NOTES

GET THE LEAD OUT: A NEW APPROACH FOR REGULATING THE U.S. TOY MARKET IN A GLOBALIZED WORLD

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TABLE OF CONTENTS

I. INTRODUCTION ........................................... 616

II. MATTEL'S INTERNAL PROCEDURES, ROGUE VENDORS, AND UNDISCLOSED PAINT SUPPLIERS .................. 619

III. RELEVANT DOMESTIC LAWS, INTERNATIONAL STANDARDS, AND THE CHINA PROGRAM ..................... 623
A. U.S. Consumer Safety Laws .................................. 623
B. Chinese Consumer Safety Laws ................................ 629
C. The International Standardization Organization .......... 633
D. The China Program: A Bilateral Agreement .................. 634

IV. GET THE LEAD OUT: COLLABORATE INTERNATIONALLY, STRENGTHEN DOMESTICALLY ...................... 635
A. The Failure of the Current Scheme ......................... 635
   1. The Failure of Domestic Laws .......................... 636
   2. The Failure of International Cooperation ............... 639
B. Recommendation ........................................ 640
   1. The United States's Role ................................ 640
   2. The Joint Roles of the United States and China ........ 642

V. CONCLUSION .............................................. 644

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I. INTRODUCTION

As the world becomes more interconnected, the actions of one country affect other countries with greater frequency and impact than ever before. Globalization has created an international marketplace where borders have all but vanished and goods are bought and sold by vendors and vendees from throughout the world. Thus, manufacturers of toy trains, bags of pet food, or pajamas in the People's Republic of China can send their products across borders into the United States with relative ease. Yet in the absence of uniform, international consumer product safety laws, importers and exporters are left with little guidance regarding product safety standards in the countries with which they interact. As major producers of low-priced, low-end products, manufacturers in China have recently come under intense scrutiny for exporting dangerous and deadly products, especially children's toys, to the United States.

Because 40% of the United States's total imports come from China and because 80% of the toys sold in the United States come from China, the United States has a clear interest in ensuring imported products manufactured abroad meet domestic safety standards. The U.S. Consumer Product Safety Commission (CPSC) is responsible for enforcing these safety standards and for protecting Americans from unsafe products, while its Chinese counterpart, the General Administration for Quality Supervision, Inspection and Quarantine (AQSIQ), has a similar duty to protect the Chinese. Despite these agencies'
efforts, however, U.S. manufacturers and the CPSC have recalled millions of hazardous children’s toys made in China.\footnote{See Dyer et al., supra note 2; supra note 3 and accompanying text; infra notes 10–14 and accompanying text.}

The summer and fall of 2007 marked a turn for the worse as toy giants such as Mattel recalled approximately three million toys due to excessive lead paint levels.\footnote{See Dyer et al., supra note 2; see generally Matt Glynn, Fisher-Price Redoubling its Efforts at Toy Safety: Last Year’s Recalls of China-Made Toys Hurt Morale and Company’s Reputation, BUFFALO NEWS, Feb. 10, 2008, at C1.} In August, Toys “R” Us “offered to refund customers for nearly one million baby bibs” containing excessive lead.\footnote{Mouawad, supra note 3, at C2.} In September, Target and RC2 recalled 555,000 Chinese-made toys after testing eleven samples, all of which proved to have a high lead content.\footnote{Id.} Later in the month, RC2 and five other companies recalled 670,000 children’s toys and furniture.\footnote{Baby Furniture Maker Recalls Playpens, N.Y. TIMES, Sept. 28, 2007, at C2.} Recalls continued into October, when the U.S. government recalled 544,000 Chinese-made children’s toys, including key chains, binders, toy mugs, blocks, and medallions.\footnote{544K Items Recalled for Lead, More Expected, CNN.COM, Oct. 4, 2007, http://money.cnn.com/2007/10/04/news/companies/lead_recall_testing/index.htm.} That same month, 1.5 million Chinese-made Boy Scouts badges were recalled due to excessive levels of lead.\footnote{Alana Semuels, Chinese-Made Scout Badge Recalled for Lead, L.A. TIMES, Oct. 6, 2007, at 15.} On Halloween, the CPSC ordered the recall of 43,000 eight-piece packages of fake “ugly teeth” because one hundred times the allowable level of lead was found in the paint decorating them.\footnote{Halloween “Ugly Teeth” Recalled Over High Lead Levels, CNN.COM, Oct. 31, 2007, http://cnn.com/2007/US/10/31/halloween.teeth.recall.ap/index.html. This product is designed specifically to be placed in a child’s mouth. This is particularly worrisome, as oral ingestion of lead carries many serious health risks. Joseph Enoch, Children Die of Lead Poisoning; Safety Agency Powerless to Act, CONSUMER AFFAIRS.COM, Feb. 7, 2007, http://www.consumeraffairs.com/news04/2007/02/cpsc_adrift2.html.}

In September and October of 2007 alone, more than thirteen million toys were recalled due to exceed lead levels.\footnote{Stephen Labaton, Bigger Budget? No, Responds Safety Agency, N.Y. TIMES, Oct. 30, 2007.} In the last three years, more than twenty million pieces of children’s jewelry made in China have been recalled.\footnote{Mouawad, supra note 3, at C2.} With respect to the three recalls by Mattel, the lead levels ranged
from just over the 0.06% allowable level to 11%; other companies recalled toys with up to 200% more lead than was allowed.\textsuperscript{16}

Moreover, the failure of the consumer product safety scheme victimizes not only the toy industry, but other manufacturers as well. Recalls during the summer of 2007 warned of both melamine-tainted pet food\textsuperscript{18} and toothpaste laced with antifreeze.\textsuperscript{19} After declaring one-fifth of Chinese goods—including food, consumer goods, fertilizers, and machinery—substandard, China pledged to improve its food and drug industries.\textsuperscript{20} Because of the barrage of recalls that hit the U.S. market, many American consumers have grown suspicious of Chinese-made goods.\textsuperscript{21}

This Note focuses specifically on the importation of toys made in China that contain amounts of lead paint\textsuperscript{22} exceeding U.S. standards.\textsuperscript{23}

\textsuperscript{16} Letter from Bob Normile, Senior Vice President and General Counsel and Secretary, Mattel, Inc., to Representative Bobby L. Rush and Representative Cliff Steams, Subcommittee on Commerce, Trade, and Consumer Protection (Sept. 5, 2007) [hereinafter Normile Letter], available at http://energycommerce.house.gov/CPSC\%20lead/Responses/Mattel.090607.response.082207.pdf.

\textsuperscript{17} Labaton, supra note 14.

\textsuperscript{18} Melamine is an “unsafe food additive.” Charles Emerick, Companies Charged in Kansas City in Pet Food Recall, DAILY REC. (Kansas City), Feb. 7, 2008. Three companies have been indicted for their involvement in the scandal. Id.


\textsuperscript{20} See, e.g., Fifth of China Goods Sub-Standard, supra note 2.


