

President Signs Consumer Product Safety Improvement Act of 2008: Major Implications for Manufacturers, Distributors, Importers, and Retailers

On August 14, 2008, the President signed into law H.R. 4040, the “Consumer Product Safety Improvement Act of 2008,” ending any speculation about whether and how the federal government might reinvent and overhaul the Consumer Product Safety Commission (CPSC) in light of increasing numbers of product recalls, particularly relating to children’s products.

The new law will have far-reaching implications for manufacturers, distributors, importers, and retailers of consumer products, including the following:

- Establishing a public consumer product safety database;
- Permitting state attorneys general to seek injunctive relief in federal court for violations of the Consumer Product Safety Act (CPSA);
- Increasing civil and criminal penalties, including asset forfeiture;
- Creating whistleblower protections for employees of manufacturers, private labelers, retailers, and distributors;
- Banning certain plasticizers called phthalates in children’s products;
- Reducing permissible lead levels in toys and children’s products;
- Requiring third-party testing for certain products prior to sale; and
- Reestablishing the CPSC quorum of five member commissioners within one year of enactment (although it provides for a two member quorum for the first year after enactment).

Acting CPSC Chairman Nancy Nord has indicated that the Commission will work with Congress to ensure that the Act’s provisions are implemented. She has noted, however, that many of the mandates are unfunded.

Although the Commission will have to take steps to implement certain provisions of the new law, some provisions become effective in short time periods. Regardless of the timing or the details of how the Commission might move forward, companies that make, import, or sell consumer products should conduct immediate reviews of their current practices to evaluate whether changes are necessary.

PUBLIC ACCESS TO INJURY INFORMATION

Reported injury information will now be more accessible. The Act requires the establishment, within two years, of a publicly-available, searchable database on the CPSC’s website that includes reports of any injury, illness, death, or risk of such injury or death received by the Commission from consumers, governmental agencies, health care professionals, hospitals and coroners, child service providers, public safety entities such as police and firefighters, or from retailers, manufacturers, or private labelers. The Act affords manufacturers and private labelers an opportunity to provide comments in the database, although the effectiveness of that provision in excluding inaccurate data or limiting ill-motivated information will depend significantly upon the Commission’s implementation. The CPSC will be able to redact business confidential information and, additionally, correct and/or remove information proven inaccurate or duplicative (the Commission will not guarantee the accuracy, completeness, or adequacy of the database’s contents).

INCREASED AUTHORITY FOR STATES AND THE CPSC

The Act gives state attorneys general authority to enforce certain provisions of the CPSA, in addition to the Commission's current enforcement authority. The new law also increases the civil and criminal penalties the Commission may obtain.

Enforcement by State Attorneys General

The Act provides that state attorneys general may seek injunctive relief under statutes enforced by the CPSC. Currently under the CPSA, private persons are permitted to bring actions seeking injunctive relief in the appropriate U.S. district court. Under the new law, a state can now also bring an action on behalf of its residents. The Attorney General must provide to the Commission 30 days written notice regarding any such civil action in order for the Commission to respond or assist with an action. States, however, may file complaints immediately following notification if such immediate action is necessary to protect the public from a substantial product hazard. A separate suit may not be brought if the same alleged violation is the subject of pending civil or criminal action by the United States. The Act does not provide authority for state attorneys general to recover costs and attorneys' fees, nor does it expressly prohibit such authority.

Limitations on Federal Preemption

With respect to the new mandatory toy safety standards (discussed below), the Act allows states and political subdivisions to apply for exemptions, which may be granted by the Commission if the state or subdivision's standard or regulation provides a significantly higher degree of protection from risk or injury and does not unduly burden interstate commerce. Additionally, nothing in the new law prevents a state or subdivision from continuing in effect a safety requirement that is designed to deal with the same risk of injury as the standards established in the new law, provided the requirement is in effect on the day before the enactment of the Act.

While the Act bans certain phthalates (discussed below), nothing in the new law shall be construed to preempt

or otherwise affect any state requirement with respect to any phthalate alternative not specifically regulated in a consumer product safety standard under the CPSA.

Finally, and more generally, the Act includes language intended to clarify that the requirements under the CPSA and the Federal Hazardous Substances Act (FHSA) are not be construed to preempt or affect any state warning requirements under state laws that were in effect prior to August 31, 2003.

Increased Civil and Criminal Penalties

The new law increases the civil penalty cap for a violation of the CPSA, the FHSA, or the Flammable Fabrics Act (FFA) from \$8,000 to \$100,000 and the maximum civil penalty cap for a related series of violations from \$1,825,000 to \$15,000,000. The law also increases maximum criminal penalties to imprisonment of up to 5 years (for knowing and willful violations) and fines. Additionally, the new law authorizes the Commission to seek asset forfeiture as a penalty for a criminal violation of acts enforced by the CPSC.

WHISTLEBLOWER PROTECTIONS

The Act prohibits manufacturers, private labelers, distributors, or retailers from discharging or otherwise discriminating against employees because the employees provide information relating to CPSA violations to the federal government or a state attorney general, testify regarding such violations, or object to participating in any activities believed to be tantamount to such violations. Employees can file complaints with, and seek recourse from, the Secretary of Labor.

