IMPROVING

THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT?

WHAT THE 2011 AMENDMENTS TO THE CPSIA MEAN FOR RETAILERS AND MANUFACTURERS

In response to the recall of 35 million consumer products in 2007, Congress passed the Consumer Product Safety Improvement Act of 2008 ("CPSIA"), which overhauled the Consumer Product Safety Act and related laws. Congress's remaking of the regulatory landscape overwhelmed both businesses and bureaucrats, and it became a textbook example of unintended consequences. The Consumer Product Safety Commission (the "Commission") struggled to meet its deadlines for issuing a river of new regulations and, for some of the most daunting CPSIA provisions, threw up its hands and successively stayed enforcement. Businesses struggled with new restrictions and requirements for products as varied as books, children's apparel, toys, sporting goods, and electronic products. By one estimate, the CPSIA in its first six months cost the toy industry more than $2 billion. And many small companies abandoned products or went out of business.

Calls for reform of the reform went up immediately, and at last they have been heard—somewhat. On August 16, 2011, the President signed a bill (H.R. 2715) containing several revisions of the CPSIA. Much like the original CPSIA, the bill passed with overwhelming support. This remarkable show of bipartisanship indicates the nature of the changes: the bill is limited to the least controversial "fixes" proposed since 2008. And many of those fixes grant greater discretion to the Commission; manufacturers and retailers will need to wait to see how useful those reforms prove to be in practice, and they will need to remain involved in the regulatory process if they wish to reap the greatest benefit from the changes.

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The reform that affects all consumer products was the addition of some modest safeguards for manufacturers to the operation of the "SaferProducts.gov" online database of "reports of harm" involving consumer products, which the CPSIA had mandated and which began operating in the spring of 2011 over much protest from businesses. Other reforms focused on children's products—those designed or intended for children 12 years of age or younger—which had suffered most of the CPSIA's wrath. These reforms particularly concerned the CPSIA's new restrictions on lead content and the use of phthalates, its requirement to have product samples tested by third parties, and its requirement to attach tracking labels. Each change is described herein.

TWEAKING THE CONSUMER-PRODUCT DATABASE

The CPSIA required the Commission to establish and maintain a publicly available, searchable, and internet-accessible database on the safety of all consumer products as well as all products or substances regulated by the Commission. Consumers and others may submit "reports of harm," which the Commission posts with minimal review at www.SaferProducts.gov, and manufacturers may have their responses to or comments on the reports included in the database.

The Commission's implementation of the statutory mandate stirred up much opposition and concern from businesses. Among the sources of complaint were the lack of Commission oversight of the accuracy of the reports and the requirement that reports be posted publicly within 15 business days of receipt (and within 10 days of businesses' receiving their copies), which left little time for manufacturers to investigate and respond before the reports were posted. Another concern was the limited amount of detail that the Commission required of reports.

The amendments to the CPSIA included two modest correctives for such concerns. First, the Commission now must stay the publication of a report by an additional five business days if it receives notice, before publication, that information in the report is materially inaccurate. However, this change does not release manufacturers wishing to prevent publication from the obligation to respond to the Commission within 10 days of receiving the report. Thus, it is critical for manufacturers not only to register on the web site's business portal to receive and respond to reports electronically, but also to develop internal controls to swiftly process any report received.

Second, if the Commission does not receive a model or serial number for the product involved in a report of harm, it must ask the submitter for that number (or for a photograph, if the number is not available) and then immediately forward it to the manufacturer. If the Commission seeks such supplementation, it will post the report of harm 15 business days after transmitting it to the manufacturer rather than the baseline 10 days. Although this provision provides the manufacturer more time to respond to the report, as well as the possibility of greater detail to use in a company investigation, it does not prevent posting—even if the submitter does not provide the Commission any additional information.

SOME REPRIEVES FROM GETTING THE LEAD OUT

The immediate catalyst for amending the CPSIA was the looming (on August 14, 2011) reduction of the CPSIA's limit on lead in children's products to 100 parts per million ("ppm") from the prior CPSIA limit of 300 ppm. (Before the CPSIA, only the lead in paint was restricted.) The lower limit, besides involving amounts so miniscule as to be difficult to detect, also was to be retroactive, requiring manufacturers and importers to destroy extensive inventory. The new law addresses this onerous aspect of the CPSIA in several ways.

First, the new limit of 100 ppm is no longer retroactive, which means that goods manufactured on or before August 14, 2011, may continue to be sold if they meet the previous standard of 300 ppm. Any future limits on lead content promulgated by the Commission will also apply only prospectively.

Second, the CPSIA's provisions authorizing the Commission to grant exemptions from the lead limits have been made more workable, primarily by allowing the Commission to consider whether lead in a product presents any real health risk. The Commission now has the authority, on its own initiative or if petitioned, to exempt a product (including a class of product, material, or component part) from the lead standard upon determining that it satisfies three requirements:

- The product requires the inclusion of lead because its manufacture is *not practicable or technologically feasible* if the excess lead is removed or made inaccessible;
- The product is *not likely to be placed in the mouth or ingested*; and
- The product will cause "*no measurable increase in blood lead levels*."

