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PRODUCT SAFETY

CONSUMER PRODUCT SAFETY COMMISSION

Amendments to the Consumer Product Safety Improvement Act signed into law Aug. 12 mitigated some of the most pressing flaws in the 2008 legislation, say attorneys Mark Duvall, Felix Yeung, and Erica Zilioli in this BNA Insight. The authors analyze the law and the recent changes, and offer their views on several unresolved issues and key upcoming developments that could shape the future of the CPSIA, including the creation of an ASTM standard for cadmium in children's jewelry, the CHAP report on phthalates, and the forthcoming appropriations determination for the CPSC.

Fixing the Consumer Product Safety Improvement Act: Are We There Yet?



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On August 12, 2011, President Obama signed into law amendments to the Consumer Product Safety Improvement Act of 2008 (CPSIA) designed to address longstanding complaints about certain aspects of the CPSIA.¹ This action came two days before the CP-SIA would have made all existing children's products containing more than 100 parts per million (ppm) of lead illegal to sell or resell, even if such products were in compliance with all applicable consumer product safety standards at the time of manufacture. Besides

¹ Pub. L. 112-28 (Aug. 12, 2011).

clarifying that the 100 ppm lead limit would not apply retroactively to products manufactured before August 14, 2011, these amendments are significant in that they mitigate some of the most onerous provisions of the CPSIA, afford some relief to small businesses and charities, and provide much-needed flexibility to the Consumer Product Safety Commission (“CPSC” or “Commission”) in implementing the CPSIA. Notably, however, the amendments leave some critical concerns of stakeholders—environmental and industry groups alike—unaddressed.

Background

Summary of the CPSIA

President Bush signed the CPSIA into law on August 14, 2008.² Largely prompted by concerns over lead in toys imported from China, the CPSIA not only strengthened requirements relating to children’s products and toys, but also overhauled the existing consumer product safety regime in the United States.³

The CPSIA established lead content limits for children’s products, defined as “a consumer product designed or intended primarily for children 12 years of age or younger.”⁴ The lead content limit was gradually lowered from 600 ppm to 300 ppm and, most recently on August 14, 2011, to 100 ppm. The CPSIA also lowered the allowable lead content in paint applied to articles intended for children to 90 ppm.

In addition, section 108 of the CPSIA banned the sale or import of children’s toys and child care articles that contain more than 1000 ppm of three different phthalates, DEHP, DBP, or BBP. Section 108 also imposed an interim ban on the sale or import of children’s toys that can be placed in a child’s mouth and child care articles if they contain more than 1000 ppm of DIDP, DINP, or DnOP.

Section 103 of the CPSIA imposed tracking label requirements on children’s products in order to facilitate recalls. The CPSIA further mandated that all toys comply with the ASTM F963 toy safety specification, which sets forth numerous design requirements and additional limitations on heavy metals in paint and surface coatings.

In addition to these standards focused on products intended for children, section 102 of the CPSIA required that *all* consumer products subject to a CPSC safety standard, rule, or ban—including children’s products—be tested and certified. Children’s products must be third-party tested for compliance with each applicable standard, a requirement that has been phased in over the last three years. Manufacturers and importers of non-children’s products must certify their products’ compliance based on actual tests of the products or a reasonable testing program.

Finally, the CPSIA required the CPSC to create and maintain a publicly available consumer product safety database for reports of harm or potential harm concerning consumer products. This database, www.SaferProducts.gov, launched in March 2011.

² Pub. L. 110-314 (Aug. 14, 2008).

³ See, e.g., Mattel Issues New Massive China Toy Recall (Aug. 14, 2007), available at http://www.msnbc.msn.com/id/20254745/ns/business-consumer_news/t/mattel-issues-new-massive-china-toy-recall/.

⁴ 15 U.S.C. § 2052(a)(2).

Increased funding and enforcement tools provided for in the CPSIA were intended to facilitate enforcement of these provisions of the CPSIA and other product safety standards.⁵

Unintended Consequences Erode Support

When enacted on August 14, 2008, the CPSIA received overwhelming support in both Houses of Congress.⁶ Yet problems with the groundbreaking law were quickly identified.