If, after an investigation and opportunities for both parties to comment and respond to the complaints, the Department of Labor finds sufficient evidence that a violation did occur, the Secretary is directed to order the employer to abate the violation, to reinstate the complainant with compensation, and to provide compensatory damages. If the complaint is found to be frivolous, the Secretary may award the employer a reasonable attorneys' fee to be paid by the complainant.

If the Department does not act in a timely manner, complainants may bring action in a U.S. District court seeking reinstatement, back pay and compensation for any special damages as a result of the discharge.

STRICTER REQUIREMENTS FOR CHILDREN'S PRODUCTS, INCLUDING RESTRICTIONS ON LEAD AND PHTHALATES AND REQUIREMENTS FOR MANDATORY TESTING

Largely in response to the series of toy recalls over the past year, many provisions of the new law focus on children's products.

Phthalates Ban

The Act bans the sale of children's toys or child care articles that contain more than 0.1 percent of di-ethylhexyl phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP). That ban begins 180 days following enactment. The Act also bans the sale of toys that can be placed in a child's mouth or child care articles that contain the following phthalates in concentrations of more than 0.1 percent: diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP). That prohibition will remain in effect until the Chronic Hazard Advisory Panel conducts a review of the health effects – including endocrine disrupting effects – of the phthalates alone and in combination with other phthalates. Those phthalates may then be banned permanently by rule by the Commission.

For purposes of the phthalate ban, a “children's toy” is a consumer product designed or intended for use by children 12 and under. The term “child care article” means a product designed or intended to facilitate sleep or the feeding of children age 3 and under or products to help children with sucking or teething.

Lead Limitations

Children's Products Containing Lead: The term “children's product” means a consumer product designed or intended primarily for children 12 years of age or younger. Under the new law, the permissible lead level in children's products will be lowered in three phases: the limit is reduced to 600 parts per million (PPM) total lead content by weight for any part of the

product beginning 180 days after enactment; 300 PPM one year after enactment; and 100 PPM three years after enactment or the lowest level technologically feasible (“technologically feasible” is defined in the Act). Pending rulemaking proceedings will not delay implementation of the new standards. A specific product can be excluded from the prohibition if the Commission determines that lead in such a product will not result in the absorption of any lead into the body or have an adverse impact on public health or safety. The Act also requires the CPSC to issue regulations exempting children's products containing a lead component that is not accessible to a child because of a sealed covering or casing, and that will not become exposed through normal and reasonably foreseeable use and abuse. Additionally, the Act includes a provision exempting certain electronic devices when established limits are not technologically feasible, provided certain protective steps are taken. The Act does not alter the authority of the Environmental Protection Agency, under the Safe Drinking Water Act and its Lead and Copper Rule, to regulate lead in public water systems.

Lead Paint Rule: One year following enactment, the lead paint standard for children's products will be lowered from 600 PPM to 90 PPM.

Every five years, the Commission must review and revise downward the permissible lead level in children's products (including in exempted inaccessible parts and electronic devices) and the lead paint standard to require the lowest amount of lead that is technologically feasible.

Third Party Testing

The Act requires third party testing of children's products subject to a consumer product safety rule under the CPSA. Manufacturers and private labelers will now be required to submit samples of the product to an accredited third-party testing body which, upon testing, will issue a certificate certifying that the product complies with the children's product safety rule. The law permits the CPSC to conduct the accreditation of facilities or to delegate that authority to an independent accreditation organization designated by the CPSC. The law imposes time periods ranging from 30 days to 10 months of enactment, depending on the product

or potential hazard, for when the CPSC must publish accreditation requirements.

Interim Mandatory Safety Standard

The Act codifies the American Society for Testing and Materials (ASTM) standard F963-07, *Standard Consumer Safety Specification for Toy Safety*, as an interim consumer product safety standard until the CPSC establishes a permanent standard, by rulemaking, to ensure the highest level of safety for toys.

Tracking Labels

The Act requires manufacturers of children's products to place distinguishing marks on children's products and their packaging to enable the purchaser to discern the source, date, and additional production information (such as the batch number, run number, or other identifying characteristics). Small items that are unable to bear such markings must have their packaging labeled so that retailers and vendors will be able to easily identify recalled products. Additionally, no label or packaging of a consumer product, or advertisement for such a product, may reference a consumer product safety rule or voluntary safety standard unless such product conforms with the applicable safety requirement.

Standards for and Consumer Registration of Durable Nursery Products

The Act directs the CPSC, in consultation with industry, child product experts, and consumer groups, to assess the effectiveness of any voluntary safety standards for durable infant or toddler products. The CPSC is also given a priority-based timetable to promulgate rules for every durable infant and toddler product category to ensure the highest level of safety for such products.

The Act requires the CPSC by rule to require each manufacturer of a durable infant or toddler product to: (1) provide consumers with a postage paid consumer registration form for each product; (2) maintain a record of the names and contact information of consumers who register ownership of such products; (3) provide a mechanism for consumers to submit electronic versions of registration forms to the manufacturer via the Internet; and (4) permanently place the manufacturer name and contact information, model name and

number, and date of manufacture on each durable infant or toddler product.

