

Congress Passes Consumer Product Safety Improvement Act

Congress Approves Major Overhaul of Consumer Product Safety Laws

On July 31, 2008, Congress passed the Consumer Product Safety Improvement Act of 2008 (“the Act”) which significantly expands the authority of the Consumer Product Safety Commission (CPSC), imposes new consumer product safety requirements for a wide-range of consumer products, including children’s products and all-terrain vehicles (ATVs), and increases funding for the CPSC. After months of negotiations in conference committee, both the Senate (89-3) and the House (424-1) passed a compromise bill last week. The bill (H.R. 4040) will now be sent to the White House where the President is expected to sign it. A summary of key provisions is provided below.

Lead Standard for Children’s Products

Under the Act, “children’s products” are broadly defined to include “consumer product[s] designed or intended primarily for children 12 years of age or younger.” The bill bans children’s products containing certain amounts of lead, by designating such products as “Banned Hazardous Substances” under the Federal Hazardous Substances Act (FHSA). The Act establishes a phase-in period that prohibits the sale of children’s products if any part of the product contains lead at levels more than 600 ppm by weight beginning 180 days after enactment; 300 ppm after 1 year; and 100 ppm lead after 3 years (unless the CPSC determines that the 100 ppm standard is not feasible). This imposes a more stringent standard than that required under the European Union’s Directive on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment, 2002/95/EC (commonly known as the “RoHS Directive”), which limits lead to 1000 ppm for each “homogenous material” in covered electronic products.

The Act contains an exemption for inaccessible component parts that are not accessible to a child through normal and reasonably foreseeable use and abuse of the product. It also gives the CPSC authority to exclude certain products and materials, by regulation, if it determines that the lead content in the products or materials will not result in the absorption of lead in the human body or does not have any adverse impact on public health or safety. In addition to the general authority to exempt products, the bill authorizes the CPSC to specifically exempt “certain electronic devices, including devices containing batteries,” if the CPSC determines that it is not technologically feasible for such devices to meet the lead standards.

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Phthalate Ban in Children's Toys

The Act bans, beginning 180 days after enactment, the manufacture or sale of any children's toy or child care article containing more than 0.1 percent of di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP). For purposes of the phthalate ban, the term "children's toy" means a "consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays."

The Act also includes an interim ban on children's toys that can be placed in a child's mouth (including if even part of the toy can be placed in the mouth) and child care articles that contain concentrations of more than 0.1 percent of diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP). The interim rule will remain in effect until a Chronic Hazard Advisory Panel (to be appointed by the CPSC) can study the effect on children's health of all phthalates and phthalate alternatives, and the CPSC can issue permanent regulations in response to the study.

Other Provisions of Note

The Act also contains provisions requiring, among other things:

- ◆ mandatory toy safety standards, to be based initially on ASTM standard F963-07 (addressing hazards related to structure/design, flammability and toxicology, among others) with subsequent mandatory assessment and possible amendment by CPSC;
- ◆ a more stringent lead paint ban;
- ◆ manufacturer labeling of children's products with tracking information to facilitate recalls;
- ◆ retailers to identify, upon CPSC request, the manufacturers of the products they sell;
- ◆ manufacturer identification, upon request by the CPSC, of their subcontractors in the supply chain;
- ◆ conformity certification for all consumer products;
- ◆ third-party compliance certification of certain children's products;
- ◆ CPSC inspection of manufacturer's proprietary labs upon request;

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- ◆ whistleblower protections;
- ◆ special cautionary labeling requirements to be included with advertisements of certain products intended for children aged 3-6;
- ◆ creation of a searchable public consumer product safety database;
- ◆ promulgation by the CPSC of safety standards for nursery products; and
- ◆ mandatory safety standards for 4-wheel ATVs and a ban on the sale of new 3-wheeled ATVs until safety standards for such vehicles are promulgated.

The Act also gives state Attorneys General authority to enforce the above provisions (except where a federal civil or criminal enforcement action regarding the same violation is already pending). It preempts some state toy safety standards but specifically does not preempt certain state laws, such as State warning requirements that were in effect on August 31, 2003 (such as Proposition 65 in California).

To view the bill, go to www.bdlaw.com/assets/attachments/HR_4040_Final_Conference_Report_7-29-08.pdf.

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