For example, the CPSC interpreted the CPSIA’s lead limit as applicable retroactively to inventory and used products, so that toys, books, and other products containing lead above the CPSIA limits that were legal when manufactured could no longer be sold, even in resale shops.⁷ Numerous bills to address this issue, impacts on small business, or other concerns were introduced in the 111th and 112th Congresses, but did not pass.⁸ A federal court also ruled that the phthalates bans applied retroactively based on the language of the statute, causing many companies to pull inventory from store shelves days before the bans went into effect.⁹

In addition, the CPSC soon determined that its authority under the CPSIA to exclude certain children’s products from the lead limits was severely hampered because virtually no product containing lead could meet the strict standard even if the product posed no risk to children.¹⁰ Rather, the CPSC had to issue a series of enforcement policies and stays, such as for youth recreational vehicles¹¹ and bicycles¹².

One of the largest unintended impacts of the CPSIA was the burden on industry, particularly small busi-

⁵ See generally Beveridge & Diamond, P.C., CPSC Implements New Consumer Product Requirements (2008), available at <http://www.bdlaw.com/news-417.html>; Beveridge & Diamond, P.C., CPSC Requests Comments on Phthalates Ban (2008), available at <http://www.bdlaw.com/news-415.html>; Beveridge & Diamond, P.C., Consumer Product Safety Improvement Act: One-Year Update (2009), available at <http://www.bdlaw.com/assets/attachments/09-15-09%20CPSIA%20Update.pdf>.

⁶ The House approved the CPSIA by a vote of 424-1, and the Senate approved it 89-3.

⁷ CPSC General Counsel Cheryl A. Falvey, Retroactive Application of the CPSIA to Inventory (Sept. 12, 2008), available at <http://www.cpsc.gov/library/foia/advisory/317.pdf>.

⁸ See, e.g., Enhancing CPSC Authority and Discretion Act of 2011, H.R. 1939 (112th Cong.); Consumer Product Safety Flexibility Act of 2011, S.1448 (112th Cong.); Common Sense in Consumer Product Safety Act of 2011, S.69 (112th Cong.); Consumer Product Safety Solutions Act of 2009 (111th Cong.); S. 374, H.R. 968, and H.R. 1465 (111th Cong.) (“To amend the Consumer Product Safety Act to provide regulatory relief to small and family-owned businesses”); Common Sense in Consumer Product Safety Act of 2009, S.608 (111th Cong.); Children’s Product Safety Enhancement and Clarification Act of 2009, H.R. 1046 (111th Cong.); H.R. 1692 (111th Cong.) (“To amend the Consumer Product Safety Improvement Act to exempt ordinary books from the lead limit in such Act”).

⁹ See *National Resources Defense Council, Inc. v. CPSC*, 597 F. Supp. 2d 370 (S.D.N.Y. 2009).

¹⁰ See, e.g., Statement of Acting Chairman Nancy Nord on the Request for Exclusions from the Lead Content Limits of the Consumer Product Safety Improvement Act of 2008 (Apr. 3, 2009), available at <https://www.cpsc.gov/pr/nord040309exclusions.pdf>.

¹¹ See CPSC, Notice of Stay of Enforcement Pertaining to Youth Motorized Recreational Vehicles, 74 Fed. Reg. 22154 (May 12, 2009), available at <https://www.cpsc.gov/businfo/frnotices/fr09/youthatvstay.pdf>.

nesses, to test and certify products' compliance with a variety of standards. Concerns ranged from the prohibitive cost of testing handmade or low-production toys to the futility of testing certain kinds of products, such as ordinary children's books, that would not likely contain lead. In response to some of these concerns, the CPSC issued enforcement stays for third-party testing,¹² exempted certain materials that do not typically contain lead, such as paper and printing ink, from the third-party testing requirement,¹⁴ and adopted a policy to allow the testing and certification of component parts rather than finished products in certain circumstances.¹⁵ But even these accommodations did not eliminate concerns.