\textsuperscript{22} Lead is banned in children’s products as a “hazardous product.” Ban of Lead-Containing Paint and Certain Consumer Products Bearing Lead-Containing Paint, 16 C.F.R. § 1303.1 (2007). Ingestion of lead by children carries with it several health risks, including death, mental
Mattel, one of the world's largest toy manufacturers, has recalled millions of toys in approximately one month, and has testified about its internal investigation and safety procedures during the manufacturing of its recalled toys, this Note begins with a discussion in Part II of the results of Mattel's internal investigation regarding its recalls during the summer of 2007.

Part III focuses on prevailing practices designed to ensure the product safety of imported Chinese goods, specifically product safety laws in the United States and China, the International Standardization Organization, and the China Program, a recent bilateral agreement between the two countries.

Part IV insists that the United States and China cure the deficiencies in the consumer safety laws that allowed for the importation and sale of dangerous products, and recommends unitary action by the United States to ensure the safety of its citizens and the use of the China Program as an opportunity to help China develop its vague consumer safety law.

II. MATTEL'S INTERNAL PROCEDURES, ROGUE VENDORS, AND UNDISCLOSED PAINT SUPPLIERS

At the time of the violations, Mattel had extensive operations abroad governed by complex internal procedures and contracts. Mattel Asia Pacific Sourcing (MAPS) is Mattel's subsidiary in China that contracts vendors to manufacture many of Mattel's toys. Vendors could obtain paint to decorate

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retardation, stunted growth, kidney failure, and impaired hearing. Enoch, supra note 13. Other symptoms and risks include: irritability, loss of appetite, weight loss, abdominal pain, vomiting, constipation, anemia, learning difficulties, and occasionally death. Lead Poisoning, Health/Library, CNN.COM, Mar. 15, 2007, http://www.cnn.com/HEALTH/library/FL/00068.html. Once lead enters the bloodstream, no procedure can remove it. Enoch, supra note 13. Children are especially "susceptible to lead poisoning because lead can accumulate in their nervous system as they grow and develop." Lead Poisoning, supra.

23 Lead finds its way into consumer products fairly easily because of its prevalence in the environment. Unless manufacturers actively take steps to remove the lead—steps that add to production costs—the lead stays in the raw materials used for production. Mark Huffman, Safety Agency Needs to Get the Lead Out, CONSUMER AFFAIRS.COM, Feb. 20, 2007, http://www.consumeraffairs.com/news04/2007/02/cpsc_lead.html. Even though this Note focuses on the health risks from lead-tainted products exported from China, the problem is far more widespread; millions of other goods have been recalled for choking hazards or other health concerns. For a particularly egregious example of toys posing a health risk, see Toy Contaminated with 'Date Rape' Drug Pulled, CNN.com, Nov. 8, 2007, http://money.cnn.com/2007/US/11/08/toy.recall/index.html.

the toys in one of two ways. First, vendors could purchase paint from eight MAPS-qualified suppliers. Each vendor was required to ensure that each batch of paint used could be traced to one of the MAPS qualified suppliers. The suppliers, in turn, were responsible for testing their own paint. Mattel thus knew that paint coming from these sources complied with applicable paint standards for children's products, such as the lead ban. Mattel required vendors to keep records demonstrating compliance and to make these records available for periodic audits by MAPS.

Second, vendors could purchase paints from non-qualified suppliers, but in doing so, a MAPS-approved lab was required to test each batch of paint. Further, vendors could subcontract other companies only if the vendors first identified the subcontractor to MAPS. Only paint supplied by the vendors, obtained in one of the two ways described above, could be used by vendors and subcontractors, and the vendors were required to identify all facilities used to assist with production to MAPS.

With respect to testing for lead specifically, most products were tested twice before export. Before a product could be shipped, samples of it had to be tested for lead, and most importers required periodic testing of the products before importing them.

Thus, MAPS' vendors were contractually obligated to only use paint that was essentially pre-approved by MAPS or approved through laboratory testing. These vendors only enlisted the aid of subcontractors after disclosing the identity of the subcontractors to MAPS (presumably for liability, auditing, or investigative purposes). Importantly, when the products or paint required testing, Mattel would use its own laboratories and not those of an independent, third party.

Nevertheless, in the summer of 2007, MAPS vendors and subcontractors violated several of Mattel's policies and U.S. laws, leading to a series of

[hereinafter Eckert Testimony] (testimony of Robert A. Eckert, Chairman and C.E.O., Mattel, Inc.).

26 Eckert Testimony, supra note 24, at 3.
27 Id.
29 Eckert Testimony, supra note 24, at 3.
30 Id. at 3–4.
31 Id. at 4. Eckert's testimony states that a "[p]roduct could be shipped only after a certificate of compliance was issued." Id. This complies with the relevant certification provision required by U.S. law discussed below. See infra Part III.A.
GET THE LEAD OUT 621

recalls. The first recall occurred on August 2, 2007 after Mattel discovered Lee Der Industrial Company, a MAPS vendor, used non-compliant, lead-containing paint; Mattel traced the paint to an undisclosed facility used by Lee Der, in breach of its contract with MAPS. The lead-containing paint was discovered through a series of three Mattel tests, two of which tested positive for the lead paint, and a home-test performed by a consumer.

In trying to discover the origin of the lead paint, there are four major companies to consider: Lee Der and three suppliers, Dongxin, Zhongxin, and Mingdai. Conflicting accounts by Mattel, Lee Der’s Chairman, and Lee Der’s workers place the blame on any one of the three suppliers, claiming that the use of fake quality inspection documents and personal friendships caused the use of noncompliant paint. However, where the supply chain broke down and where the paint was contaminated is unclear.

The second recall on August 14, 2007 involved vendor Early Light Industrial Company, which subcontracted Hon Li Da Plastic Cement Products Company (HLD) to paint olive-green tops on toy cars. HLD used nonconforming lead paint and was not identified by Early Light as a subcontractor, in breach of Early Light’s contract with MAPS. The lead paint was discovered during a recertification test, which is required by Mattel’s internal policies for all toys produced for direct import and which continues for more than a year. After this discovery of nonconforming paint, Mattel suspended distribution of all finished products from Asia.

Mattel’s third major recall occurred on September 4, 2007 when vendor Holder Plastic failed to identify subcontractors Dong Lian Fa Metal Plastic Produce Factory and Yip Sang, again in violation of contract terms. The two

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33 Eckert Testimony, supra note 24, at 6–7.
34 Id. at 5–6.
36 Chairman of Lee Der, Xie Yuguang, insists supplier Zhongxin sold contractor Dongxin the lead pigment using false quality inspection documents that Dongxin did not recognize; yet, workers for Lee Der insist Dogxin, owned by a friend of Zhang Shuhong, Lee Der’s owner, was the paint supplier. Mattel, however, believes Mingdai sold the contaminated yellow pigment to Dogxin and Zhongxin, the producers of the paint. Mingdai has since disappeared and Zhang Shuhong has committed suicide because of the scandal. See id.
37 Eckert Testimony, supra note 24, at 7.
38 Id.
39 Id. at 4, 7.
40 Id. at 7.
41 Id. at 8.
subcontractors decorated Mattel’s toys with lead paint, despite having been supplied with approved paint from Holder Plastic. These nonconforming goods were discovered when, in light of the previous recalls, Mattel began testing for lead in paint on all toys coming from Asia.

