

Working Paper¹

April 2016

Regulator-to-Regulator Communication and Collaboration at the U.S. Consumer Product Safety Commission

Nancy Nord²

The George Washington University Regulatory Studies Center

Abstract

This case study examines the development of the CPSC's program to communicate and collaborate with safety regulators from foreign jurisdictions over the past 12 years. Given the agency's small size and limited resources, it has a good track record working with its foreign counterparts to enhance consumer safety. However, given the growing complexity of both consumer products and the global marketplace, consumer safety will require increased efforts to foster such communication and collaboration. That collaboration can take many forms. The case study makes recommendations for greater engagement with foreign counterparts on both a technical and policy level, cooperation on enforcement matters, and regulatory cooperation, including efforts to align or harmonize standards.

¹ The contents of this working paper are the sole responsibility of authors and can in no way be taken to reflect the views of the European Union. This working paper does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at <http://regulatorystudies.columbian.gwu.edu/policy-research-integrity>.

² Nancy Nord is a former Commissioner and acting Chairman of the CPSC. She is currently Of Counsel, Olsson, Frank, Weeda, Terman, Matz law firm in Washington, DC.

Regulator-to-Regulator Communication and Collaboration at the U.S. Consumer Product Safety Commission

Nancy Nord³

April 2016

The Consumer Product Safety Commission (CPSC) presents a good case study of cooperation between regulators internationally because, even though it is a small agency, it developed a robust program of outreach to its counterpart regulators around the world in a relatively short period of time. As discussed below, this program developed because of the growing need for regulatory scrutiny beyond U.S. borders brought about by safety issues arising in connection with imports into the U.S.

In addition, it is a good case study because the CPSC is an independent regulatory agency, unlike the Department of Transportation and the Food and Drug Administration, both of which are under executive control. Independent agencies function outside the direct control of the President and are distinguished by three statutory characteristics: a bipartisan process for appointing members, fixed term appointments for those members with terms usually extending beyond that of the President, and a requirement that removal from office be for cause. In addition, their organizational form as multimember bodies also can mark a difference between independent agencies and executive branch departments (although there are executive branch multimember agencies).⁴ The result of a multimember body made up of members of both political parties serving fixed terms and who can be removed only for cause is, at least in theory, to insure collegial and considered decision making.

Unlike executive branch departments and agencies, regulations of independent regulatory agencies like the CPSC are not subject to review and interagency coordination by the Office of Information and Regulatory Affairs in the White House Office of Management and Budget.⁵ With more and more policy being made by independent regulatory agencies, insulation from presidential control can lead to more fractured and less consistent government-wide positions on important policy issues. As independent agencies see the global economy impacting the scope of

³ Nancy Nord can be reached at nancynord@gmail.com. Her blog on consumer safety issues is *Conversations with Consumers*: www.nancynord.net.

⁴ For a good description of the characteristics of independent agencies, see Verkuil, Paul R., "Purpose and Limits of Independent Agencies", *Duke Law Journal*, 1988.

⁵ There are legislative efforts to establish greater executive oversight over the activities of independent agencies, such as the CPSC. For example, legislation has been introduced that would subject major rules issued by independent agencies to review by the Office of Information and Regulatory Affairs (OIRA).

their responsibilities and consequently need to reach out to their counterparts around the world to carry out these responsibilities, the need for government-wide coordination and control may increase as an issue. This dynamic is important to understand when discussing how regulators from different countries interact with each other.

Regulator-to-Regulator Collaboration at the CPSC

CPSC's International Activities

The international activities of the CPSC were shaped by the rapid development of the global marketplace. The vast expansion of international trade, the sourcing of consumer products and components throughout the world and the growing sophistication and safety expectations of U.S. consumers about the products they purchase necessarily required a closer level of communication and coordination between regulators in the U.S. and other jurisdictions. The rest of this case study examines how the CPSC, through its leadership and its international program, developed and facilitated regulator-to-regulator communication and cooperation, the lessons learned from those efforts and recommendations for moving forward.

Early Efforts (2004-2006)

For many years the CPSC had a staff member who ostensibly had responsibility for international activities but any outreach between U.S. and EU safety regulators was of an *ad hoc* nature. This changed in 2004, when the CPSC Office of International Programs and Intergovernmental Affairs (IPIA) was established under the leadership of then-CPSC Chairman Hal Stratton.⁶ Among the stated purposes of the office was to “provide a more comprehensive and coordinated effort in the international... arena versus the ad hoc approach of the past decade” and to provide “liaison activities [with] international counterparts.”⁷ Outreach to foreign regulators was the responsibility of this office and it took several different forms. A discussion of the major activities of the office and agency that involved regulator-to-regulator communication and cooperation follows.

