

Products Liability & Mass Torts Alert

An informational newsletter from Goodwin Procter's Products Liability & Mass Torts Group

New Law Reforms Consumer Product Safety Standards and Reauthorizes the CPSC

On August 14, 2008, the President signed into law H.R. 4040, the Consumer Product Safety Modernization Act ("CPSMA"). This Act amends the Consumer Product Safety Act ("CPSA") and addresses several product safety issues, including the safety of children's products, the regulation of imported consumer goods and third-party testing requirements. This legislation was spurred largely by concerns about the importation of unsafe products from China, and was approved by both houses of Congress with near-unanimous votes.

The CPSMA increases funding and authority for the Consumer Product Safety Commission ("CPSC") and allows the CPSC to operate with two Commissioners from different political parties as a quorum for one year. The Act also imposes new requirements on consumer product manufacturers, and as a result, manufacturers will need to familiarize themselves with this legislation to develop appropriate compliance plans within the required timeframes.

Under the CPSMA, criminal and civil penalties for distributing products in violation of consumer-products laws and regulations are significantly higher. Civil penalties are now \$100,000 per violation, up from \$5,000, and the cap on penalties increased over ten-fold, to \$15 million. The Act also authorizes asset forfeiture as a penalty in criminal cases and eliminates the requirement that officers and directors be notified of a violation before being subject to potential criminal liability. Furthermore, officers and directors may be held liable for individual criminal responsibility even in the absence of actual knowledge of a violation, although criminal action must be based on knowing and willful conduct.

The CPSA also creates a joint enforcement regime with states, permitting state Attorneys General to seek injunctive relief on behalf of their residents. Under this Act, an AG has authority to initiate enforcement action to obtain injunctive relief in federal court and to enforce specific provisions of the CPSMA. An AG must provide written notice to the CPSC and must wait at least 30 days to file a suit unless the CPSC consents to an earlier action or the AG can demonstrate there is a "substantial product hazard," in which case, the State may act immediately. This new enforcement authority will likely increase potential litigation exposure for manufacturers, especially in situations where the CPSC would not ordinarily seek enforcement. Provisions of the CPSMA also limit the ability of private lawyers retained to assist an AG to share information obtained during litigation. There is

also a new whistleblower provision for non-governmental employees, allowing employees who allege they were discharged for reporting a product safety violation to file suit for compensatory, consequential and punitive damages.

In addition to providing a more comprehensive enforcement scheme, under the CPSMA, the CPSC must develop a new public database for incident information submitted by consumers or other third parties, and timeframes for responding to disclosure requests have been reduced. Additionally, the CPSMA imposes new import/export requirements, including a ban on exports of recalled or non-conforming products unless the destination country accepts the product or the product was made for export in accordance with applicable law; a requirement that the CPSC develop a plan for cooperation with Customs and Border Protection; and a requirement that the CPSC develop a comprehensive risk assessment methodology for screening noncompliant imported consumer products to establish a substantial product hazard list and require destruction of noncompliant imports.

Several provisions of the Act focus on the safety of children's products (*i.e.*, products primarily intended for children 12 and under). Specifically, the bill includes new limits on total lead in all children's products as well as a lower lead paint standard. Within six months, total lead in all children's products may not exceed 600 ppm, with a further drop to 300 ppm in one year, and 100 ppm, if feasible, within three years. All children's products will be subject to these lead limits, with a limited notice and hearing process for exceptions. Under the CPSMA, the CPSC is required to adopt a rule within one year applicable to inaccessible component parts, and if the Commission determines that it is not feasible for certain electronic devices, including batteries, to comply with the prohibition, it can issue standards to reduce the exposure and accessibility of lead and establish a schedule by which electronic devices must fully comply.

The Act also includes new limits on six different phthalates in children's toys and child care articles (*e.g.*, items for children three and under to facilitate sleep, feeding or help with sucking and teething). Three phthalates, di (2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP) and benzyl butyl phthalate (BBP), may not be present in excess of .1% within six months in any children's toys or child care articles. Limits on diisononyl phthalate (DINP), diisodecyl phthalate (DIDP) and di-n-octyl phthalate (DnOP) are identical – .1% in six months – but are interim limits pending review by a new Chronic Hazard Advisory Panel.

In addition to new lead and phthalate limits, the CPSMA imposes additional requirements on manufacturers of children's products. Such requirements include third-party certification by a qualified non-governmental independent party; a requirement that products conform to applicable children's product safety standards; mandatory tracking labels on children's products to identify them in the event of a recall, where feasible; and mandatory warning information (*e.g.*, choking hazard warnings) in any advertising for toys and games that provides a direct means of sale. Under this Act, the CPSC will also require manufacturers of durable infant or toddler's products to provide consumers with postage-paid registration forms, which can be used only to notify consumers of recalls and safety notices. The

voluntary standard applicable to toys, ASTM F963-07, becomes mandatory within 180 days of the passage of this legislation.

The new law also includes several other regulatory provisions, including requirements for ATVs and requirements to study formaldehyde in textiles and apparel.

Provisions of the CPSMA address preemption, highlighting the need for uniform national standards that prevent conflicts between various state laws. Existing provisions of laws administered by the CPSC, including the CPSA, the Federal Hazardous Substances Act (“FHSA”), and the Flammable Fabrics Act, bar states from adopting rules or standards that are not identical to federal standards. The lead provision of the CPSMA includes specific language that effectuates preemption under the FHSA. Similarly, the Act reserves states’ ability to regulate phthalate alternatives not covered by the statute. The CPSMA does, however, include language intended to preserve the California Proposition 65 warning scheme and includes a provision on toy safety standards that allows states to file for recognition of their own provisions within 90 days, potentially establishing conflicts in specific requirements applicable to toys.

The CPSMA significantly modifies national standards for manufacturers and distributors of consumer goods, and as such, manufacturers must assess how the new requirements and obligations will affect production and marketing practices. It is likely that with increases in funding, the Commission will turn its attention to company compliance and public disclosure requirements and that state Attorneys General, equipped with new enforcement authority, will become more active in prosecuting violations of consumer-products laws and regulations.

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