Concerns quickly arose over these recalls. Mattel was just one of many companies to order recalls, and the lead paint was just one common reason among many others. The U.S. House of Representative’s Committee on Energy and Commerce sent letters to nineteen companies, demanding explanations of how so many toys contained hazardous amounts of lead. The Committee later held hearings and elicited testimony from the heads of some of the United States’ largest toy companies. Other U.S. attitudes reveal “growing concerns about unscrupulous Chinese businessmen: cutting corners; pouring cheap, sometimes lethal ingredients into their products; endangering consumers around the world, even children, to make a bigger profit.” Another concern is that Chinese businesses regularly use long supply chains, which are highly susceptible to fraud and difficult to regulate because they involve so many different contractors and subcontractors. However, some Chinese commentators blame rising U.S. protectionism for the increasing frequency of Sino-U.S. trade disputes and note that some Americans are exploiting product safety concerns to set up trade barriers against Chinese

42 Id. at 8–9.
43 Id. at 8.
44 See supra Part I.
45 Of the approximately thirteen million toys recalled by Mattel in August and September, the vast majority—about 11.7 million—were recalled for safety concerns not related to lead paint. See Normile Letter, supra note 16, at 1–2.
48 Barboza, supra note 35, at C2.
49 Id.
exports. These failures and concerns highlight the need for a change in the current landscape of the law.

III. RELEVANT DOMESTIC LAWS, INTERNATIONAL STANDARDS, AND THE CHINA PROGRAM

A. U.S. Consumer Safety Laws

In the United States, the Consumer Product Safety Commission (CPSC), the Consumer Product Safety Act (CPSA), and the Federal Hazardous Substances Act (FHSA) provide the foundation for consumer safety law. This part discusses how these mechanisms relate to toy safety, as well as recent proposals and changes to the law in the wake of mounting product recalls.

The CPSC is responsible for “protecting the public from unreasonable risks of serious injury or death from more than 15,000 types of consumer products under the agency’s jurisdiction.” Generally, the CPSC’s jurisdiction extends over consumer products found around the home and schools and those used in recreation. Frequent budget cuts and subsequent staff reductions have left the Commission’s staff at roughly 420 employees, about half the size it was in the 1980s. Only one full-time employee tests toys, and only fifteen inspectors are assigned to monitor all imported consumer products over which the CPSC has jurisdiction, a $614 billion market in 2006. In the political aftermath of the recalls and proposed legislation, discussed later, House and Senate Democrats asked acting chairwoman of the agency, Nancy Nord, to resign. At the date of publication of this Note, she has not yet done so.

The U.S. CPSA gives the CPSC authority to regulate product safety, making it unlawful to import a product that does not conform to rules.
promulgated pursuant to the Act by the CPSC. Through sections eight and nine of the CPSA, the CPSC passed 16 C.F.R. § 1303, a regulation banning the use of lead-containing paint. The ban covers paint and other similar surface-coating materials that contain more than 0.06% lead. The ban applies to toys, but exempts products unlikely to be used by children from its coverage. A violation exposes the importer to civil, and in some situations criminal, penalties, and the courts may enjoin the importer from distributing the tainted toy.

Further, pursuant to section ten of the FHSA, the CPSC promulgated 15 C.F.R. § 1500, which defines as a hazardous substance and bans "any toy or other article intended for use by children that" is shipped in interstate commerce and includes paint containing lead "in excess of 0.06 percent of total weight of the contained solids or dried paint film." The regulation emphasizes the danger posed by the lead, stating that an adequate cautionary label "cannot be written" and the only way to protect the public is to keep the articles out of interstate commerce. In accordance with this provision, the Secretary of the Treasury has the power to ban entry of hazardous substances shipped to the United States and may ultimately have such products destroyed.

The applicability of the CPSA and FHSA lead bans depends on a finding, made through testing, that a particular paint contains more lead than is legally permissible. Section 17(a)(2) of the CPSA requires that a certification indicating compliance with all relevant consumer product safety provisions accompany each imported toy. Manufacturers must base the certification—defined as a "declaration of conformity"—on a test of the

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60 Id.
61 Id.; 16 C.F.R. § 1303.3 (2008).
64 Hazardous Substances and Articles; Administration and Enforcement Regulations, 16 C.F.R. § 1500.17(a)(6)(ii)(A) (2008).
65 Id. § 1500.17(a). Ingestion of lead by children carries with it several health risks, including death, mental retardation, stunted growth, kidney failure, and impaired hearing. Once lead enters the bloodstream, there is no procedure to remove it. Enoch, supra note 13.
68 CON. PROD. SAFETY COMM’N, SECOND U.S.-SINO SAFETY SUMMIT: IMPORTER
product or a testing program; however, the CPSC cannot require the test to be done by a third party. The manufacturer, therefore, is free to perform the test.

As for products made in the United States for export to other countries, the CPSA does not place substantive restrictions on manufacturers in most circumstances. Although the Commissioner of the CPSC stated it would be unreasonable to expect foreign countries to ensure their exported goods comply with the standards of the importing country, minimum action is required by U.S. exporters of goods not in compliance with the CPSA. These exporters must notify the CPSC—which in turn must notify the government of the importing country—of the export and the rule or standard the exporter is violating.

However, these laws failed in protecting the U.S. market from contaminated toys in the summer of 2007. As the CPSC and toy manufacturers continued to announce recalls, the breadth and depth of the problem became obvious, and legislators and the White House responded with a slew of recommendations. The Senate initially sought to amend the CPSA through Senate Bill 2045, which altered the enforcement requirements of the law, specifically: importers who repeatedly violate the law could have their import licenses revoked.


69 Id. at 9.

70 Indeed, Mattel performed tests of its paint and products in its own laboratories operated in China. See Normile Letter, supra note 16.

71 15 U.S.C. § 2067(a) states the act will not apply to products if: (1) it can be shown that such product is manufactured, sold, or held for sale for export from the United States (or that such product was imported for export), unless (A) such consumer product is in fact distributed in commerce for use in the United States, or (B) the Commission determines that the exportation of such product presents an unreasonable risk of injury to consumers within the United States, and (2) such consumer product when distributed in commerce, or any container in which it is enclosed when so distributed, bears a stamp or label stating that such consumer product is intended for export.

72 Moore Testimony, supra note 21, at 4–5 (testifying, “Other countries expect, as we do, that the receiving countries’ regulators (or the marketplace) will find and address problems with products within their owner borders. [O]ur own statute makes it clear . . . that it is not the Commission’s concern whether products made in the U.S. for export meet the mandatory or voluntary product safety standards of other countries. It may be a bit unreasonable for us to realistically expect more from other countries than that which we expect of ourselves.”).


manufacturers of children’s products would be required to have a third-party, nongovernmental organization certify that their products adhere to all applicable CPSC rules; the CPSC could prohibit a manufacturer of a noncompliant good (under either the CSPA or FHSA) from being exported from the United States; the current $1.83 million cap on fines would be increased to $100 million; and there would be a full ban on the use of lead paint in toys except for trace amounts.

