
Signed into law by President Bush last week, the “Consumer Product Safety Improvement Act of 2008” (the Act) will significantly enhance and change how consumer products are regulated by the U.S. Consumer Product Safety Commission (CPSC). High profile product safety recalls and widespread criticism in Congress over the regulation of product safety has produced long-awaited reform legislation. The Act significantly raises civil penalties (up to $15 million and $100,000 per violation), empowers state attorneys general for the first time to enforce federal product safety laws, imposes specific requirements and restrictions on lead content in children’s products, and addresses (and will ban in certain instances) the use of phthalates in toys and other products. A host of new rulemakings and other initiatives will keep CPSC, and regulated industries, quite busy over the next few years with many changes taking effect in just a few months.

Background: How CPSC Works and the Obligation to Report a Potential Problem

The CPSC was established in the early 1970s as an independent federal agency charged with broad authority to regulate the safety of consumer products, ranging from children’s toys, appliances, consumer electronics, supplements and drugs packaged in child-resistant packaging, household chemicals and cleaners, textiles and clothing, among many other articles used by consumers. This five-year reauthorization significantly increases funding for the CPSC and imposes a series of deadlines for new regulations and actions.

In our experience counseling and representing companies before the CPSC, potential legal liability often arises in one of the following instances: (1) a firm is unaware of CPSC jurisdiction, standards, and other requirements; (2) a failure to recognize possession of facts that trigger mandatory notification of a potential safety issue (thus exposing the firm to civil penalties for failure to make a timely report to the government); and (3) quality issues arising from third-party manufacturers for items that may not meet required specifications or otherwise possess undetected defects. Civil and criminal penalties for inadvertent or knowing violations of CPSC requirements in these and other circumstances is significantly higher with enactment of the reform legislation.

Beyond the legislative changes highlighted in this memorandum, it is important for companies to understand long-standing requirements—product standards, labeling requirements, and testing parameters arising under the Consumer Product Safety Act (CPSA) and companion laws. Firms
that fail to act (and notify CPSC) in a timely fashion are exposed to the substantially higher penalties specified in the Act. ¹

Timely reporting of a potential safety concern is required when information is received that a product defect exists that could create a substantial product hazard, a product fails to comply with an applicable product standard or creates an unreasonable risk of serious injury, or in the face of multiple lawsuits arising in a given time period. The existing regulations provide an inventory of definitions of key terms (e.g., what constitutes a “defect”) and factors to be considered in evaluating if the relevant facts a firm must consider trigger mandatory reporting to the CPSC. Collaboration between a firm’s technical and legal/regulatory functions is critical to this evaluation.

Turning to the Act, we highlight some of the key provisions that will change the way the CPSC operates and industry will be regulated. The Act, totaling over 60 pages, warrants careful review beyond the highlights noted below.

**Major Provisions of Reform Legislation**

**Lead** [Section 101] – Creates a nationwide ban on products for children aged 12 and younger at 600 parts per million (ppm) 180 days after enactment, 300 ppm after one year, and 100 ppm after three years (unless the CPSC determines such level “is not technologically feasible for a product or product category” and may establish a level lower than 300 ppm if warranted). The limits apply to the total lead content for any part of a product. Any delay in CPSC promulgation of new rules does not change the effective dates (and enforcement) specified by Congress. Various provisions address the method by which compliance will be measured.

Express allowance for exclusions – if the CPSC affirmatively finds no risk of absorption of any lead taking account of foreseeable use and misuse and in the absence of other risks. Other exclusions include component parts that are found by the CPSC to be inaccessible from foreseeable use and abuse (i.e., swallowing, mouthing, breaking, or other children’s activities and the aging of the products). The CPSC is to provide guidance on “accessibility” of lead by one year following enactment. Paint, coatings, or electroplating are expressly deemed not to be considered barriers to lead exposure. The CPSC is permitted to consider special requirements for batteries if the rules restricting lead content cannot be feasibly applied.

Mandating more restrictive lead standards, the CPSC is afforded some discretion to determine when higher lead content may be permissible. At the same time, the CPSC’s approach to assessing “available lead” that poses an ingestion risk will have to be abandoned or significantly revamped. The result – some uses of lead that may currently be viewed as posing no risk by CPSC will soon be considered violative.

**Phthalates Ban** [Section 108] – The sale of children’s toys or child care articles that contain more than 0.1 percent di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP) are prohibited, effective 180 days after enactment. The sale of children's toys or

¹ The array of product standards, labeling, and other requirements are typically product-specific, and well beyond the scope of this memorandum. We can certainly furnish such information.
child care articles containing concentrations of more than 0.1 percent of diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP) are prohibited on an interim basis, effective 180 days after enactment, pending a review by a Chronic Hazard Advisory Panel (CHAP). The CHAP will study the effects on children’s health of all phthalates and phthalate alternatives and issue a report to the CPSC. The Commission will then determine whether to continue the interim prohibition and evaluate whether other phthalates need to be regulated, within 180 days of receipt of the report.