Finally, industry raised concerns about the reliability of reports submitted for publication in the publicly available consumer product safety information database. The concerns included that inaccurate or incomplete reports could cause reputational harm and also subject companies to unfounded litigation if the information is used in furtherance of product liability or personal injury lawsuits.

In response to a request from the House of Representatives in its December 2009 appropriations Conference Report,¹⁶ the CPSC issued a report in January 2010 raising some of these concerns and identifying potential amendments to the CPSIA.¹⁷ The CPSC specifically called for more flexibility that would allow it to exclude certain children's products or parts from compliance with the lower lead limits.¹⁸ Additionally, even the CPSC acknowledged that blanket application of the lead limits without regard to retroactivity created "substantial problems for manufacturers and retailers with large inventories of children's products and similar problems will occur in the future whenever the lead lim-

its are lowered."¹⁹ Furthermore, the CPSC recognized that it would need to find ways during the rulemaking process to remove unnecessary testing and certification burdens on smaller and home-based businesses while upholding protections for children.²⁰

Calls for reform continued to come from both sides of the aisle, from the regulated community, and from the CPSC itself. At a Senate subcommittee hearing December 2, 2010, Commissioner Anne Northup even went as far as to say that CPSIA had "almost nothing to do with improving safety[.]"²¹

The Subcommittee on Commerce, Manufacturing, and Trade of the House Energy and Commerce Committee held hearings on February 17 and April 7, 2011, on a draft bill to amend the CPSIA that was circulated for comment.²² On May 23, 2011, Representative Mary Bono Mack (R-CA) introduced the "Enhancing CPSC Authority and Discretion Act of 2011," H.R. 1939. In response to Democratic opposition on the grounds that H.R. 1939 went too far, Rep. Bono Mack subsequently introduced a more limited unnamed bill on August 1, 2011, H.R. 2715, which garnered bipartisan support. On the day it was introduced, the bill was passed by the House by a vote of 421-2 and sent to the Senate. The Senate had its own more limited bill introduced by Senator Mark Pryor (D-AR) on July 28, 2011, the "Consumer Product Safety Flexibility Act," S. 1448. The Senate passed H.R. 2715 without amendment by unanimous consent, rather than its own bill, also on August 1. H.R. 2715 became Public Law 112-28 with President Obama's signature on August 12, 2011.

Summary of the Amendments to the CPSIA

Public Law 112-28 amends a variety of key provisions of the CPSIA. The following summarizes those changes.

Applicability of Lead Limits to Existing Products

Section 1 of Public Law 112-28 amends CPSIA § 101(a) by adding a provision that each lead limit (other than the 600 ppm and 300 ppm limits) "shall apply only to a children's product

... that is manufactured after the effective date of such respective limit." This overturns the CPSC General Counsel's opinion that found that each CPSIA lead limit applies retroactively to existing inventory and used children's products.

The timing of this change is critical. On August 14, 2011, the allowable lead limit dropped from 300 ppm to

¹² See CPSC, Notice of Stay of Enforcement Pertaining to Bicycles and Related Products, 74 Fed. Reg. 31,254 (June 30, 2009), available at <https://www.cpsc.gov/businfo/frnotices/fr09/bicycles.pdf>.

¹³ See, e.g., CPSC, Consumer Product Safety Act: Notice of Commission Action on the Stay of Enforcement of Testing and Certification Requirements, 76 Fed. Reg. 6,765 (Feb. 8, 2011), available at <https://www.cpsc.gov/businfo/frnotices/fr11/stayleadrev.pdf>; CPSC, Consumer Product Safety Act: Notice of Commission Action on the Stay of Enforcement of Testing and Certification Requirements, 74 Fed. Reg. 68,588 (Dec. 28, 2009), available at <http://www.cpsc.gov/businfo/frnotices/fr10/stay.pdf>.

