



Consumer Product Safety Advisory

September 11, 2008

Consumer Product Safety Commission Overhauled

On August 14, President Bush signed into law a measure that represents a major overhaul of U.S. product safety regulation. The controversial Consumer Product Safety Improvement Act of 2008 (the "Act"), which has been lauded by consumer advocacy groups, was delayed in conference as lawmakers wrangled over key differences between House and Senate versions of the bill.

The Act amends the Consumer Product Safety Act, 15 U.S.C. §§ 2051-2084, in many respects and also authorizes over \$626 million for the Consumer Product Safety Commission (the "CPSC") in fiscal years 2010 through 2014. This budget represents, on average, a \$40 million per year increase from current funding levels and will allow CPSC to add at least 500 new employees by 2013.

The CPSC is the federal agency responsible for regulation of the sale and manufacture of more than 15,000 different consumer products, ranging from cribs and pacifiers to all-terrain vehicles, equestrian helmets, and hazardous chemical products. CPSC fulfills its mission by creating product safety standards, researching potential hazards associated with consumer products, and issuing product recalls and assessing penalties for products that are deemed unsafe. Because this influx of money will likely lead to increased enforcement by CPSC, manufacturers should take steps to ensure their compliance with the Act.

In addition to increasing CPSC's financial resources, the Act does the following:

- The Act allows state attorneys general to enforce consumer product safety standards, except in cases where CPSC has an ongoing action. Nancy Nord, acting Chairman of the CPSC, opposed this provision, arguing that empowering states in this way would lead to inconsistent application of federal law and therefore would undermine the goal of uniform, national product safety standards.
- The Act permanently bans any children's toy or child care article that contains more than 0.1% of di-19 (2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP). The ban, which goes into effect 180 days after signing, effectively requires impacted manufacturers to switch to nonphthalate plasticisers for products sold in the United States. Given the lack of scientific certainty regarding the impact of phthalates, this ban signals a shift towards a more precautionary approach to chemicals regulation.
- Three other phthalates, diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), and di-n-octyl phthalate (DnOP), are temporarily banned pending further review by a chronic hazard advisory panel. Presumably, if testing indicated that the phthalates did not impact children's health, the CPSC would allow these products to be re-introduced to the marketplace. The expected timeframe for a final CPSC decision is 3 years, however, effectively forcing manufacturers to switch to alternate chemicals long before a decision is reached. It is also unclear what impact a reversal would have on established state laws banning the substances.
- The Act bans children's products containing lead over a specified level and lowers the lead threshold at which paint becomes a banned hazardous product.
- The Act requires third-party, pre-market testing and certification for certain children's products, including metal jewelry, cribs and pacifiers. Testing of such products is currently voluntary. Companies can obtain accreditation to conduct testing on their own if the CPSC determines that such testing would provide equal or greater consumer safety protection than independent third party testing.

CONTACT

If you would like more information, please contact any of the following McKenna Long & Aldridge LLP attorneys or public policy advisors:

Charles A. O'Connor, III
202.496.7586
coconnor@mckennalong.com

Stanley W. Landfair
414.267.4170
slandfair@mckennalong.com

Michael Boucher
202.496.7729
mboucher@mckennalong.com

- The Act provides authority to the CPSC to inspect the laboratories of product manufacturers.
- The Act expands the automatic defect notification requirements to include any product or substance over which the CPSC has jurisdiction (for example, products that fall under the auspices of the Federal Hazardous Substances Act).
- The Act authorizes the CPSC to order a manufacturer, distributor, or retailer to distribute notice of CPSC's actions to the public in certain circumstances.
- The Act requires manufacturers of consumer products to place distinguishing marks on a product or its packaging to enable the purchaser to identify the manufacturer and the production date of a product. This information will help vendors and purchasers identify recalled products.
- The Act requires the CPSC to maintain on its website a publicly searchable database that includes consumer, governmental or interest group complaints about a product's safety. Manufacturers can respond to such complaints and CPSC will remove complaints deemed to be inaccurate.
- The Act increases the maximum civil penalties under the Consumer Product Safety Act, the Federal Hazardous Substances Act, and the Flammable Fabrics Act from \$1.8 million to \$10 million. The Act also strengthens criminal penalties under those Acts.
- The Act authorizes CPSC to make certain information available to any federal, state, local, or foreign government agency, provided that each agency agrees to maintain the information in confidence and use it only for law enforcement or consumer protection.
- The Act creates protections for public and private sector whistle-blowers.

While establishing a stricter regulatory regime, the Act also provides some relief and clarity from the ever-growing maze of state legislation by establishing a single set of standards for regulation of many products. It also acknowledges the need for national, uniform standards by preempting state regulation in certain circumstances. States still may petition CPSC for acceptance of stricter state regulations if the situation warrants. In addition, lawmakers have already noted that the Act does not preempt California's Safe Drinking Water and Toxic Enforcement Act of 1986 (also known as Proposition 65).

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