**Mandatory Toy Standards** [Section 106] – The American Society for Testing and Materials (ASTM) International standard F963-07, as it exists on the date of enactment of the Conference Report (except for section 4.2 and Annex 4 or any provision that restates or incorporates an existing mandatory standard or ban promulgated by the CPSC or by statute), is adopted as an interim consumer product safety standard pending evaluation by the CPSC. The CPSC must establish the mandatory standards by rule after the relevant components of the standard are evaluated. Large segments of this industry already follow the ASTM standard, in addition to CPSC requirements. Traditional testing done for purposes of determining regulatory compliance will expand or be modified in some respects to include the parameters of the ASTM standard.

**Third Party Testing; Inspection of Proprietary Labs** [Section 103] – Third party testing of certain children’s products is mandated for the first time. Every manufacturer of applicable children’s products must submit samples to an accredited third-party conformity assessment body before importing, warehousing, or distributing the products into commerce. Following testing, the manufacturer must issue a certificate attesting that the product complies with the children’s product safety rule and specifying each rule, standard, or regulation that applies to the product. The manufacturer may issue a separate certificate for each children’s product safety rule applicable to a product or a combined certificate that certifies compliance with all applicable rules.

This requirement represents one of the most significant changes arising from the new legislation. Regular testing of consumer products by manufacturers has been infrequent or non-existent in some cases after initial production of a product is passed. This requirement will benefit companies that source affected products for promotions, sales, or otherwise as they can now expect (and verify) that the product has been tested and complies with applicable safety standards.

**Labeling Requirements** [Section 103] – Manufacturers of children’s products must put permanent labels on products and packaging that will enable the purchaser to ascertain the source, date, and cohort (including the batch number, run number, or other identifying characteristic) of production of the product. If an advertisement or label for the product contains a reference to a consumer product

2 The Act defines “children’s product” to mean “a consumer product designed or intended primarily for children 12 years of age or younger.” [Section 235]

3 Each certificate must: (1) identify the issuer and third-party conformity assessment body (name, mailing address, telephone number, and contact information for the responsible party); (2) state the date and place of manufacture; (3) state the date and place where the product was tested; and (4) be in English. The bill also provides authority to the Commission to inspect manufacturers’ proprietary laboratories. The accreditation structure for governmental participation will apply equally to all entities—domestic, foreign, joint ventures, or controlled in whole by a government. The CPSC will maintain an up-to-date list of accreditation entities on its website. These changes go into effect 90 days after the CPSC has established and published notice of requirements for accreditation of third-party assessment bodies.
safety rule or voluntary consumer product safety standard the product must conform to the applicable safety requirements of the rule or standard.

**Enhanced Recall Authority [Section 214]** – Several statutory provisions largely formalize existing CPSC practice, including the authority to order the manufacturer and all persons who handle the product to cease distribution; notify state and local public health officials; require the manufacturer to post “clear and conspicuous” notice on its Internet website alerting consumers of the recall and provide notice to any third-party Internet website where the product is advertised or offered for sale; and require a firm to modify its recall plan if deemed ineffective by the CPSC. CPSC has long had authority to compel the recall, repair or replacement of a product, and various changes to this authority further enhance its ability to remove unsafe products from the marketplace.

**Enforcement [Section 218]** – State attorneys general have the authority to uniformly enforce consumer product safety laws by bringing an action on behalf of their residents. The State must serve notice on the Commission at least 30 days before bringing a civil action and the Commission may intervene in the action.

The nature and predictability in how federal product safety laws are enforced could change significantly. No such authority was previously accorded state attorneys general and the essential expertise and experience that informs CPSC compliance decisions is not easily created or transferred to state consumer protection agencies. A hotly contested provision leading up to enactment, the effect of this new authority on the consistent and effective enforcement of federal safety requirements is difficult to predict.

**Whistleblower Protections [Section 219]** – Manufacturers, distributors, and retailers may not discharge or discriminate against an employee who provides information to the government, attorney general, or employer regarding a violation of the CPSA, testifies regarding a violation, assists or participates in a proceeding, or refuses to participate in an activity that the employee reasonably believes to be a violation of the CPSA. Employees may file a complaint with the Secretary of Labor within 180 days of the alleged violation and the Secretary will notify the person named in the complaint and conduct an investigation.