Standards Harmonization

The ability of standards to facilitate access to markets and the significance of divergent standards as a drag on trade was recognized and the IPIA office was specifically tasked as one of its goals

⁶ The CPSC was certainly neither the first nor the last independent agency to establish an international programs office. The Securities and Exchange Commission established such an office in 1988. The Federal Trade Commission consolidated its global activities into one office in 2007.

⁷ Joseph P. Mohorovic. *IPIA White Paper*. Office of International Programs and Intergovernmental Affairs (IPIA), U.S. Consumer Product Safety Commission. July 11, 2006.

to address harmonization of standards.⁸ While the Commission stated its support for harmonizing standards, it recognized that it was “an arduous and ambitious undertaking.”⁹ It also recognized that the level of safety enjoyed by U.S. consumers could not be compromised by harmonization efforts. The office’s activities to achieve harmonization focused on working with consensus standards groups rather than with foreign regulators, and, as predicted, accomplishing demonstrable results proved to be arduous.

Memoranda of Understanding

The CPSC negotiated memoranda of understanding (MOUs) with a number of countries beginning in 2004.¹⁰ The MOUs were typically negotiated between the CPSC and the foreign country’s counterpart safety agency and indicated the parties’ intention to share information and cooperate on relevant safety issues. In early 2005, the CPSC and the Directorate-General Health and Consumer Protection of the European Commission¹¹ negotiated an MOU setting out a framework for the exchange of information on such matters as emerging health and safety issues, standardization activities, and market surveillance and recall activities, among other things. The MOU with the European Commission (EC), while necessarily cast in general terms, represented an important commitment for engagement on safety issues, and, as will be discussed below, that bi-lateral engagement used the MOU and subsequent agreements as a framework.

Bilateral U.S./China Safety Summit

Negotiating an MOU with the Chinese counterpart safety agency, the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), in 2004 was a watershed achievement with respect to regulator-to-regulator cooperation. The MOU led to the first U.S./China Safety Summit in 2005. This was the first example of Chinese participation in such an agreement and meeting of product safety regulators. The parties agreed to set up working groups of U.S. and Chinese government experts to meet periodically to address safety issues for certain product classes (toys, fireworks, lighters and electrical products). The willingness of the Chinese to engage the CPSC was influenced by the growing concern in the U.S. and the rest of the world over the safety of Chinese products. In addition, the CPSC’s very visible engagement with the EC in the safety arena could not help but be noticed in Beijing, since the U.S. and the EU were

⁸ See IPIA White Paper, July 11, 2006, for a discussion of the Commission’s goals for the office with respect to standards harmonization.

⁹ IPIA White Paper.

¹⁰ The fact that these agreements were MOUs underlines the nature of the CPSC as an independent regulatory agency. The agreements were not negotiated through the Department of State (although State and the U.S. Trade Representative were typically consulted) and did not commit the U.S. Government to any kind of formal action.

¹¹ The MOU was signed for the EC by Robert Madelin, Director General, and for the CPSC by Harold Stratton, Chairman.

China's two biggest markets. The CPSC's outreach to the EC helped get AQSIQ to the table to discuss safety issues.

International Consumer Product Safety Caucus

The International Consumer Product Safety Caucus (the Caucus) was established in 2006 to provide an organizational platform for enhanced cooperation among product safety regulators and market surveillance authorities from around the globe. The objectives of the Caucus were enunciated in the Bethesda Declaration¹² of May 2006 and included an exchange of information on government policy, legislation and market surveillance. The U.S. representative agreed to act as the first chairman of the Caucus and the group agreed to meet twice a year, often meeting in conjunction with the meetings of the International Consumer Product Health and Safety Organization (ICPHSO).¹³

Import "Crisis" Drives Increased Cooperation (2006-2009)

The growing number of recalls of products imported from China as well as several high-profile recalls of popular consumer products that received wide-spread media attention resulted in a heightened public concern about the safety of imported products. That public outcry drove legislative action in the United States.¹⁴ However, safety regulators in both the U.S. and in Europe recognized the need to increase efforts to address import safety both individually and collectively. Those efforts built on the foundation that had been established earlier and took several forms, including enhanced cooperation among regulators.

Second Bilateral U.S./China Safety Summit

The second meeting of U.S. and Chinese safety officials, in September 2007, in Washington, DC, took place at the height of the "recall crisis." Unlike the first summit, here the Chinese made specific promises with respect to safety, agreeing to ban lead paint in children's products, to conduct monthly meetings with their U.S. counterparts to try to resolve problems that led to each recall, and to other procedures addressing recurring safety issues.

U.S. - EU Toy Safety Working Group

This group was established in 2007 to provide a focal point for discussions between the CPSC and the EC on toy import safety issues. Initially the group met quarterly and explored closer

¹² "Bethesda Declaration." *International Consumer Product Safety Caucus*. Accessed November 2016.
http://www.icpsc.org/Bethesda_Declaration.html

¹³ ICPHSO is a non-profit organization made up of government and private sector professionals working in the product safety sector and seeks to provide a neutral forum for discussing safety issues.