Chairwoman Nord urged the Senate not to pass Senate Bill 2045 (resulting in the call for her resignation) and has expressed a proposal which caps civil penalties at $10 million and creates incentives for companies to immediately stop selling recalled products. In rejecting the proposed amendment, the chairwoman said she would welcome the increased resources but ‘wants them to be the right resources.’ She explained that she feared the amendments ‘would not strengthen enforcement’ but instead ‘would put the agency in court.’ The chairwoman’s criticism notwithstanding, the Senate Subcommittee on Commerce, Science, and Transportation approved Senate Bill 2045 on October 30, 2007.

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75 Id. § 10.
76 Id. § 16.
78 Weintraub Letter, supra note 77. The letter—signed by top officials at the Consumer Federation of America; the U.S. Public Interest Research Groups; Kids in Danger; the Consumers Union, publisher of Consumer Reports; and the Union of Concerned Scientists—explains that experts have confirmed that there is no safe level of lead exposure and the use of lead is not necessary in children’s products. . . . The provisions in S. 2045 would expand current lead regulations. Currently, only a ban on lead up to 600 ppm exists for paint and surface coatings on children’s products. S. 2045 limits the ban on lead on paint on children’s products to 90 ppm and lowers the acceptable levels of lead to 200 ppm for jewelry and 400 ppm for all other children’s products. We view this as a positive improvement over the status quo but we would continue to urge the Committee to work to reduce the levels of lead even further.
79 Labaton, supra note 57.
80 Labaton, supra note 14.
81 Labaton, supra note 57.
82 Id.
83 Press Release, Senate Comm. on Commerce, Sci., and Transp., Commerce Committee
The House of Representatives made its own recommendations to the CPSA in the Consumer Product Modernization Act, also addressing enforcement issues. The bill recommended the $10 million cap on civil penalties suggested by Chairwoman Nord. It also allowed state attorneys general to enforce the act and permitted the CPSC to ban the export of nonconforming goods unless the importing country accepted the product by notifying the CPSC. The resolution further strengthens the lead standards, banning goods with more than 100 parts per million or trace amounts, rather than the current standard or 600 parts per million; this would be the same stringent standard in the world. Lastly, like Senate Bill 2045, House Resolution 4040 requires independent third party facilities to test products from every manufacturer of children’s products.

The House passed this version of the bill, which has endured and become the front-runner for Congressional consideration. The Senate has not acted on S. 2045 in months, but instead passed a version of H.R. 4040, which is currently in a conference committee to finalize a version to present to the President for his signature or veto.

This version, the CPSC Reform Act, incorporates many of the suggestions proposed by both houses of Congress. It chooses the House cap of a $10 million fine for violation of the CPSA or FHSA, absent a finding of “aggravated circumstances.” The Act requires that third party laboratories test products that will be used by children seven years old or younger. Attempting to exercise undue influence on the third party laboratories is


84 H.R. 4040, 110th Cong. § 215 (as passed by the House, Dec. 19, 2007).
85 Id. § 217.
86 Id. § 213.
87 Id. § 101.
89 H.R. 4040, § 102.
93 Id. § 10(a)(2)(A).
prohibited by the Act. The laboratories would have to meet certain accreditation standards and test random samples of products to determine whether they meet the requirements of certification. The certification would continue to require a declaration that the product conforms with safety standards and the Act explicitly bans the import of children’s products that are unaccompanied by a certificate as required by the Act. Notably, if the good does not meet U.S. standards and does not meet standards of an importing country, the CPSC may ban the export of the product, pursuant to the Act.

The White House, in its Action Plan for Import Safety, makes many of the same recommendations as the CPSC Reform Act, including increased civil penalties and mandatory third party testing. A major tenet of the White House’s plan is “prevention with verification,” which focuses on preventing tainted goods from entering the United States by verifying that imported goods comply with U.S. safety laws. This approach is arguably the overall strategy of the current scheme, which does not attempt to inspect all goods coming into the country but rather insists that importers certify that their goods comply with relevant safety standards. In the proposed Action Plan, certification would be mandatory for “high-risk” products and encouraged for all others. Incentives to encourage certification include expedited processing when the

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94 Id. § 16.
95 Id. § 10(d)(1)(A)(ii).
96 Id. § 10(d)(1)(A)(iii).
97 Id. § 10(a)(2)(B)(i).
98 Id. § 10(f).
99 Id. § 15(c).
101 See id. 15–26.
103 "Certification" in this context refers to a process whereby the United States would certify that certain manufacturers meet U.S. safety standards. To ensure that the manufacturers are complying, on-site inspections and random testing would be necessary. Compare WHITE HOUSE ACTION PLAN, supra note 100, at 17, with SECOND SAFETY SUMMIT, supra note 68, at 6, and Consumer Product Safety Act, 15 U.S.C. § 2063(a)(1) (certification under the CPSA refers to a process whereby a manufacturer or laboratory certifies that an import complies with U.S. standards).
104 WHITE HOUSE ACTION PLAN, supra note 100, at 18–19.
goods reach U.S. ports and "expedited processing of samples for laboratory testing."105

Thus, the landscape of consumer protection law in the United States could change dramatically depending on whether Congress and the White House enact any of these recommendations into law. However, the common thread running through both Congress’ and the White House’s recommendations is that third party laboratories should test the products106 and civil penalties for violating the CPSA should be increased.107 Thus, no matter the compromise forged between the two political branches, those two aspects will likely be incorporated into the new law.

The next section addresses how China—a major exporter to the United States and the recent source of products with high lead levels—handles consumer safety by examining the flaws that weaken Chinese product quality laws.

B. Chinese Consumer Safety Laws

The Chinese laws relevant to product safety are considerably less developed than the U.S. consumer safety laws.108 The Law of the People’s Republic of China on the Protection of Consumer Rights and Interests109 (CRIL) along with the People’s Republic of China on Product Quality110 (PQL) serve as the primary legal tools for the Chinese government to protect consumers and regulate its manufacturing industry.

The CRIL establishes rights for Chinese consumers and imposes obligations on manufacturers, the government, and consumer organizations.

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105 Id. at 19.
107 Compare Consumer Product Safety Act, § 16(a)(4), with WHITE HOUSE ACTION PLAN, supra note 100, at 11.
108 See generally A. Brooke Overby, Consumer Protection in China After Accession to the WTO, 33 SYRACUSE J. INT’L L. & COM. 347 (2006) (discussing the four national laws concerning consumer protection issues that were passed in anticipation of China’s entry into the World Trade Organization).
It lists approximately a dozen rights that the law establishes for its consumers including the right of inviolability of personal and property safety, the right to demand compensation for personal injury or property damage caused by unsafe products, and the right to "form public organizations for the maintenance of their own legitimate rights and interests." The CRIL also requires manufacturers to fulfill their duties under the PQL when they supply goods to consumers and guarantee the goods they supply meet requirements for personal safety.

