The Consumer Product Safety Commission agrees with the recommendations made by the GAO with respect to import safety. The Commission is taking the following actions to implement GAO's recommendations:

- commencing rulemaking under section 15(j) to adopt rules to address hair dryers and children's upper outerwear with drawstrings, with other product classes to follow on a periodic basis;

- developing rules to support implementation of certification and testing requirements, with a planned vote on February 10, 2010, to terminate the current partial stay of enforcement;
- negotiating with U.S. Customs and Border Protection three Memoranda of Understanding governing cooperation between the agencies as well as CPSC access to CBP data, including particularly pre-arrival data;
- hiring a new employee to represent CPSC at the new Commercial Targeting Analysis Center (CTAC); and
- developing plans for revision of CPSC's Strategic Plan.