¹⁴ The Consumer Product Safety Improvement Act of 2008, Public Law 110-314, 122 Stat. 3016 (August 14, 2008).

collaboration on toy safety standards, areas for potential convergence of standards or test methods and possible joint outreach activities.

U.S. - EC Joint Safety Outreach to China

Immediately following the passage of new safety legislation in the United States, representatives of the CPSC, including the acting chairman of the agency, and representatives of the European Commission conducted a series of safety seminars in China in September 2008. The purpose of the seminars was to educate Chinese product manufacturers about the EU and U.S. safety requirements for clothing, toys and electrical products, including the new statutory requirements. The seminars had the visible support of Chinese officials from AQSIQ. This joint outreach effort by representatives of the two largest markets for Chinese products speaking with one voice about the importance of safety, with the Chinese government looking on in support, was designed to make a loud statement about the serious need to promote respect for, and compliance with, safety requirements.

Trilateral U.S.-EU-China Product Safety Summit

The safety outreach effort described above was immediately followed, in November 2008, by a high-level trilateral meeting in Brussels attended by the EU Consumer Affairs Commissioner, the CPSC Acting Chairman and the Chinese Vice Minister of AQSIQ. The purpose was to signal the importance of product safety as an international political issue. The parties agreed to cooperate on safety standards for toys and children's products, strengthen information and expertise exchange and address product traceability. The parties agreed to similar meetings on a biannual basis.

2010 to 2014

Among other things, legislation passed in 2008 directed the CPSC to issue specific regulations addressing the safety of imported products. As the agency rolled out those regulations, the focus of the CPSC's interaction with other regulators shifted to explaining those regulations and their implications on the global supply chain. In addition, as a further recognition of the nature of the global marketplace, the agency reached out to its North American neighbors to establish a more collaborative relationship. The maturation of the CPSC outreach program manifested itself in several different ways.

U.S. - China Safety Summits

While the CPSC and AQSIQ did hold a 3rd and 4th safety summit, the summit decreased in importance as a device for formal regulator-to-regulator communication on a going forward basis after 2011. While summits were scheduled for both 2013 and 2015, both were cancelled for budgetary reasons. It should be noted that at this time, the agency opened an office in Beijing,

concluding an effort that was started in 2008. This office provided a means for more accessible information exchange and interaction with product manufacturers in China and other points in Asia.

Trilateral Summits

Trilateral product safety summits among the U.S., the EC and China were held in 2010, 2012 and in 2014.¹⁵ Future plans for continuing this effort have not been announced as yet.

Organisation for Economic Cooperation and Development

Beginning in 2008 and moving forward, the Organisation for Economic Cooperation and Development (OECD), through its Committee on Consumer Policy, began to play a bigger role in facilitating discussion of product safety issues among governments, including the CPSC, businesses and NGO stakeholders. This activity focused first on making recommendations for enhancing information sharing among jurisdictions. Later, the Committee focused its efforts on establishing a Global Recalls Portal, which was launched in 2012.¹⁶ CPSC staff participated in both of these activities.

North American Safety Summits

Recognizing that products imported from outside North America can easily cross into each other's jurisdictions because of extensive shared borders, in 2011, the CPSC and its sister product safety agencies from Mexico and Canada held their first product safety summit in Bethesda, Maryland.¹⁷ At this meeting, under a Cooperative Engagement Framework, the parties agreed, among other things, to consult on proposed regulations and voluntary standards, consult and cooperate on potential joint recalls as well as import and market surveillance activities, undertake coordinated consumer awareness campaigns, and cooperate on training and outreach.

In 2013, in Ottawa, Canada, the parties met for the second summit and revised the Cooperative Engagement Framework to set out a four year work plan.¹⁸ Very importantly, the parties recognized the concrete cooperative achievements that had been undertaken through this effort. These achievements included several safety campaigns, the first coordinated trilateral recall,¹⁹ and ongoing information exchanges among the technical staffs of the three safety agencies.

¹⁵ www.cpsc.gov/en/Business--Manufacturing/International/International-Activities

¹⁶ The Global Recalls portal includes automobiles and other products outside the jurisdiction of the CPSC.

¹⁷ [www.cpsc.gov/en/Business--Manufacturing/international/International-Activities/First North America Consumer Product Safety Summit Joint Statement](http://www.cpsc.gov/en/Business--Manufacturing/international/International-Activities/First%20North%20America%20Consumer%20Product%20Safety%20Summit%20Joint%20Statement)

¹⁸ [www.cpsc.gov/en/Business--Manufacturing/International/International-Activities/Second North America Consumer Product Safety Summit Joint Statement](http://www.cpsc.gov/en/Business--Manufacturing/International/International-Activities/Second%20North%20America%20Consumer%20Product%20Safety%20Summit%20Joint%20Statement).