¹⁴ See CPSC, Final Rule: Children's Products Containing Lead; Determinations Regarding Lead Content Limits on Certain Materials or Products, 74 Fed. Reg. 43,031 (Aug. 26, 2009), available at <http://www.cpsc.gov/businfo/frnotices/fr09/leadcontent.pdf>.

¹⁵ See CPSC, Interim Enforcement Policy on Component Testing and Certification of Children's Products and Other Consumer Products to the August 14, 2009 Lead Limits, 74 Fed. Reg. 68,593 (Dec. 28, 2009), available at <http://www.cpsc.gov/businfo/frnotices/fr10/compol.pdf>.

¹⁶ Departments of Transportation and Housing and Urban Development, and Related Agencies Appropriations Act, 2010, Conference Report, H.R. Rep. No. 111-366, 912-13 (2009), available at <http://www.gpo.gov/fdsys/pkg/CRPT-111hrpt366/pdf/CRPT-111hrpt366.pdf>.

¹⁷ CPSC, U.S. Consumer Product Safety Commission Report to Congress Pursuant to the Statement of the Managers Accompanying P.L. 111-117 (Jan. 15, 2010), available at <http://www.cpsc.gov/about/cpsia/cpsiareport01152010.pdf>.

¹⁸ *Id.* at 7.

¹⁹ *Id.* at 4.

²⁰ *Id.* at 8.

²¹ Subcommittee on Consumer Protection, Product Safety and Insurance, Senate Committee on Science, Commerce & Transportation, Hearing: Oversight of the Consumer Product Safety Commission: Product Safety in the Holiday Season, testimony of Anne M. Northup, Commissioner, U.S. Consumer Product Safety Commission (Dec. 2, 2010), available at <http://www.cpsc.gov/pr/northup12022010.pdf>.

²² Subcommittee on Commerce, Manufacturing, and Trade, House Energy and Commerce Committee, Hearing: A review of CPSIA and CPSC Resources (Feb. 17, 2011), available at <http://energycommerce.house.gov/hearings/hearingdetail.aspx?NewsID=8220>; *id.*, Hearing: Discussion Draft of H.R. ___, a bill that would revise the Consumer Product Safety Improvement Act (Apr. 7, 2011), available at <http://energycommerce.house.gov/hearings/hearingdetail.aspx?NewsID=8422>.

100 ppm.²³ On that date, previously manufactured children's products with lead content below 300 ppm but above 100 ppm would have become illegal to sell, but for enactment of this law. Now the new, lower limit applies only to children's products manufactured on or after August 14, 2011.

Exceptions to the Lead Limits

Section 1 of Public Law 112-28 makes explicit that the lead limits do not apply to used children's products. This exclusion does not apply to children's metal jewelry or to children's products that the donor or seller knows have lead above the otherwise applicable lead limits.

CPSIA § 101(b) allowed the CPSC narrow authority to exempt products or components from the applicable lead limits. Section 1 of Public Law 112-28 broadens that authority considerably. Now, the CPSC may find that a product, class of products, or component part requires the inclusion of lead above the applicable limit because it is not technologically feasible to remove the excessive lead or make the lead inaccessible, and an exception would have no measurable adverse effect on public health or safety, such as by increasing blood lead levels.

Section 1 completely exempts off-road vehicles, such as all terrain vehicles, snowmobiles, and dirt bikes, from the lead limits. Members of Congress speaking in support of the bill pointed out that safety requires certain components and parts of these vehicles to include levels of lead that may exceed CPSIA's allowable limits, but not to the extent that would threaten public health or safety. For example, Rep. Henry Waxman (D-CA) stated that "there are some products that require a small amount of lead to maintain their strength and durability and don't pose a serious threat to public health or safety. ATVs and bicycles are examples of these."²⁴

Section 1 of Public Law 112-28 makes permanent CPSC's 2009 stay of enforcement of lead limits for bicycles, jogger strollers, and bicycle trailers intended for children 12 and younger, except that it drops the maximum lead limits to 300 ppm beginning January 1, 2012.

