



PRODUCTS LIABILITY AND INTERNATIONAL TRADE UPDATE

Congress Approves Significant Reforms to the Controversial Consumer Product Safety Improvement Act

After more than two years of intractable partisan differences and inaction, on August 1, 2011, Congress sent the President legislation to reform the Consumer Product Safety Improvement Act (CPSIA), originally enacted in August 2008. The legislation includes provisions, such as changes to the controversial Consumer Product Safety Information Database created under the CPSIA, that could benefit the broad spectrum of companies whose products are regulated by the five-member Consumer Product Safety Commission (CPSC or Commission). Further provisions should benefit the all-terrain vehicle and bicycle industries, libraries, charities dealing in used children’s products, and various small businesses, including the handmade toy industry.

Congress’ sudden action was likely triggered by the CPSC’s imminent August 14, 2011, deadline to reduce the lead content limit for children’s products¹ to 100 parts per million (ppm). Under the CPSIA, this newest reduction in the lead content limit would apply to any children’s products in the marketplace, regardless of date of manufacture (as did earlier reductions to a 600 ppm limit and then to a 300 ppm limit). Although the CPSC was unanimous in its view that the 100 ppm limit should only be applied prospectively, it lacked legal authority to impose such a rule. With the August 14, 2011 deadline fast approaching, Congress passed a bipartisan measure to address the retroactivity of the lead limit reduction, as well as—to the surprise of many—to make more than a dozen other significant changes to the CPSIA.

The legislation, H.R. 2715, was introduced and approved in a single day, with an overwhelming 421-2 vote in the House and a voice vote in the Senate. The bill is sure to be signed into law by President Obama before August 14, 2011, and will be effective upon signature.

The legislation includes the following notable reforms to the CPSIA:

1. The 100 ppm lead substrate limit for children’s products is only prospective.

The 100 ppm lead content limit will apply only to products manufactured on or after August 14, 2011, and any future revisions in the limits also will be prospective in effect. For small manufacturers, particularly handmade toymakers, and small retailers, this is a particularly important change, because they could ill afford to purge their inventories. Major retailers, on the other hand, have almost certainly been requiring their suppliers to meet the 100 ppm limit for some time to ensure that on August 14, 2011, there would be no stock on the sales floor with lead content levels above 100 ppm.

¹ Children’s products are defined as a consumer product designed or intended primarily for children 12 years of age or younger.

2. A “functional purpose” exception to the lead substrate limit is now permitted – but only subject to CPSC approval on a case-by-case basis.

The new law authorizes the CPSC, on its own initiative or upon petition by an interested party, to except from the lead limit a product, material or component that requires the inclusion of lead because it is not practicable or technologically feasible to manufacture that item without lead or to make the lead inaccessible. There are, however, several limitations to the new functional purpose exception: (a) the CPSC may not except products that are likely to be placed in the mouth or ingested; (b) the CPSC must find that the exception for a particular product, material or component will not have a measurable adverse effect on public health or safety; (c) the party seeking an exception has the burden of proving that the product meets the requirements for an exception; and (d) the CPSC may establish an alternative lead limit, or impose a manufacturing expiration date for the exception.

3. Off-highway vehicles, including all-terrain vehicles (ATVs), dirt bikes and snowmobiles are excepted from the lead substrate limits.

4. Bicycles will remain subject to a 300 ppm lead substrate limit—instead of the lower 100 ppm limit —and metal components of bikes are exempted from third party testing.

Although enforcement of a lead limit for bicycles has been stayed by the CPSC, a 300 ppm limit will begin to apply as of December 31, 2011, to the total lead content by weight for any metal component part that is currently subject to the stay. Further, third party testing requirements to ensure compliance with lead limits do not apply to the metal component parts of bicycles.

5. Certain used children’s products are exempted from the lead content limit.

Many charities that deal in used children’s products are likely to benefit from the exempting of used children’s products from lead limits, although this provision does have strict conditions and limitations. A used children’s product is defined as one that was obtained by the seller for use and not for the purpose of resale, or was obtained by the seller, either directly or indirectly, from a person who obtained the item for use and not for the purpose of resale. Donations to a seller for charitable distribution or resale to support charitable purposes are expressly recognized as falling within the exemption. There are a few types of products, that are precluded from benefiting from this exemption:

- i. Children’s metal jewelry;
- ii. Any children’s product for which the donating party or the seller has actual knowledge that the product violates the lead limits; and
- iii. Any other children’s product that the CPSC determines, after notice and hearing, presents an unreasonable risk to children’s health.