¹⁹ <http://www.cpsc.gov/en/Recalls/2013/Teavana-Recalls-Glass-Tea-Tumblers/> and www.cpsc.gov/en/Recalls/2015/Graco-Recalls-11-Models-of-Strollers.

The third North American Summit took place in November 2015 in Mexico City. Well prior to the meeting, the three agencies established “joint project teams” to examine various issues including outreach campaigns and joint customs exercises. The need for increased consultation prior to standards development and increased information sharing was recognized. Like the earlier summits, the most recent also included public seminars by regulators and stakeholders on safety issues that relate to all three jurisdictions.²⁰

Major Coordination Projects

Safety Summits

As described above, the U.S./China bilateral and the U.S./EC/China trilateral safety summits provided an effective means for establishing the CPSC’s cooperative outreach to other safety agencies. This was important as the program was being developed and when the parties were wrestling with solving the immediate import safety problem. The summits allowed for interaction between technical agency staff and provided a means for senior agency leadership to establish a relationship with peers. That cooperation was enhanced by the fact that the bilateral and trilateral summits both involved the same parties, although addressing somewhat different issues, so that there was ample opportunity for engagement.

The second bilateral summit with China and the North American Summits show the benefits of identifying specific areas for engagement. In addition, to the extent that desired outcomes can be identified and addressed in a specific manner or on a timeline rather than in aspirational terms the parties have a more realistic chance of pushing forward desired action.

The summits also laid the groundwork for more specific cooperative activities between the CPSC and the EC with respect to outreach to Chinese product manufacturers. As noted above, the first of such ventures occurred in 2008, shortly after Congress mandated new U.S. safety requirements, when the staffs of the CPSC and the European Commission conducted joint safety seminars in China for product manufacturers. These joint educational activities have continued with the most recent occurring in September 2015 and included product safety training for sourcing professionals dealing in electrical products, apparel and toys from China.²¹

Caucus/OECD Activities

CPSC staff has participated both in the Caucus and in the product safety activities of the OECD. The Caucus provided an important opportunity for market surveillance authorities to informally

²⁰ See Product Safety Letter, November 23, 2015. See also <http://www.cpsc.gov/en/Newsroom/News-Releases/2016/Collaborating-Across-Borders-North-American-Regulators-Working-Together-to-Protect-Children-from-Harmful-Toys/>

²¹ See <http://www.cpsc.gov/en/Newsroom/Public-Calendar/>

meet for consultation and information exchange. One of the early projects undertaken by the Caucus was to develop enhanced product tracking and traceability tools. Even as the Caucus was engaged in this work, the OECD Product Safety Working Party initiated a project in 2010 to undertake very similar activity. It became clear that many of the same parties were participating in both efforts and that both were competing for the same scarce resources. Even though the Caucus was seen as a more flexible forum for informal discussion, the OECD was considered the more appropriate forum for pushing forward the issues identified by the Caucus and it had the administrative infrastructure to support the work. In February 2014, a decision was made to transfer the substantive work items of the Caucus to the OECD Working Party and the Caucus was, for all intents and purposes, disbanded.

Whether initiated by the Caucus and then taken on by the OECD or whether initiated by the OECD, several important cooperative projects are now underway. With respect to product tracking, after a period of public comment and consultation, a proposed product identification system is being developed that will be detailed in a report, soon to be published, with the thought that businesses will adopt the recommendations and governments will endorse them. The Working Party is also undertaking a forecasting project to identify emerging issues, including a matrix of issues of interest to multiple jurisdictions. The Global Recalls Portal is seen as a key informational tool for accomplishing the objective of identifying safety issues at an early point.²²

One especially effective example of regulator collaboration in the international safety arena dealt with consumer education about the dangers of button batteries. In June 2014, the OECD member safety agencies participated in an *International Awareness Week on Button Battery Safety* aimed at raising the awareness worldwide of the dangers of children swallowing button batteries. The program included coordinated media, social media, online and on-site initiatives in over 26 jurisdictions around the world, culminating in an international safety conference in Brussels, Belgium.²³ The program was a well-coordinated effort and provides a roadmap for similar efforts in the future.

Foreign Executive Exchange Program

In 2012 the CPSC established a foreign exchange program. This program hosted safety executives from Health Canada and from the Australian Competition and Consumer Commission at the CPSC headquarters for a three-month period. Other jurisdictions have also sent executives for training sessions at the CPSC. As budgets and staffing resources are available, CPSC staff has also been hosted by foreign jurisdictions. The program provides a means of developing

²² Presentation by Peter Avery, Consumer Policy Unit, OECD, Global Product Safety Meeting, Review of Ongoing International Collaboration Projects, Orlando, FL, February 23, 2015.