Third-Party Testing

Section 2 of Public Law 112-28 directs the CPSC to seek public comment on ways to reduce the cost of third-party testing requirements mandated under CPSC § 102 while still maintaining compliance with applicable product safety rules. It identifies several opportu-

nities for reducing burdens on which the CPSC is to solicit comments. Within a year after the end of the comment period, the CPSC must prescribe new or revised third-party testing regulations if it determines they would reduce testing costs while assuring compliance. If the CPSC determines that it lacks authority to implement opportunities for reducing the burdens, it must so report to Congress.

In addition, section 2 specifically tries to help reduce the burdens of third-party testing on small batch manufacturers (defined to include manufacturers of no more than 7,500 units of the same product and with no more than \$1 million in gross revenues from consumer products). It directs the CPSC to take into account "any economic, administrative, or other limits on the ability of small batch manufacturers to comply with such requirements" and provide alternative testing requirements for them. If no alternatives are available or economically practicable, the CPSC must exempt small batch manufacturers from the requirements altogether. Alternatives and exemptions are not available for lead paint; cribs; small parts; children's metal jewelry; baby bouncers, walkers, or jumpers; or durable infant or toddler products. Any small batch manufacturer operating under alternative requirements or an exemption must register with the CPSC.

Further increasing flexibility under this provision, section 2 authorizes certification of compliance with an applicable product standard by documentation that a product meets another national or international governmental standard that the CPSC determines is the same as or more stringent than the applicable product standard.

Ordinary books and ordinary paper-based printed materials are exempted altogether from the third-party testing requirements. Metal or plastic parts are not included in the exemption. Also, bicycle parts are excluded with respect to certification of compliance with the lead limits.

Durable Nursery Products

CPSIA § 104, known as the "Danny Keysar Child Product Safety Notification Act," directs the CPSC to adopt consumer product safety standards for durable nursery products, such as cribs, based on voluntary standards. Section 3 of Public Law 112-28 facilitates the process for updating those CPSC standards as the underlying voluntary standards change.

ASTM Toy Standard

CPSIA's adoption of the ASTM International Standard Consumer Safety Specification for Toy Safety, F963, in section 106(a) required compliance with certain Food and Drug Administration (FDA) food provisions in connection with food products supplied with toys and cosmetics in toys, but it also raised concerns about overlapping jurisdiction between the two agencies.²⁵ Section 4 of Public Law 112-28 exempts from the CPSC's consumer product safety standard any provisions of ASTM F963 that restate or incorporate FDA requirements.

²⁵ See memorandum from J. Midgett, Office of Hazard Identification and Reduction, to R. Howell, Office of Hazard Identification and Reduction, CPSC, Evaluation of the Toy Standard for Section 106 of the CPSIA (May 10, 2010), available at http://www.cpsc.gov/volstd/toys/f963_05102010.pdf.

²³ CPSIA § 101(a)(2)(C) provided that, as of August 14, 2011, children's products may not contain more than 100 ppm of lead "unless the Commission determines that a limit of 100 parts per million is not technologically feasible for a product or product category." On July 26, 2011, the CPSC announced its decision that the 100 ppm limit was technologically feasible and would go into effect on August 14 for children's products not otherwise excluded under CPSC regulations. 76 Fed. Reg. 44463 (July 26, 2011).

²⁴ 157 Cong. Rec. H5827 (daily ed. Aug. 1, 2011) (statement of Rep. Henry Waxman). Co-sponsor Rep. G.K. Butterfield (D-N.C.) also pointed out that vehicles such as all terrain vehicles, snowmobiles, and dirt bikes should be exempted because "constructing strong, rigid parts for these vehicles often requires more lead than CPSIA would otherwise allow" and "[t]he safety of our young people is paramount." 157 Cong. Rec. H5826 (daily ed. Aug. 1, 2011) (statement of Rep. G.K. Butterfield).