These requirements, however, will remain difficult to meet, particularly the first. And much will depend on how the Commission implements and applies them.

Third, the new law grants relief for the particular kinds of products that have suffered most under the CPSIA's limits on lead content:

1) Off-highway motorized vehicles, such as ATVs, are exempt.
2) Bicycles and related products (such as jogging strollers and bicycle trailers) are subject to the lead-content limits that the Commission set in its stay of enforcement concerning them only through the end of 2011; thereafter, the limit will be 300 ppm at most. Congress thus bowed to the reality that some lead in the metal-alloy parts of these products (think tire valve stems, spokes, and brakes) is necessary for strength, corrosion resistance, and functionality.
3) Most "used children's products" are exempt from the lead-content standard, the main exceptions being children's metal jewelry and any products subject to a recall. This exemption is a welcome reprieve for Goodwill, the Salvation Army, and garage sales and thrift shops nationwide.

AN OBVIOUS EXCEPTION FROM PHTHALATES LIMITS

The CPSIA effectively banned the use of certain phthalates (chemicals that soften plastic materials) in children's toys and child-care articles. Three phthalates (DEHP, DBP, and BBP) were permanently banned; three others (DINP, DIDP, and DnOP) were banned on an interim basis from children's toys that can be placed in a child's mouth and from any child-care articles.

The new law adds an exception for inaccessible component parts. Borrowing from an exception in the original CPSIA for lead-content limits, the law defines "inaccessible" as "not physically exposed by reason of a sealed covering or casing and that does not become physically exposed through reasonably foreseeable use or abuse of such a product," including aging and children's activities like swallowing, mouthing, and breaking. Congress also directed the Commission to provide further guidance on the scope of this exception within a year.

MITIGATING THE BURDENS OF THIRD-PARTY TESTING

High on the list of banes in the CPSIA for businesses manufacturing children's products was the new requirement to have a "sufficient sample" of their products tested for compliance with the new limits by a Commission-certified "third party conformity assessment body." The cost can be prohibitive, particularly for small manufacturers. The new law offers one general hope for mitigation of this burden, plus two more-targeted efforts at mitigation.

First, Congress directed the Commission to seek comment on opportunities to reduce the cost of third-party testing consistent with ensuring compliance with applicable safety rules. Within a year of the end of the comment period, the Commission must prescribe new or revised third-party testing regulations if it determines that such testing would reduce costs while ensuring compliance. If the Commission determines that statutory constraints preclude it from providing such relief, it is to report that determination to Congress.

Second, Congress directed the Commission to directly take into account the burdens of third-party testing on "small batch manufacturers" and provide alternative testing requirements, or perhaps even exemption from third-party testing, for such manufacturers' "covered products." "Small batch manufacturers" are generally those that have $1 million or less in gross revenue. "Covered products" are those of which the manufacturers made no more than 10,000 units the year before. One option for the Commission is to allow small batch manufacturers to certify products on the basis of compliance with another national or international governmental standard that is the same as or more stringent than the applicable federal standard. However, alternatives and exemptions are not available for lead paint; cribs; small parts; children's metal jewelry; baby bouncers, walkers, and jumpers; and durable infant products.

Third, the CPSIA revisions provide an exemption from third-party testing for ordinary, printed books and other paper-based printed materials, such as magazines, posters, and greeting cards. A book that is really a toy (having "play value"), or a toy packaged with an ordinary book, would not benefit from this exemption. Moreover—as is also the case for small batch manufacturers—the exemption is only from the third-party *testing* requirements, not from compliance with the relevant *content* standards, such as those for lead and phthalates. Manufacturers of children's books will still need

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a "general conformity certification," based on a "reasonable testing program," that they meet the content requirements.

MORE PRACTICAL TRACKING LABELS

In the name of enabling better identification of children's products subject to corrective action such as a voluntary recall, the CPSIA requires manufacturers of children's products to mark them with information making it possible to trace the products to their original batches or runs or to provide them with other tracking identification. The CPSIA vaguely provided that such labels should be placed on the product "to the extent practicable" and did not expressly authorize the Commission to exempt any product or class of product.

The amendments grant such exemption authority, which the Commission may use upon finding it not practicable for a given product or class of product to bear the marks required for tracking. In such cases, the Commission may establish alternative requirements.

CONCLUSION

These correctives to the CPSIA offer some relief from that law's worst excesses. But much will depend on the Commission, and thus much depends on the involvement of businesses in providing comments to the Commission and, where appropriate, raising their particular concerns to the Commission through petitions. The CPSIA is not going away, but it may become a bit more workable. ■

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