²³ See <http://www.cpsc.gov/en/newsroom/news-releases/2014/cpsc-joins-international-effort-to-prevent-button-battery-related-injuries-and-deaths/>

expertise with the regulatory systems of other jurisdictions and has fostered greater collaboration with other safety regulators.

Joint Recalls with Other Jurisdictions

From time to time, products sold in several different countries may present hazards dictating that those products be recalled in multiple jurisdictions. Until 2009, the CPSC's practice was to announce the U.S. recall, request that the recalling company contact other jurisdictions where the product was sold and, in some cases, notify foreign safety regulators of the recall after it had been announced in the U.S. The Consumer Product Safety Act constrains the ability of the agency to share product-specific information with other jurisdictions without agreement of the product seller before a recall is publicly announced.²⁴

In February 2009, the CPSC conducted its first joint recall with Health Canada and since that time, has conducted several hundred more joint recalls with Health Canada. It is important to remember that these are all voluntary recalls and are done with the cooperation of the recalling company. The first joint recall with both Canada and Mexico occurred in May 2013.²⁵ In this case, the U.S. and Canada announced the recall on the same day and Mexico made a recall announcement shortly thereafter. In November 2014, the three jurisdictions announced a trilateral joint recall on the same day using the same press release.²⁶

The agency has not undertaken a joint recall with the European Commission. Conducting a joint recall in the EU would present problems since the CPSC would need to work with each member country individually because each member country has responsibility for enforcing its safety laws.²⁷ Instead, the agency collects information on other jurisdictions where the product has been sold and urges the recalling company to report to those other countries or allow the agency to contact them. In these instances it is important that the regulators and the company coordinate closely since a premature recall announcement in another jurisdiction could impact the timing and substance of the recall in the U.S. In most instances where a recall is needed in multiple jurisdictions, the company does not object to the agency working with other regulators since this

²⁴ See 15 U.S.C. §2055(b) (1) which requires that the agency give the submitter 15 days' prior notice before releasing product specific information without the agreement of the manufacturer and directs the agency to make every effort to assure that the information released is fair and accurate. The manufacturer may appeal commission decisions with respect to information release under this provision. In addition, 15, U.S.C. §2055 (b)(5) prohibits the public disclosure of information submitted by a manufacturer pursuant to 15 U.S.C. §2064 relating to corrective actions of substantial product hazards unless the submitter agrees to the release or the Commission determines that public health and safety require disclosure prior to the 15 day period referenced above.

²⁵ See <http://www.cpsc.gov/en/Recalls/2013/Teavana-Recalls-Glass-Tea-Tumblers/>

²⁶ See <http://www.cpsc.gov/en/Recalls/2015/Graco-Recalls-11-Models-of-Strollers/>

²⁷ EU rules of market surveillance usually foresee that if one member state recalls a product it informs the other member states- so at least they are aware and will in all likelihood follow. Nevertheless, there is no mechanism for doing a EU wide recall.

advances the common goal of reducing duplication and enhancing efficiencies for both the government and the company.

Standards Alignment

From the beginning, standards alignment (or harmonization) has been a consistent but elusive goal of the CPSC's work with other foreign jurisdictions. In addition, Congress has expressed an interest in the agency working to reduce regulatory burdens through standards alignment.²⁸ The agency has undertaken several efforts to explore the feasibility of harmonizing or otherwise aligning U.S. safety standards with those throughout the world.

In 2011, the agency unveiled its pilot alignment initiative (PAI) with the EC, Australia and Canada to seek alignment of safety standards for three product classes: corded window coverings, infant slings and chair-top booster seats for children. The PAI work attempted to reach consensus among the jurisdictions about preferred substantive requirements for standards for the three products under review with the notion that these consensus requirements would be adopted by each jurisdiction when it undertook a review of existing standards for those products. However, with respect to window coverings, consensus could not be reached on a preferred regulatory approach and instead included options for regulatory requirements for these products.²⁹ The consensus agreement for booster seats did include specific recommendations for standards alignment.³⁰ As yet, this effort has not resulted in the alignment of the standards for any of the products under discussion.

In contrast, the agency has taken a somewhat different approach to activities seeking alignment of toy standards. In 2010, the Commission directed staff to draft a plan to address the agency's role in aligning toy safety requirements in various international jurisdictions and how the elements of that plan could be applied to alignments of requirements for other products. The resulting "Roadmap for Toy Safety Regulation and Standards Coordination and Alignment" sets out a fairly detailed analysis of the history and issues surrounding alignment of toy standards.³¹ While the Roadmap does acknowledge that the existence of differing standards can lead to market confusion and adversely impact safety, it recommends that any standards alignment activity must result in improved safety. It also recognizes that the bulk of the work with respect to toy standards alignment must be done by industry since the CPSC mandatory toy standards are based on voluntary industry consensus standards. The plan acknowledges that the U.S. Government could and should play a role in encouraging its counterpart safety regulators to work

²⁸ 15 U.S.C. §2063(i) (3) (A) (v).