Phthalates Bans

The ban on three phthalates (DEHP, DBP, and BBP) and interim ban on three others (DINP, DIDP, and DnOP) in CPSIA § 108 apply to children's toys and child care articles. Section 5 of Public Law 112-28 clarifies that those bans apply only to any plasticized component part of a children's toy or child care article or any component made of other materials that may contain phthalates.

Section 5 also excludes from the bans any inaccessible parts of a children's toy or child care article. The lead limits under CPSIA § 101 have an inaccessible parts exclusion, but the phthalate bans under CPSIA § 108 have lacked one until now. The CPSC is directed to provide guidance on the scope of this exemption within one year, similar to its guidance on the inaccessible parts exclusion for lead,²⁶ but the exemption became effective upon the enactment of Public Law 112-28.

Public Law 112-28 leaves undisturbed the work of the Chronic Hazard Advisory Panel (CHAP), which was established pursuant to Section 108 of the CPSIA to study the effect on children's health of phthalates and phthalate alternatives as used in children's toys and child care articles. The CHAP has held five public meetings since April 2010 and plans to conduct additional conference calls and meetings through April 2012, but it is unclear when the final report will be issued. The CPSIA calls for the CPSC to take into account the report's findings to determine whether the interim ban on DINP, DIDP, and DnOP should become permanent and whether additional phthalates or phthalate alternatives should be declared banned hazardous substances. As such, additional regulatory changes may be in store for products containing phthalates.

Tracking Labels

Section 6 of Public Law 112-28 authorizes the CPSC to adopt rules excluding specific products or classes of products from CPSIA § 103's tracking label requirement if it is not practicable for them to bear such marks. Instead, the CPSC may establish alternative requirements for those products.

Consumer Product Safety Information Database

Pursuant to CPSIA § 212, which directed the CPSC to establish the public database on consumer product safety, the CPSC has five business days to transmit reports of database submissions to the corresponding manufacturer and offer the latter an opportunity to respond. No later than the 10th business day after that transmission, CPSC must publish the report.

Since its launch in March 2011, the database, www.SaferProducts.gov, has logged almost 2,900 reports. In response to industry concerns about inaccurate reports being publicized without sufficient vetting, Section 7 of Public Law 112-28 delays by five days the posting of information on the database for which the CPSC receives notice that the information is materially inaccurate. During that time the CPSC can consider whether to determine that the information is materially inaccurate and thus should be excluded.

²⁶ See 16 C.F.R. § 1500.87 for the CPSC's interpretive rule on this exclusion.

Section 7 also directs the CPSC to respond to a report of harm by seeking the model or serial number, or a photograph, of the consumer product involved, if such information is not included in the report. Inclusion of a report in the database does not depend on the CPSC's receipt of such information, however.

The continued viability of the database has been called into question. In June 2011, the House Appropriations Committee approved a spending bill, H.R. 2434, that would cut off funding for the database.²⁷ In response, the Office of Management and Budget (OMB) issued an administration policy statement in July that spoke against the decision to eliminate funding for the database.²⁸ Although the appropriations bill is currently pending, pressure to cut funding to the CPSC will be strong; OMB recently called on agencies to provide 2013 budgets based on two scenarios: a 5 percent and a 10 percent cut from 2011 discretionary spending levels.²⁹

Subpoena Authority

Section 27(b) of the Consumer Product Safety Act (not amended by the CPSIA) authorizes the CPSC to issue subpoenas for documentary evidence. Section 8 of Public Law 112-28 also authorizes subpoenas for physical evidence. The CPSC may now subpoena federal, state, and local government agencies for documentary and physical evidence.

All Terrain Vehicles Standard

In 2006, the CPSC published a proposed rule on banning three-wheeled all terrain vehicles.³⁰ Section 9 of Public Law 112-28 directs the CPSC to adopt a final standard within one year of enactment.

Lingering Issues

Public Law 112-28 ultimately gained passage with near-unanimous approval from both Houses of Congress, but not without sacrifice among those who had advocated for additional or different approaches to amend CPSIA. Proponents struggling to balance business interests with product safety had sought, among other things, to change implementation timelines, retroactivity provisions, definitions of "children" and "children's products," or introduce additional substance restrictions that would either broaden or curtail the reach of CPSIA. Thus, the new law is as noteworthy for what it did *not* change as for what it did change.