**Penalties [Section 217]** – The civil penalty cap for each violation of a prohibited act under the CPSA is increased from $8,000 to $100,000, and the maximum civil penalty cap for a related series of violations is increased from $1.85 million to $15 million. Criminal penalties may include imprisonment for up to five years for a knowing and willful violation, fines, and forfeiture of assets. When determining penalties, the Commission will consider: the product distributed, the nature, circumstances, extent, and gravity or the violation, and undue adverse economic effects on small businesses. These penalties become effective one year after enactment. Within one year following enactment, the Commission will also issue a final regulation providing its interpretation of the penalty factors.

**Public Database [Section 212]** – The CPSC must establish a publicly available, searchable database, accessible on the Internet, on the safety of consumer products and other products
regulated by the CPSC within two years of enactment. The database will include reports of harm relating to the use of consumer products that are received by the CPSC from consumers, local, State, or Federal government agencies, health care professionals, child service providers, and public safety entities.

Upon receipt of a report, the CPSC has five days to submit the report to the manufacturer. The manufacturer will have an opportunity to submit comments, which may be posted in the database upon request by the manufacturer, and to request that portions of the report be designated as confidential and therefore redacted. The CPSC will make the report available in the database within 10 days after transmitting the report to the manufacturer. If the manufacturer requests that its comments be included in the database, the CPSC will post the comments at the same time as the report is posted, or as soon as practicable thereafter. If the manufacturer requests that confidential or proprietary information be redacted and the CPSC disagrees as to the confidentiality of the information, the CPSC will notify the manufacturer and the information will be included in the database. The manufacturer may bring an action in a United States district court to seek removal of the information from the database. The CPSC must remove any inaccurate or duplicate information in the comment database within seven days of determining the information is inaccurate.

Although reports and other data on consumer injuries are warehoused at CPSC and are accessible upon request, such information is not always obtained in a timely manner nor is it readily accessible to the general public. The creation of a database will be a significant undertaking and provide a level of visibility of information that is not currently the case. CPSC, by regulation and in practice, has traditionally been afforded strong protection under the Freedom of Information Act. The Act suggests that information submitted in response to a “five day letter” forwarding a consumer complaint may not receive robust protection absent a willingness of a company to seek protection in federal court (should CPSC disagree with its FOIA protection claim). Firms with dealings before the CPSC should be vigilant to ensure that proprietary, protected information furnished to the CPSC remains non-public.

**Preemption** [Section 232] – A key debate of the legislation concerned how CPSC standards preempt State law. Preemption provisions are included “where appropriate,” with the purpose of ensuring a uniform national standard of toy safety. The legislation contains language intended to clarify that the requirements under the Conference Report, the CPSA, and the Federal Hazardous Substances Act (FHSA) shall not be construed to preempt or affect State warning requirements under State laws, such as California’s Proposition 65, that were enacted prior to August 31, 2003. A closer evaluation of the various provisions would be prudent.

**Authorization of Appropriations** [Sections 201-203] – The Commission is reauthorized for five years beginning in fiscal year 2010. There is also an authorization of appropriations for the Commission, beginning at $118,200,000 in 2010 and increasing each year to end at $136,783,000 in 2014. The CPSC will also increase the number of full-time personnel employed by the CPSC to 500, subject to the availability of appropriations. We understand that the CPSC is currently at approximately 450 employees.
**Imports and Exports** [Sections 221-225] – The CPSC may prevent a person from exporting any consumer product that does not conform to a consumer product safety standard unless the importing country notifies the Commission that it will accept the shipment within 30 days after the Commission has provided notice of the impending shipment.

Products refused admission into the United States will be destroyed, unless the Secretary of the Treasury permits export of the product. The distribution of imported goods in commerce is conditioned upon the manufacturer’s compliance with the CPSC recordkeeping and inspection requirements. Within two years of enactment, the CPSC will create a risk assessment methodology through the use of an international trade database system for identifying shipments that are intended for import into the United States and that are likely to include products that violate safety standards. The Commission will also develop a plan for sharing information and enhancing coordination with U.S. Customs and Border Protection.

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We continue to review and assess the full implications of the new legislation. The CPSC staff is already grappling with a range of implementation issues. CPSC’s September 4, 2008 public briefing in Washington, D.C. (which we will attend) will be informative. The highlights of the Act underscore the importance of a firm’s understanding how CPSC works and take necessary steps to ensure compliance. Congress has put into play a number of new requirements that will change how CPSC operates and the regulatory environment companies must navigate.

For more information about the new law or more generally about CPSC’s authority and underlying requirements, please contact the Hogan & Hartson attorney with whom you work or an author listed below.

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