²⁹ See GAO, International Regulatory Cooperation, GAO-13-588, p 41. The consensus report for window coverings is at http://ec.europa.eu/consumers/archive/safety/int_coop/docs/pai_window_blinds_and_coverings_en.pdf

³⁰ See http://ec.europa.eu/consumers/archive/safety/int_coop/docs/booster_seats_consensus_en.pdf.

³¹ See <http://www.cpsc.gov/pagefiles/90341/toyplan.pdf>.

for greater alignment of standards and does include recommendations to this point, but those recommendations are very general and nonspecific in nature.

In 2014, the agency chairman undertook a project, in response to Congressional pressure to reduce testing costs, to look at toy standards in jurisdictions around the globe to try to determine whether a unified standard incorporating the most stringent tests could be developed. The conclusion was that such a standard would not result in reducing testing burdens and so was not pursued.³²

The toy industry has been working over the years in various ways to seek greater harmonization of global toy standards. Some of those efforts are detailed in the Roadmap. Most recently, the Toy Industry Association has been working with its counterpart association in Canada to develop recommendations for aligning the standards between the two countries. The parties have set up a steering committee made up of all relevant stakeholders to set out the process for moving forward as well as specialized groups to deal with technical issues. The group is working to identify “low hanging fruit” where consensus on alignment can be reached more easily while the group works to identify options for resolving more challenging issues.

This is very significant since, should a U.S./Canadian aligned standard be adopted by ASTM (the voluntary standards development organization), this could become the basis for the mandatory U.S. toy safety standard and the mandatory Canadian standard. In addition, both Hong Kong and Israel recognize the ASTM standard (as well as the European and ISO toy standards). Therefore these efforts, if successful, provide a stronger position for those who are seeking to achieve greater alignment of toy safety standards on a global basis, or alternatively, mutual recognition of standards from other jurisdictions.

Recommendations

Given the challenges of delivering safe products to consumers when those products are sourced and manufactured throughout the world, it is apparent that greater collaboration among safety regulators can only aid in meeting that challenge. That collaboration can take many forms including (1) greater engagement with foreign counterparts on both a technical and policy level; (2) greater cooperation on market surveillance and enforcement matters; and (3) regulatory cooperation efforts, including efforts to align or harmonize standards.

³² <http://www.cpsc.gov/global/about-cpsc/reports/miscellaneous/staff-report-burden-reduction-while-assuring-compliance-march2015.pdf>. See also Senate Commerce Committee, CPSC QFR Responses Aug 8, 2015, Response to question 3.

Greater Engagement

The agency's experience with safety summits is that they served to focus attention as an issue is developing. In addition it is important to clearly define expectations and deliverables going into such meetings for them to be of real value.

The agency's work with its European safety counterparts in educating suppliers and manufacturers about the safety requirements of the two jurisdictions offers a template for others to follow. To the extent that the agency has complex requirements (and the CPSC does), educating suppliers about how to comply with those requirements will help lessen chances that product will be out of compliance and either be refused entry into the U.S. or be recalled. That many of these educational sessions are being conducted with officials of the European Commission amplifies the safety message. It also offers the opportunity to emphasize where regulations differ between the jurisdictions. That is important since many factories are producing goods for both jurisdictions. These educational efforts should be continued and, if available resources allow, expanded. The agency's work here could probably be leveraged through greater use of association and other private resources.

The button battery safety campaign conducted with the OECD and discussed above is another example of an engagement effort that offers opportunity for greater collaboration. Working through the OECD to identify an emerging hazard and collaborating on a safety campaign to educate consumers about the hazard could provide real safety benefits to consumers worldwide.

Compliance and Enforcement

Capacity Building

Given the global nature of the consumer products marketplace, consumers in one country are not isolated from the regulatory shortcomings of other countries. Certainly this was abundantly apparent during the recalls from China during the 2007-2008 period, and safety issues from imported counterfeit products show that this is an ongoing issue. Therefore U.S. and European consumers benefit from building the regulatory capacity of supplier countries in Asia and in other developing countries that are building export markets, since stronger internal safety regulations will work to improve the safety of exported products.³³ Executive exchange programs and supplier training can work to support capacity building efforts. A focused effort (1) to examine regulatory practices of developing countries that seek to become export markets, (2) to provide technical and other assistance in developing appropriate regulatory and legal frameworks, and (3) to support the complimentary structures needed to assure successful implementation of those systems could result in regulatory systems that complement those in the U.S. and Europe.