In addition to imposing obligations on manufacturers, the CRIL requires the government and consumer organizations to undertake certain duties. The government is required to help administrative agencies better perform their consumer safety duties, to "listen" to complaints of consumers and public organizations regarding the quality of products, to investigate product quality, and to prosecute those who violate consumer safety laws. Consumer organizations are to exercise "social supervision" over goods and to protect consumers' rights. The organizations also have several other functions to perform, such as providing "support to victims in their legal proceedings against infringement upon the rights and interests of consumers" and "[exposing] and [criticizing] through mass media the acts infringing upon the legitimate rights and interests of consumers." Each of these rights and obligations are enforceable through the PQL, or other similar product quality laws.

Overall, the two laws combine to provide a solid base for a consumer protection scheme. Producers may apply to have their "enterprise quality system" authenticated, which allows the producer to use "authentication marks" on its products. The Chinese government references international
product standards in its authentication decisions.\(^\text{123}\) Regardless of authentication, no products may present consumers with unreasonable risks threatening bodily injury and must meet national quality standards, if they exist.\(^\text{124}\) To enforce this standard, China shall enforce a "supervision and inspection program" through random testing,\(^\text{125}\) and the government shall inspect products "if the supervision and random checking for such products so require."\(^\text{126}\) The law does not specify when products require inspection.

If the government discovers that a good does not comply with national or trade standards aimed at safeguarding human safety, the manufacturer must stop producing the good immediately.\(^\text{127}\) Further, the government will confiscate any earnings made by selling the unsafe good and may fine the manufacturer two to five times the amount of the earnings made on the product.\(^\text{128}\) Producers must compensate consumers for damages to one’s person if caused by a defective product\(^\text{129}\) or for products that do not meet national safety standards, if national safety standards exist.\(^\text{130}\) Each of these avenues for compensation seem to protect the rights codified in the CRIL.\(^\text{131}\)

Although the two Chinese laws provide for mechanisms to ensure consumer safety similar to the American system,\(^\text{132}\) the laws’ vagueness hinders them considerably.\(^\text{133}\) It is unclear to whom the rights established in the CRIL extend,\(^\text{134}\) and it seems that "producer," "seller," and "business operator" are

\(^{123}\) Id.

\(^{124}\) Id. ch. 3, § 1, art. 14.

\(^{125}\) Id. art. 10.

\(^{126}\) Id.

\(^{127}\) Id. ch. 4, art. 37.

\(^{128}\) Id.

\(^{129}\) Id. ch. 4, art. 31. Defect means "the unreasonable danger existing in product which endangers the safety of human life or another person [sic] property; where there are national or trade standards safeguarding the health or safety of human life and property defect means inconformity to such standards." Id. ch. 4, art. 34.

\(^{130}\) Id. ch. 3, § 1, art. 14.

\(^{131}\) See Consumers' Rights and Interest Law, supra note 109.


\(^{133}\) See Zhao, supra note 121, at 581. It is important to note that Zhao’s note examines the 2000 version of the PQL. Although the PQL was amended in 2004, it still suffers from many of the same problems discussed in the Zhao piece.

\(^{134}\) Id. at 584.
The law does not specify the international standards by which the "enterprise quality system" is measured and "enterprise quality system" itself is not defined. The PQL does not specify which national and trade standards are applicable to its provisions, except that they must relate to "safeguarding health or safety of human life." Additionally, it is not clear what the law requires of the government in "listening" to consumers nor is it clear when "supervision and random checking ... products" is required.

Further, weak enforcement seems to be another problem, demonstrated by the fact that it took a catastrophe in the international toy market to spur the Chinese government into inspecting its thousands of toy manufacturers. China revoked the export licenses of at least 750 toy companies due to the risks their toys posed. An additional 690 toy factories have been "ordered to renovate or improve their facilities" because of similar safety issues. Despite these poorly written statutes, the incredible number of recalls, and the confirmed presence of unsafe amounts of lead in its toys, the AQSIQ maintains that 99% of toys in that same region are safe. However, this reassurance from the AQSIQ does not withstand scrutiny. Regulators in the southern Guangdong province claim to have visited more than 1,700 of the region’s 5,000 facilities. Of those, approximately 1,500 facilities had their licenses revoked or were ordered to come into compliance with quality standards. Thus, if those 1,500 facilities make any more than 1% of the toys in that region alone, AQSIQ’s statement is false. Misleading statements aside, one must ask whether this crackdown by the Chinese would have come absent the U.S. condemnation that followed the recalls.

Lastly, unlike current U.S. law, neither the CRIL nor the PQL contain a provision requiring notification to an importing country of a good’s unsafe nature when China knows the good does not meet its own safety standards.

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135 Id.; at 584–85; see generally Product Quality Law, supra note 110.
136 See Product Quality Law, supra note 110, art. 9.
137 Id.
138 Consumers’ Rights and Interest Law, supra note 109, ch. 4, arts. 26, 28.
139 See Product Quality Law, supra note 110, art. 10.
140 David Barboza, China Suspends Exports from 750 Toy Makers, N.Y. TIMES, Nov. 2, 2007, at C3.
141 Id.
142 Id.
143 Id.
144 Id.
145 Id.
Nevertheless, China’s effort to eliminate unsafe toy manufacturers is a step in the right direction. China has not ignored thoughtful consumer safety regulation, as it has enhanced its product quality and consumer protection laws through the passage of the PQL and the amendment of the PQL in 2004. Such a willingness and intent in making its products safer bodes well for the import-export relationship between the United States and China, as the two countries have a similar goal to work toward.

C. The International Standardization Organization

In addition to each country’s domestic laws, international standards have emerged to provide optional, albeit widely accepted, consumer product safety norms. The International Standardization Organization (ISO) provides a set of trade standards that countries can voluntarily adopt in order to achieve the ISO’s goal of having “‘one standard, one test, [and] one conformity assessment procedure accepted everywhere.’” The ISO is a nongovernmental organization comprised of the national standards institutes of 157 participating countries. Whether considered a governmental or nongovernmental agency, each country’s national standards institute is responsible for establishing the standards of its country. Member countries are not required to adhere to all ISO-promulgated standards, as they are voluntary.

In the context of lead paint standards in the toy industry, an official at China’s Chamber of Commerce for Trade in Light Industrial Products, Arts

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146 See generally Zhao, supra note 121, at 592–93 (discussing the effect of the PQL’s enactment and describing it as “a significant improvement over the [CRIL]” that has “supervision and control” as its enforcement mechanisms).
147 See generally Product Quality Law, supra note 110.
150 China’s institute is a governmental agency, the Standardization Administration of China, while the U.S.’s member of ISO is a nongovernmental agency, American National Standards Institute. See ISO, ISO Members, http://www.iso.org/iso/about/iso_members.htm (last visited June 8, 2008).
151 See Thompson & Thompson, supra note 148, at 160–61.
152 Id.
and Crafts explained, "‘Chinese manufacturers apply ISO standards ... in the production of toys, while the United States has its own standards.’”