For example, Rep. Bono Mack's earlier bill, H.R. 1939, would have given manufacturers and importers more leeway in compliance by postponing the implementation of a 100 ppm lead restriction until August 14,

²⁷ Financial Services and General Government Appropriations Act, 2012, H.R. 2434 (112th Cong.).

²⁸ Office of Management and Budget, Statement of Administration Policy, H.R. 2434 – Financial Services and General Government Appropriations Act, 2012 (July 13, 2011), available at http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/sap112r2434r_20110713.pdf.

²⁹ OMB, 2013 Budget Guidance, available at <http://www.whitehouse.gov/blog/2011/08/18/2013-budget-guidance>.

³⁰ CPSC, Notice of Public Rulemaking: Standards for All Terrain Vehicles and Ban of Three Wheeled All Terrain Vehicles, 71 Fed. Reg. 45,904 (Aug. 10, 2006), available at <http://www.cpsc.gov/BUSINFO/fr07/3wheel.html>.

2012, and prohibiting retroactive enforcement of *both* the existing 300 ppm and the new 100 ppm lead limits. As enacted, Public Law 112-28 only managed to make the 100 ppm limit prospective, and left the August 14, 2011 implementation date intact. Furthermore, manufacturers must still invest in new materials, equipment, processes, and sourcing partners in order for their new products to meet the lowered lead threshold.

H.R. 1939 also sought to reduce the scope of the lead restriction by only applying it to products that are targeted towards children 6 years of age or younger (rather than 12 and younger) and can be placed in a child's mouth. Independently, at least two CPSC commissioners had also recommended revising the law to account for the differences in how older and younger children interact with products by lowering the age requirement of the statute and giving the CPSC more flexibility to implement the substance restrictions.³¹ The final law did not change the scope of regulated products by reducing the target age range, however.

Likewise, Public Law 112-28 could have provided the CPSC with more flexibility with regard to third-party testing. H.R. 1939 proposed that independent third-party testing may not be required or enforced until the Commission determined that the benefits of such a requirement would justify the costs and tailored the testing rules in a way that imposes "the least possible burden" on the regulated community. Although the CPSC must now consider alternatives and practices to reduce the impact on industry, the third-party testing requirement remains largely unaffected at present.

Other proposals that did not get enacted include:

- Defining small batch manufacturers as those that produce 10,000 units or less of a product, as opposed to 7,500 units.

- For the interim ban on the phthalates DINP, DIDP, and DnOP under Section 108(b)(1) of the CPSIA, imposing a strict 180-day deadline on the CPSC to commence and finalize a rulemaking, or else terminate the prohibition altogether.

- Requiring that submissions to the consumer product safety information database under section 6A of the CPSA must be done by, or on behalf of, those who suffer harm or risk of harm related to the use of a product, as opposed to allowing any "consumer" to do so.

- Giving manufacturers additional time to notify the CPSC of its objections to "material inaccuracies" and insufficient product identification, and allowing them a longer, or perhaps even unspecified "reasonable" period of time to correct or identify the product(s) in question before the consumer complaint is published on the database for public viewing.

Another issue absent from Public Law 112-28 is the regulation of cadmium in children's products. Cadmium, an alternative to lead in some products, can be equally toxic and has received much publicity in the wake of several high-profile recalls of products containing large amounts of cadmium. In May 2010, three environmental groups, including the Sierra Club, peti-

tioned both CPSC and the EPA and urged the agencies to promulgate rules to ban toy metal jewelry that contain more than trace amounts of cadmium and which could be ingested by children. EPA granted the petition and agreed to proceed with rulemaking under the Toxic Substances Control Act (TSCA) Section 8(d) to regulate cadmium in metal toy jewelry and other consumer products if the CPSC does not act.³² The advocacy groups were not, however, successful in their petition to prompt the CPSC to regulate cadmium.