Cautionary Statements in Advertising

The Act requires cautionary statements on any advertisement that provides a direct means for the purchase or order of any toy, game, balloon, small ball, or marble (including ads on websites and in catalogues).

SALE, IMPORTATION, AND EXPORTATION OF RECALLED AND REGULATED PRODUCTS

Ban on Sale of Recalled Products

Entities subject to the CPSA will now be barred from selling, offering for sale, manufacturing for sale, distributing in commerce, or importing into the United States any consumer product, or other product or substance that is regulated under this CPSA or other law enforced by the CPSC, if the product is not in conformity with applicable consumer product safety rules. Moreover, products that are subject to a voluntary corrective action, subject to an order issued under the CPSA, or banned as hazardous under the FHSA will also be prohibited from being sold, offered for sale, manufactured for sale, or distributed into commerce.

Importation and Exportation

Import Safety Management and Interagency Cooperation: The law requires the development of a risk assessment methodology for the identification of shipments of consumer products intended for import to the United States that are likely to be in violation of the CPSA. To the extent possible, the CPSC is directed to provide for the use of the International Trade Data System and to consult with U.S. Customs and Border Protection (CBP) in developing this methodology. The CPSC is also directed to develop, within one year of enactment, a plan for enhanced information sharing and coordination with CBP.

Substantial Product Hazard List and Destruction of Noncompliant Imported Products: The Act authorizes the Commission to specify characteristics whose existence or absence is deemed a substantial product hazard for any consumer product or class of products. Those

adversely affected by such a rule are afforded the opportunity to file a petition for judicial review. Further, products refused admission into the United States shall be destroyed unless the Department of the Treasury permits the export of the product in lieu of destruction. The manufacture for sale, offering for sale, distribution for commerce, or importation into the United States of any consumer product will be conditional upon compliance with the Commission's inspection and recordkeeping requirements.

Financial Responsibility/Bond Requirements: The law directs the CPSC to work with Customs and Border Protection and other agencies to identify and determine bond amounts sufficient to cover the cost of destruction of regulated products. Further, the bill directs the Government Accountability Office (GAO) to conduct a study to determine the feasibility of requiring the posting of an escrow, proof of insurance, or security to cover the cost of (1) destruction of a domestically-produced product and (2) the effective recall of a domestically produced or imported product regulated under the CPSA.

Noncompliant Exports: The law authorizes the CPSC to prohibit certain exports, including the export of any consumer product that does not conform with an applicable consumer product safety rule unless the importing country notifies the Commission that it will accept the product.

OTHER REQUIREMENTS

The law imposes a number of other requirements. Among them are:

All-terrain Vehicle Safety Standards: The law mandates that the American National Standard for Four Wheel All-Terrain Vehicles Equipment Configuration, and Performance Requirements developed by the Specialty Vehicle Institute of America, be adopted as a mandatory standard. The standard bars the import or distribution into commerce of non-compliant ATVs.

Formaldehyde in Textiles Study: The law requires the GAO to study the use of formaldehyde in the manufacturing of textiles and apparel articles and to

prescribe consumer product safety standards for such textile and apparel articles.

Audits: The law directs the Commission's Inspector General to conduct reviews and audits to assess the CPSC's capital improvement efforts as well as the adequacy of procedures for accrediting conformity assessment bodies and overseeing required third-party testing. The Inspector General is also directed to conduct a review of complaints to the Commission from employees related to the failure of other Commission employees to enforce, in good faith, CPSC rules and regulations. To assist in this effort, the law requires a link on the Commission's website to the Inspector General's website, on which a mechanism will be established through which individuals may make anonymous reports of waste, fraud, or abuse within the Commission.

Information Sharing: The law requires the Commission to coordinate with other federal, state, local, and foreign entities to share information.

For additional information regarding this bill please see our previous advisories issued December 19, 2007, March 21, 2008, and May 15, 2008.

KELLEY DRYE & WARREN LLP

Kelley Drye & Warren's Consumer Product Safety Practice Group is experienced in providing advice on the difficult issues of how and when potentially hazardous consumer products must be reported to the CPSC. If product recalls are necessary, we work with our clients and CPSC staff to quickly develop and implement cost-effective communications programs that satisfy product liability concerns and minimize potential penalties. When the CPSC threatens or brings enforcement actions, we advise our clients on appropriate strategies.

Kelley Drye & Warren's Government Relations and Public Policy Practice Group helps clients interpret and shape governing laws, enabling them to achieve and maintain market leadership. The varied backgrounds of its government relations lawyers and lobbyists enable the team to handle a variety of clients needs, including representation and strategic planning.

For more information about this
Client Advisory, please contact:

CHRISTIE L. GRYMES

(202) 342-8633

cgrymes@kelleydrye.com

DUSTIN J. PAINTER

(202) 342-8875

dpainter@kelleydrye.com

MAGGIE CLARKE

(202) 342-8896

mclarke@kelleydrye.com