She clarified, stating that the ISO and U.S. standards allow for different amounts of lead in children’s products, creating a situation where compliance with the pervasive ISO standard does not ensure compliance with the more stringent U.S. standard.

This illustrates the problem that occurs when a variety of countries with different technological capabilities try to find “one standard, one test and one conformity assessment procedure accepted everywhere.” Here, according to the Chinese official, the United States requires products sold within its borders to have less lead in their paint and surface coatings than required by the international consensus. Thus, rather than facilitating trade, the different standards have created confusion in the industry, thus inhibiting trade. One attempt to deal with the problems the differing standards have caused is the China Program, discussed in the next section.

D. The China Program: A Bilateral Agreement

The United States and China agreed to collaborate on addressing their consumer safety issues through the China Program, a bilateral agreement based on two formal documents, the Memorandum of Understanding (MOU) and the Plan of Action for Cooperation (PAC). The MOU, signed April 21, 2004, recognizes the “growing importance of international product safety in the United States with regard to consumer products imported from China and the desire for mutual cooperation.”

The PAC, adopted August 30, 2005, creates a mechanism for “communication and coordination” between the CPSC and the AQSIQ, primarily through the creation of working groups in particular industry areas. The broad goals of the PAC are to protect consumer health and safety, “[t]o enhance the understanding and cooperation of the [parties,] [t]o establish a smooth liaison channel for the [parties],” and to consult on important “safety

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153 Huang, supra note 50.
154 Id.
155 INT’L STANDARDIZATION ORG., supra note 148, at 2; see generally Bapuji & Beamish, supra note 21, at 7.
156 CHINA PROGRAM, supra note 3, at 2–3.
157 Id. at 2.
158 Id.
events related to consumer products."159 The working groups established by the PAC are comprised of personnel from each of the countries’ consumer product safety agencies and “are to study and discuss [...] issues of mutual concern,” fulfill the objectives set by China and the United States at an annual summit, and to solve “problems arising in the relevant fields.”160 One of the four working groups focuses specifically on toy products.161

Additionally, after the wave of toy recalls made by Mattel in 2007, the CPSC and AQSIQ again came together to issue a joint statement on enhancing consumer product safety.162 There, the AQSIQ agreed to establish, and the CPSC agreed to support and help the AQSIQ establish, a plan to eliminate the use of lead paint on Chinese manufactured toys exported to the United States.163

Thus the two countries have pledged to communicate with each other about consumer safety issues and to work together to rid China’s toys of excessive levels of lead. However, the two countries need an affirmative plan to act, such as the one proposed below.

IV. GET THE LEAD OUT: COLLABORATE INTERNATIONALLY, STRENGTHEN DOMESTICALLY

A. The Failure of the Current Scheme

Just as national governments impose requirements on national markets to ensure the quality of goods they supply, domestic law, as well as bilateral and multilateral agreements, needs to regulate products in the international market to ensure the quality of goods moving between countries. The scheme regulating lead paint in the international toy trade is currently supported by each country’s domestic laws and international industrial standards. These two


160 Id. at 2.

161 See CHINA PROGRAM, supra note 3, at 3.


163 See id.
sources of regulation are patched together to create a piecemeal consumer safety regime that is peppered with holes. Through these holes Mattel, and other similarly situated toy makers, imported dangerous products into the United States.

1. The Failure of Domestic Laws

The CPSA, FHSA, CRIL, and PQL were unable to stop tens of millions of lead-tainted toys from entering the United States. Arguably some blame lies with the product designers rather than with China and its vendors. Certainly unsecured supply chains and unrealized contract obligations are at fault as well. However, poor product designs, broken supply chains, and inadequate corporate supervision of contractors or subcontractors is only part of the problem. U.S. citizens expect that when wrongdoers do wrong, the law will catch and punish them. The United States and China are not absolved of their responsibilities to reexamine the failure of the consumer safety laws simply because the products should have been designed more safely or never have been imported into the United States in the first place. Indeed, both countries have an obligation to reevaluate the laws and focus on their major deficiencies.

First, the funding budgeted for the CPSC is alarmingly low. The agency has too few employees and too little funding to adequately perform its duty of monitoring and, when necessary, inspecting the toys coming into the country. Currently, the CPSC employs fewer than five hundred people, only fifteen of whom are inspectors, to regulate the safety of a $614 billion import industry. In other words, each employee is responsible for approximately $1.5 billion worth of imports and each inspector is responsible for around $40 billion worth of imports.

Second, the current testing and certification procedures are insufficient in detecting the hazardous levels of lead in the paint. Section 17(a)(2) of the CPSA requires that an imported toy must be accompanied by a certification that it complies with all relevant consumer product safety provisions, which

164 See Bapuji & Beamish, supra note 21, at 7 (noting that most of the defects in toys were design defects, but recognizing that most lead paint problems were manufacturing defects); Chinese Manufacturing: Plenty of Blame to Go Around, ECONOMIST, Sept. 29, 2007, at 74 (noting that Mattel likely recalled more toys than was necessary).
165 See Barboza, supra note 35, at C1.
166 Moore Testimony, supra note 21.
167 Labaton, supra note 14.
GET THE LEAD OUT

would include the lead limitations found in 16 C.F.R. § 1303.1. The law states that the product should be certified and the certification should be based on a test.\textsuperscript{169} But it does not require a particular type of testing facility—such as a neutral, third-party facility.\textsuperscript{170} This allows self-interested manufacturers to find a favorable testing facility to perform the required test.\textsuperscript{171}

Further, the obligation to notify the CPSC arises only after the manufacturer, distributor, or retailer becomes aware that the product "creates an unreasonable risk of serious injury or death."\textsuperscript{172} The CPSC has no pre-market jurisdiction, which prohibits the agency from testing goods before they are put up for sale in the U.S. market.\textsuperscript{173} Thus, lead-tainted goods that are not caught by the manufacturer's tests will reach the shelves of American retailers before the CPSC can test the goods. Thus, the CPSC's power is only reactionary and the only precautionary activity is performed by self-interested manufacturers. This highlights the importance of the manufacturer's testing and certification procedures in ensuring that only safe toys reach the market in the first place.

For Mattel, whose C.E.O. testified before Congress, the problem rests with false-negatives, where the initial tests mistakenly showed compliant levels.\textsuperscript{174} This shows a clear problem with the accuracy of the testing. Assuming the other toy companies that recalled their products had certified their imports as required by law,\textsuperscript{175} several possibilities could explain why their certified products did not comply with required safety standards. For example, the companies may not have performed the lead tests but nevertheless certified the toys. It is also possible that they performed the tests, which inaccurately showed a compliant amount of lead, and unknowingly (or knowingly) certified the toys. Or, they could have performed the test, which accurately showed a noncompliant amount of lead paint, and knowingly certified the documents. Because certification and testing are meant to assure compliance with all safety

\textsuperscript{169} Id.
\textsuperscript{170} See id. § 2063(a)(1).
\textsuperscript{171} See id.; see Normile Letter, supra note 16 (explaining that Mattel did indeed use its own laboratories located in China to test its paint, but that it changed its internal policy after the August and September recalls to require neutral, third-party laboratories to perform the tests).
\textsuperscript{172} Reporting of Unreasonable Risk of Serious Injury or Death, 16 C.F.R. § 1115.6(a) (2008).
\textsuperscript{174} See supra Part I.
regulations, and the goods had excess levels of lead despite certification, it is clear that the certification or testing procedures (or both) are faulty.