In October 2010, the CPSC staff issued a report concluding that cadmium can migrate in sufficient amounts from children's jewelry to cause adverse health effects.³³ However, given that ASTM International already has a subcommittee (F15.24) set up to develop a voluntary standard to address accessible cadmium from children's metal jewelry, and another subcommittee (F15.22) to focus on the ASTM F963 standard for toy jewelry, the CPSC staff recommended that the Commission defer its decision on the petition and direct the staff to participate in ASTM's efforts first before taking further action. On October 19, 2010, the CPSC wrote a letter to ASTM urging the organization to expedite completion of a safety standard that addresses cadmium in children's jewelry and also in other toys.³⁴ No cadmium provision was included in Public Law 112-28.

Conclusion

Public Law 112-28 succeeded in mitigating some of the most pressing flaws in the 2008 CPSIA, and even managed to secure broad-based legislative support in a politically charged environment. However, in order to achieve this compromise, several difficult questions were left unanswered, and many constituents still contend that the legislation should have gone further—either to ease restrictions further for the benefit of industry or to make the provisions more stringent to ensure maximum protection of public health and safety.

It is unlikely that Congress will re-open the CPSIA to further amend the same provisions that have already been tackled in Public Law 112-28. Additionally, the 2013 budget cuts urged by OMB will make it more difficult for the CPSC to expand its regulatory and en-

³² Letter from Stephen Owens, Assistant Administrator, US EPA Office of Prevention, Pesticides and Toxic Substances, to Ed Hopkins, Director, Sierra Club Environmental Quality Program, Aug. 30, 2010, available at <http://www.epa.gov/oppt/chemtest/pubs/Owens.Cadmium.Response.8.30.10.pdf>.

³³ CPSC Staff Report: Cadmium in Children's Metal Jewelry (October 2010), available at <http://www.cpsc.gov/library/foia/foia11/os/cadmiumjewelry.pdf>. See also <http://www.cpsc.gov/library/foia/foia11/brief/cadmiumpet.pdf>.

³⁴ Letter from Colin Church, CPSC Voluntary Standards Coordinator, to Brent Cleaveland, Chairman, ASTM F-15.24 Subcommittee on Children's Jewelry, Oct. 19, 2010, available at <http://www.cpsc.gov/library/foia/foia11/os/cadmiumjewelry.pdf>; letter from Colin Church, CPSC Voluntary Standards Coordinator, to Joan Lawrence, Chairman, ASTM F15.22 Subcommittee on Toy Safety, available at <http://www.cpsc.gov/LIBRARY/FOIA/FOIA11/os/cadmiumtoy.pdf>. The Commission has also announced recalls of other children's products, such as promotional items targeted towards children, due to the presence of cadmium. See, e.g., Press Release, CPSC, McDonald's Recalls Movie Themed Drinking Glasses Due to Potential Cadmium Risk (June 4, 2010), available at <http://www.cpsc.gov/CPSCPUB/PREREL/prhtml10/10257.html>.

³¹ See, e.g., Statement of Commissioner Nancy Nord on the Commission Report to Congress Pursuant to the Statement of Managers Accompanying P.L. 111-117, at 2 (Jan. 15, 2010), available at <http://www.cpsc.gov/pr/nord01152010.pdf>.

forcement footprint beyond that contemplated by Public Law 112-28. The CPSC may not even have the resources to exercise the case-by-case assessment flexibility granted to it by the amendments.

Nonetheless, Public Law 112-28 has afforded the CPSC several opportunities to make its implementation of the CPSIA more workable. Also, upcoming developments, such as the creation of an ASTM standard for

cadmium in children's jewelry, the CHAP report on phthalates, and the forthcoming appropriations determination for the CPSC, could shape the future of the CPSIA. None of these changes will come without strident opposition from multiple stakeholders as each side advocates its own views about how to balance economic concerns with public health protection and safety. If history is any indication, compromises will be reached.