6. The CPSC must consider ways to reduce the burdens of third party testing requirements.

Within 60 days of enactment of H.R. 2715, the CPSC must solicit public comment on opportunities to reduce the cost of the requirements for third party testing for compliance with lead limits. Such alternatives must be consistent with assuring compliance with any applicable consumer product safety rules, bans, standards or regulations. Within one year of enactment, the CPSC may prescribe new or revised third party testing regulations. Moreover, if the CPSC concludes that it lacks authority to implement an approach to reduce third party testing costs that is consistent with assuring safety, it must transmit a report to Congress with recommendations for legislation to permit implementation.

7. The CPSC is authorized to approve alternative testing requirements for small batch manufacturers.

In implementing third party testing requirements, the CPSC will now be required to take into consideration any economic, administrative or other limits on the ability of small batch manufacturers to comply with lead limits, and the CPSC is now authorized to provide alternative testing requirements for “covered products.” A covered product is

defined as a consumer product produced by a small batch manufacturer that produced no more than 7,500 units of the same product in the previous calendar year. A small batch manufacturer is defined as one that had no more than \$1 million in total gross revenue from sales of all consumer products in the previous calendar year. The \$1 million threshold will be subject to adjustment annually based on the Consumer Price Index. Durable infant and toddler products, regardless of whether they are made by small batch manufacturers, are not eligible for alternative testing requirements.

8. Most printed materials are excluded from third party testing requirements.

Ordinary books and paper-based printed materials, including magazines, posters, and greeting cards, are not subject to third party testing requirements for compliance with lead content limits. This exception does not, however, apply to books with inherent play value. It also does not apply to books or printed materials that contain components printed on material other than paper or cardboard, or that contain nonpaper-based components, such as metal or plastic parts that are not part of a conventional binding.

9. The ban on phthalates applies only to the plasticized component parts of a children's toy or child care article that is accessible to a child through normal and reasonably foreseeable use and abuse.

Within one year of enactment, the CPSC is required to promulgate a rule providing guidance on what plasticized components or classes of components will be considered inaccessible for purposes of the phthalates ban.

10. The CPSC is authorized to modify the tracking labels requirement where it determines marking is not practicable.

The tracking label requirement was designed to permit consumers to better identify whether a children's product is within the scope of a recall. The CPSC may now establish alternative requirements.

11. Publication in the Consumer Product Safety Information Database of a comment or a report of harm must now be stayed for five additional business days (beyond the 10 business days already required from the date a report is sent to a manufacturer) if the CPSC receives notice that the report or comment contains materially inaccurate information.

To address business community concerns that reports may be published in the Database despite the presentation to the CPSC of information demonstrating that a consumer's report is factually wrong, the new law mandates that in such cases the CPSC must wait 15 business days before posting the report to the Database. Whether the CPSC will prove able to sufficiently investigate the facts within that period remains an open question, but the additional time may help to prevent materially inaccurate reports from being published.

12. The CPSC is required to attempt to get a model number, serial number or photograph of a product for which a report of harm is filed with the Database, but the CPSC may not condition inclusion of a report in the Database on the presentation of such details or a photograph.

Responding to businesses' concerns about reports that provide insufficient information to identify the product at issue, the legislation provides that where a model or serial number for a product is not provided with a report of harm, the CPSC must request such information or, if it is not available, a photograph of the product. However, even if that information is not provided, the Commission still must make the report available in the Database on the 15th day after the report is sent to the manufacturer. The CPSC is instructed to include in the Database any additional information when it is obtained.

13. A new process is established for automatically updating durable nursery product safety standards that are based upon voluntary standards.

If a standards organization revises a voluntary standard that has been adopted by the CPSC, in whole or in part, as a consumer product safety standard for a durable nursery product, that organization must notify the Commission. The

revised voluntary standard will be considered a consumer product safety standard issued by the Commission effective 180 days after the date on which the organization notifies the CPSC, unless the CPSC, within 90 days of receiving that notice, notifies the organization that it has determined that the proposed revision does not improve the safety of that product and that the Commission is retaining the existing consumer product safety standard.

Conclusion

This soon-to-be law provides the CPSC with greater flexibility and discretion in applying the product safety mandates established under the CPSIA. The legislation thereby responds to repeated statements by Commissioners that their hands were tied in cases where they would otherwise create exceptions to particular rules. It remains to be seen, however, whether a majority of the CPSC—which is composed of three Democrats, including a Democratic chairman, and two Republicans—will be able to agree on how and when to take advantage of the discretion now specifically delegated to the Commission by Congress.

If you have any questions regarding this update, please contact Brenda A. Jacobs (+1.202.736.8149, bjacobs@sidley.com), or the Sidley lawyer with whom you usually work.

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