Third, although the CRIL and PQL afford China with a legal basis for a consumer safety and product quality system, the absence of defined standards and terms and China's relaxed enforcement of the laws render the system weak. Indeed, the PQL seems to fall far short of its stated purpose to "strengthen the supervision and control over product quality law [and] to define the liability for product quality." For example, in performing random testing to catch products that do not comply with standards, China has no firm, defined standards to which it holds its products. In terms of "supervision and control," i.e., enforcement, inspections of 1,700 toy factories reveal that 85% of the facilities had sufficient violations to warrant the revocation of their export licenses or to receive an order to renovate or improve their facilities. Considering that China has approximately 10,000 toy factories, 1,500 is a fairly substantial sample that suggests deficiencies in many of the factories. In other words, the Chinese government does not seem to have achieved the PQL's goal of "supervision and control."

Lastly, the complete absence of a consumer protection provision for exported goods is particularly worrisome considering the volume of imports the United States receives from China. Under the current law, Chinese manufacturers can export even the lowest quality goods without any product quality-related restraints under Chinese law.

176 Id. ch. 1, art. 1.

177 Compare id. ch. 2, art. 7 (stating that a product "shall be inspected and proved to be up to the standards), and id. ch. 2, art. 10 (stating that products that pose "possible threats to the health or safety of human life" will be subject to random checking), with Consumer Product Safety Act, 15 U.S.C. § 2068(a)(1) (2000) (banning the import of a good that does not comply with a consumer product safety standard), and Ban on Lead Paint, 16 C.F.R. § 1303.1 (2008) (explaining that excess amounts of lead paint is a violation of the CPSA), and 15 U.S.C. §§ 2069-2071 (providing specific civil, criminal, and equitable penalties for specific CPSA violations).

178 See Barboza, supra note 140, at C2.

179 See Bapuji & Beamish, supra note 21, at 6.

180 See Mouawad, supra note 3, at C2 (stating that China manufactures 80% of all toys sold in the United States); CHINA PROGRAM, supra note 3, ¶ 3 (2007) (stating that China manufactures approximately 40% of all consumer products imported into the United States).
2. The Failure of International Cooperation

In the globalized world, a country’s actions rarely affect only that country. When a product is the synthesis of ideas from one country, materials from another, labor from a third, and capital from a fourth, all of those countries’ laws are implicated. Commissioner Moore’s statement about import product safety is a truism for every country, not just the United States. Testifying before Congress, he stated:

Increasing numbers of U.S. companies are either importing finished products or component parts made in other countries or establishing their own production plants outside of the U.S. In most cases, domestic companies are not going to have the same degree of control over these products as they would have if their products were being made in this country. This inability to have constant hands-on supervision can result in products entering this country that do not meet U.S. safety standards.181

He went on to caution against “dependence on foreign governments to make sure that products exported from their countries comply with . . . U.S. standards.”182

Dependence on foreign governments to protect domestic consumers, as ascribed by U.S. standards, was never the approach contemplated by U.S. or Chinese law. The United States requires the importers, not the foreign exporters, to test products and holds them liable for unsafe products.183 But it seems that this scheme separates actors who should be working together. When country A’s products can hurt country B’s consumer, of course country B will do its best to ensure the safety of the products that it purchases from country A. However, a country can do this much more effectively with meaningful communication regarding specific consumer safety issues that each country needs to address and with collaboration with respect to the steps necessary to resolve those issues.

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182 Id.
B. Recommendation

1. The United States's Role

The solution for the United States is two-fold. The United States must take responsibility for the quality and safety of the goods it imports by reevaluating its laws, making any necessary changes, and collaborating with China to revise its consumer safety laws.

The United States needs to take a set of unitary actions that respond to failures in its own domestic law. Many of the necessary steps are found in the proposed amendments to the CPSA as proposed by the Senate, House, and White House. Provisions like those allowing states' attorneys general to enforce the CPSA and allowing for expedited processing at U.S. ports for certified goods would all strengthen the consumer safety scheme in the United States. However, given the documented failures of the certification and testing processes established by the CPSA, it seems that those two areas are of particular concern.

First, the CPSC must have adequate funding to carry out its mission, which includes ensuring compliance with testing and certification requirements. The United States imports $2 trillion worth of products from more than 825,000 importers. Adequate regulation of this much trade demands a large budget so that the agency may aggressively enforce the standards it promulgates, research industries and leading problems associated with the products of those industries, and test goods and monitor the ports when needed. It is important to note, however, with this much trade, it is unrealistic for the United States to inspect a meaningful number of goods that cross over its borders; this is all the more reason to provide significant funding for monitoring importers and their certification processes, instead of the actual products being imported. When the amount of imports that come into the country is so substantial that it is impossible to ensure compliance via governmental inspection of imports, the importing country must establish an effective program that ensures that importers are complying with the law and carrying out the needed quality assurance tests.

185 WHITE HOUSE ACTION PLAN, supra note 100, at 18–19.
186 Id. at 2.
187 This type of non-inspection scheme comports with the "prevention with verification" goal of the White House's plan. See id. at 16–18.
Second, the certification of imports should come only after multiple tests that confirm compliance with U.S. lead standards. The United States should require that a product is tested twice by a U.S.-certified laboratory before it can be imported. If either test indicates a noncompliant level of lead, then the CPSC should have the option of having it tested a third time by an independent laboratory, or having one of its own inspectors perform the test. Depending on the results of that third test, the product should be granted or denied entry into the country. To offer the CPSC the option of performing the test would first require an expansion of the CPSC’s jurisdiction to the toys before they reach the U.S. market, where it currently does not reach. It also would require additional funding to substantially increase the number of inspectors the CPSC has working in its laboratories. Currently there is only one full-time toy inspector.

Under the present scheme, the CPSC only requires that a test be performed, and the CPSC cannot require a manufacturer to seek third-party testing before certification. Therefore it is likely that the tests are often less reliable and more prone to bias than if they were performed by a third-party. Though many company laboratories may be reliable, they certainly would have an interest in appeasing the company paying for the test. Thus, the White House’s plan and the CPSC Reform Act recommend mandatory third party testing of children’s products. The CPSC, or a standards group chosen by the CPSC, should certify that the third-party laboratories are capable of performing the needed tests. This certification not only increases the accuracy of the test but also ensures that the executive branch is accountable and has a stake in certifying only capable laboratories that perform accurate tests.

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188 Multiple tests are used in other situations where one test result is, for whatever reason, often incorrect or misleading. See, e.g., RONALD L. CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 246 (6th ed. 2007) (explaining that the National Research Council recommends that two laboratories perform DNA testing when trying to match DNA to a person because of the risk of error through contamination). Likewise, in the lead paint context, test results have repeatedly incorrectly stated that imported toys contain allowable levels of lead paint. Multiple tests would likely yield a more accurate result.