³³ GAO-13-588 International Regulatory Cooperation, p 46.

Joint Recalls

The practice of conducting joint recalls with Canada and, to a lesser extent, Mexico, emphasizes the importance of the North American trading region. There is no reason to think that such recalls will not increase, given how closely aligned the laws and safety practices of the trading partners are. When appropriate, such recalls offer a way to effectively address a regional safety issue, generate more publicity for a safety issue and reach more consumers across a greater area.

However, one observation that is made with increasing frequency is that Canada is more efficient in managing the details surrounding publicizing the recall than is the U.S., which is a surprising development given the relative size of the organizations.³⁴ The CPSC staff explains this by pointing to internal time deadlines imposed by Health Canada in dealing with recalls depending on risk while CPSC staff scrutinizes very closely language proposed for every press release, regardless of risk, which can be a time-consuming process.³⁵ Nevertheless the growing concern of practitioners before the agency about delays at the CPSC in announcing recalls that are also being conducted in Canada points to a problem that should be addressed by the agency if the joint recall program is to fulfill its potential as a trans-border consumer protection device.

Regulatory Collaboration

Compliance with Executive Order 13609

Like many independent regulatory agencies, the CPSC takes every effort to make clear that it is not required to follow presidential executive orders. However, it also strives to minimize executive conflict by noting its compliance with those orders, such as Executive Order 13609,³⁶ when such happens. With respect to recent regulations, the CPSC has not methodically addressed differences between its standards and those of other jurisdictions, and such an analysis is not systematically integrated into the rulemaking process of the agency. While such analysis is relevant to the cost benefit analysis that the agency must do for some of its regulations, and should do for all its regulations, tight Congressionally-mandated deadlines for certain rules make such analysis difficult to do in a thorough and meaningful manner.³⁷

³⁴ Contrast Canadian press release for Franklin Corp Power Reclining Furniture Switch recall: <http://healthycanadians.gc.ca/recall-alert-rappel-avis/hc-sc/2015/52493r-eng.php> issued March 12, 2015, with CPSC release issued May 7, 2015: <http://www.cpsc.gov/en/recalls/2015/power-reclining-furniture-recalled-by-franklin/>. It took the CPSC two additional months to notify the public of the same hazard.

³⁵ Email from Scott Wolfson, CPSC Director of Communications, to author, September 23, 2015.

³⁶ See https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo_13609/eo13609_05012012.pdf. The order, issued on May 1, 2012, recognizes that differing regulatory approaches among jurisdictions addressing similar issues can hinder open trade and directs federal agencies to take steps to reduce unnecessary requirements between the U.S. and its trading partners.

³⁷ Passage of legislation clarifying that independent agencies are subject to presidential executive orders would help rectify this situation.

Standards Alignment

Not all standards can and should be harmonized. Product differences, cultural differences, available power supplies, government regulations and many other factors inhibit harmonization. However, divergent standards and redundant testing for compliance with those standards can increase costs to consumers and make regulatory compliance more complex, and so standards alignment, when appropriate, is a goal worth pursuing.

The Commission has acknowledged that differing standards can lead to market confusion and adversely impact safety. Yet, for the CPSC, this is apparently not a sufficient reason in itself to engage in standards alignment activity. That may be a reaction to concerns that alignment may devolve to adopting the least stringent standard and result in a “dumbing down” of standards. To assure against that result the agency requires that any aligned standards (at least with respect to toys, where there has been the most activity) must result in a net increase in safety. While this requirement is not formalized in statute or guidance, it appears to have the support of the majority of commissioners and thus is expressed in CPSC policy.

However, as recent activity has shown, that requirement has not led to productive results and so should be reconsidered. In rethinking how to approach alignment, certainly the current level of safety that U.S. consumers enjoy should be maintained. However, that goal should also recognize the value of facilitating the entry of new and safe products into the U.S. market, especially if those products are being safely enjoyed by consumers in other jurisdictions. As an example, with respect to plastic toys, the European standard EN-71 and the U.S. standard ASTM 963 arguably provide the same level of protection but have somewhat different requirements. The agency should explore the concept of determining the two to be substantially equivalent for the purposes of recognizing the validity of testing to either of the two standards.

A corollary to the issue of standards alignment is that of mutual recognition of standards of other jurisdictions. There has been strong reluctance on the part of the agency to aggressively explore the concept of mutual recognition of standards, which is unfortunate since this could be an effective way to assure consumer safety while still promoting free flow of safe goods between jurisdictions. Mutual recognition would be especially relevant when different test results are mandated for a standard with generally the same regulatory objective or where the differences in the standards are relatively minor and the regulatory policy objectives of the jurisdictions are aligned. In addition, as the agency reviews existing standards under any regulatory review activity, alignment or mutual recognition should be part of the analysis. The agency needs to rethink its position on that issue.