189 Kavilanz, supra note 173.

190 Labaton, supra note 14.


192 SECOND SAFETY SUMMIT, supra note 68, at 9.

193 CPSC Reform Act, H.R. 4040, 110th Cong., § 10(a)(2)(A) (as amended by the Senate, Mar. 3, 2008); WHITE HOUSE ACTION PLAN, supra note 100.

194 Similar requirements are recommended in H.R. 4040, § 10(d)(1)(A)(ii).
A scheme such as this would solve the problem where a toy is tested and the test mistakenly shows conformity with U.S. lead standards, thus gaining certification. By having two testing facilities certified by the CPSC, it is likely that at least one test will discover any noncompliant lead levels in the paint.

As discussed above, false-negatives, i.e., where the test failed to discover noncompliant levels of lead, are not the only way to explain the imported contaminated toys. The manufacturers simply could have refused to perform the tests, or they could have performed them, discovered noncompliant levels of lead paint, and certified the product anyway. These situations justify consumers’ fear of unscrupulous businessmen, both U.S. and Chinese alike. Stiffer fines, such as the $10 million cap recommended by the CPSC Reform Act, would provide a heightened deterrent more capable of keeping a manufacturer from purposefully breaking the law.

2. The Joint Roles of the United States and China

Working together, the United States and China can make great strides in solving the consumer safety problem presented by the toy market. The China Program can be used as a tool to strengthen weak Chinese consumer safety law and to discuss the possibility of requiring Chinese exporters to certify that their goods comply with U.S. standards.

However, the China Program could also become a toothless instrument containing indefinite and noncommittal language that does little more than espouse cooperation, communication, and general goals. To be useful, the agreement between the countries must provide strategies to meet their shared goals. The agreement to eliminate lead in Chinese made goods ignores the broader question of how unsafe goods that violate U.S. consumer safety laws get into the country. The two countries may need to eliminate the use of lead in children’s toys, but the larger point is to ensure that the consumer safety scheme effectively detects any unsafe products.

A necessary step in strengthening the consumer safety scheme is to overhaul Chinese consumer safety laws and rewrite them with more specificity. These deficient consumer safety laws should be an area of “mutual

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195 It is clear, however, that Mattel falls into the “false negative” category above. See supra Part II.

196 See Barboza, supra note 35, at C2 (citing concern of “unscrupulous Chinese businessmen”).

197 H.R. 4040, § 16(a)(4).

198 See Joint Statement, supra note 162.
concern” that the China Program’s working groups are called on to address.\textsuperscript{199} In the same way that the CPSC and the AQSIQ came together to propose a joint effort in eliminating lead in children’s toys exported to the United States, the two countries should work together to bolster China’s consumer safety law, particularly with respect to provisions about Chinese exports. In recognition of the “growing importance of international product safety issues in the United States with regard to consumer products imported from China,”\textsuperscript{200} the United States and the AQSIQ should work together. They should create a regulation similar to the provision in the CPSC Reform Act,\textsuperscript{201} allowing AQSIQ to ban the export of goods that do not meet Chinese and U.S. standards. At the very least, the law should require the exporter to inform the importer that the exports do not conform with the safety standards of the importing country so that the importer may take appropriate measures to protect consumer welfare.

Lastly, the United States should persuade China to require its exporters to certify that their goods comply with the U.S. standards. By requiring that both exporters and importers certify that their goods comply with appropriate safety standards, under the threat of stiff penalties, both the importers and exporters will take more care in the production of the goods. Exporters would have an incentive to secure their supply chain, and importers would have an incentive to deal only with trusted manufacturers. Though unlikely to materialize,\textsuperscript{202} such an agreement would probably decrease the number of unsafe goods imported to the United States from China and may even restore some of the lost consumer confidence in Chinese made goods.

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\textsuperscript{199} See CPSC AND AQSIQ ACTION PLAN, supra note 159, at 2.
\textsuperscript{200} CHINA PROGRAM, supra note 3, at The China Program: Founding Documents, ¶ 3.
\textsuperscript{201} See H.R. 4040, § 15(c)(1) (allowing the prohibition of exports that do not comply with U.S. and the importing country’s consumer protection standards).

\textsuperscript{202} However, it may not be entirely unlikely, considering the economic interests of the two countries. An interesting and compelling argument is that forces of supply and demand within the toy market will adequately regulate, since lead operates as a cost that buyers must consider in purchasing the goods. With the public’s increased concern over the effects of lead poisoning due to the dozens of recent recalls, such a cost would be heavy for toy manufacturers. Presumably, with such a significant cost for buying toys from China, U.S. consumers would look elsewhere to either buy from producers who do not charge such a high cost or for substitute goods. Thus, China would have an incentive to change, and perhaps it would come in the manner suggested above.
V. Conclusion

The import of finished products and component parts, and the establishment of production plants abroad for domestic companies, is an excellent way for companies to lower their costs and offer cheaper products to consumers everywhere. But Commissioner Moore’s suggestion that the loss of hands-on supervision translates into a loss of control over whether goods comply with safety standards is not necessarily true.203

The responsibility of protecting American consumers from poorly made, dangerous toys falls squarely on the United States. To the extent that China aids in this endeavor, the effort will be more successful. The United States must nevertheless amend its laws to account for the incredible number of imports now coming into the country. The current law was doomed from the beginning because it failed to adapt to the changing global economy, wherein countries are importing and exporting more than ever before.204 Because such a substantial portion of products sold in the United States are manufactured abroad, the task of ensuring their quality is a large one. The recent slew of recalls has acted as a catalyst for change, and various pieces of legislation from Congress and the White House have recommended change in different ways.

However, U.S. law currently permits less lead in children’s products than the pervasive international standard set by the ISO.205 Therefore, to enter the U.S. market, other countries must comply with the U.S. standards, and in the absence of a supranational governmental authority regulating the “international market,” nations are left to themselves when determining their terms and conditions of trade.

In the toy market, China is a major producer206 and the United States is a major consumer.207 To ensure the economic viability of China’s many producers and the health and safety of U.S. consumers, the two countries

203 See Moore Testimony, supra note 21, at 4.
205 Huang, supra note 50 (“The ISO standard allows a certain quantity of lead in each toy, while US standards set a permitted quantity of lead for each square centimetre of a toy.”).
206 In China, there are between 8,000 and 10,000 toy-making facilities. Compare Bapuji & Beamish, supra note 21, at 6 (10,000), with China's Toy Industry Feels Growing Pains, USA TODAY, Dec. 21, 2006, at 7B (8,000). South China accounts for 78% of China’s $15.2 billion toy export industry. China's Toy Industry Feels Growing Pains, supra.
207 In 2005, the total traditional toy industry (thus, excluding video games) in the United States was $21.3 billion. About.com: Retail Industry, Annual Toy Industry Sales, http://retailindustry.about.com/od/seg_toys/a/toy_sales.htm (last visited May 14, 2008).
should each create stronger domestic laws and cooperate through the China Program to solve disputes and confront issues in consumer safety law.