The agency has a number of new rulemakings now underway. The Commission should direct the staff to investigate standards in other jurisdictions as a part of its work in developing a proposed rule and provide an explanation of what efforts were made to align the proposed rule with any

existing rule. That would be consistent with Executive Order 13609. In addition, the agency should continue to provide positive support to the ongoing efforts of the U.S. toy industry in its work with the Canadian industry to develop an aligned standard and then encourage work with stakeholders to promote any aligned standard to other jurisdictions.

Information Exchange

Robust exchanges of information among jurisdictions can only serve to promote efforts to align standards or, alternatively, provide justification for maintaining differences. The agency does not have a mechanism to share information as it develops mandatory standards and as it works with those developing consensus standards. While there are no statutory prohibitions for this result, there are also no statutory requirements either.

As an independent agency, the CPSC is not required to follow the dictates of Executive Order 13609 (as noted above) which could arguably result in more information sharing. While the Commissioners have authority to set overall direction on such matters to the staff, that has not been done in any formal way and until that happens there is little incentive to engage in systematic information exchange when developing mandatory standards. The situation is sometimes exacerbated by the short statutory timeframes that apply to certain mandatory rule proceedings. The need for open information flows becomes more critical as products become more and more complex, technology dependent, and more interconnected.³⁸ Yet the agency's efforts here are *ad hoc* at best. The Commission should consider a direction to staff to make more robust efforts to share information as it engages in its rulemaking responsibilities.

Sharing information with other jurisdictions about specific recalls before those recalls are announced presents more problematic issues. The Consumer Product Safety Act gives competing direction to the agency with respect to information sharing. The Act directs product sellers to immediately report to the agency if a product it sells "could" present a substantial product hazard.³⁹ While this standard is somewhat vague, it is designed to encourage early reporting of potential hazards to the agency.⁴⁰ Since such reporting necessarily demands that confidential business information be given to the agency, the statute also encourages reporting by providing strong protections against the release of such information while the agency is investigating the nature of the hazard and considering whether a recall is required.⁴¹ Finally, the statute allows the agency to negotiate agreements to share product specific information with other jurisdictions

³⁸ See <http://www.natlawreview.com/article/internet-things-and-inevitable-collision-product-liability-part-4>-government for a discussion of the security and safety implications presented by the Internet of Things.

³⁹ 15 U.S.C. §2064(b) (3).

⁴⁰ Adverse event and defect reporting requirements in other statutes administered by other agencies are more precise in their requirements and do not result in the judgment differences that this provision has brought about. See, for example, the Food, Drug and Cosmetic Act, 21 U.S.C. §379aa.

⁴¹ 15 U.S.C. §2055 (b).

before a recall is announced if those jurisdictions have comparable procedures for protecting confidential business information.⁴² No agreements with foreign jurisdictions have been negotiated to date.⁴³

Under this statutory construct, there is a low threshold for reporting potential hazards to the agency, but the agency takes what time it needs to determine whether a hazard requiring a recall actually exists. And it should be noted that it is not unusual for the agency, after investigation, to determine that no recall is warranted. The resulting question is whether sharing information about *potential hazards* with other jurisdictions before the agency has determined the existence of an *actual hazard*, especially if that information were made public, could both impede reporting and the ability of the agency to effectively investigate the need for a recall. Instead of unilaterally releasing information, including sensitive business information, to other jurisdictions before a decision to do a recall is made, the agency both collects information on where in the world the product under investigation has been sold, and encourages a product seller to reach out to those countries' safety authorities. Any efforts to change this balanced approach should be done only after a stronger case for change has been made and should be mindful of the potential negative impact the change may have on the ability of the agency to collect information from product sellers and to investigate potential hazards.

Conclusion

Over the past twelve years, the CPSC has built an impressive track record of outreach to and cooperation with safety regulators in foreign jurisdictions. This is especially true given its small size and constrained resources. Given the growing complexity of both consumer products and the global marketplace, there is every reason to expect that consumer safety will demand greater communication and collaboration among regulators.

The agency should continue to look for ways to educate foreign suppliers about U.S. standards and safety expectations, including leveraging the resources of non-governmental groups. On the enforcement side, the agency's efforts to reach out to its North American trading partners to engage in recalls provides an added level of safety to consumers in those jurisdictions. However, the agency's reluctance to more aggressively work to minimize regulatory burdens by supporting efforts to align standards and to embrace the related concepts of substantial equivalency and mutual recognition of standards represents a timid and unimaginative approach to regulation and, in the end, does not necessarily advance consumer protection.

⁴² 15 U.S.C. §2078 (f).

⁴³ With respect to the EC, it would be difficult to structure an agreement that would meet the statutory requirements because of the differing jurisdictions and the need to withhold the information from a parliamentary or judicial inquiry.