

**Senate Passes  
Sweeping CPSC  
Legislation:  
Major  
Implications  
for  
Manufacturers,  
Importers,  
and Retailers**

On March 6, 2008, the United States Senate passed legislation that reauthorizes the Consumer Product Safety Commission (“CPSC”) and has major implications for many manufacturers, distributors, importers, and retailers of consumer products.<sup>1</sup> For example, if signed into law it would:

- Impose much greater fines than permitted under current law;
- Allow state attorneys general to seek injunctive relief under the Consumer Product Safety Act (“CPSA”) in federal court;
- Require the CPSC to establish a publicly-available database to include incident information submitted to the CPSC by a wide range of sources, including retailers, manufacturers, and private labelers;
- Increase the CPSC’s funding;
- Reduce the amounts of lead permissible in children’s toys; and
- Forbid the sale of recalled products.

**NEXT STEPS: SCENARIOS**

The Senate bill covers many of the same topics as the reauthorization bill the House of Representatives passed unanimously in December of last year, but includes additional provisions that are deemed more problematic by industry representatives. Both bills represent bipartisan compromises

within each chamber. The next step for the two bills may involve a number of scenarios:

1. The two bills may be considered by a conference committee,<sup>2</sup> to reconcile the bills’ differences. The conference would likely begin in April with votes in both Chambers on approval of the final conference report by July;
2. The bills may be “pre-conferenced” by staff during the forthcoming Spring recess from March 17th until the 31st, with votes in the House and Senate shortly thereafter; or
3. The House leadership may simply call up H.R. 4040 as amended by the Senate, pass it, and avoid a conference altogether.

**COMPARISON OF THE HOUSE AND SENATE BILLS**

The House and Senate bills cover many of the same topics, although there are notable differences in the bills’ legislative language on these topics:

- *Increased Civil Penalties:* Both the House and Senate bills increase the civil penalties the CPSC can obtain for violations of the CPSA. The House bill increases the cap on civil penalties from \$1.825 million to \$10 million. The Senate bill increases maximum civil penalties to \$20 million (and

<sup>1</sup>The Senate passed the bill by a roll call vote of 79-13. A similar bill, S. 2045, “The CPSC Reform Act of 2007,” was reported out of the Senate Commerce Committee on October 30, 2007. That bill was considered too controversial to pass the Senate and its provisions were the subject of bipartisan negotiations that led to the less controversial S. 2663. Rather than voting on S. 2663, the Senate amended the reauthorization legislation previously passed by the House of Representatives, H.R. 4040, the “Consumer Product Safety Modernization Act,” to include the text of S. 2663.

<sup>2</sup>A *conference committee* is a temporary, ad hoc panel composed of House and Senate conferees formed to reconcile the differences between House and Senate bills.

increases the current penalty per violation of \$8,000 to \$250,000 per violation).

- *Enforcement by State Attorneys General:* Both the House and Senate bills provide that state attorneys general may seek injunctive relief under the CPSA in federal court. Under the CPSA, private persons are currently permitted to bring actions seeking injunctive relief in the appropriate U.S. district court.
- *Decreased Confidentiality Protections:* Both the House and Senate bills require the CPSC to give manufacturers 15 days notice that they intend to release information submitted to the CPSC by the manufacturer to the public. Both versions permit the CPSC to release information that a manufacturer contends is inaccurate, but require the CPSC to notify the manufacturer at least five days in advance.
- *Increased funding:* Both the House and Senate bills increase funding for the CPSC and authorize additional sums for the renovation, repair, and re-equipping of the CPSC testing facility. The House bill authorizes increases in funds gradually to \$100 million by fiscal year 2011. The Senate bill authorizes an increase in funds gradually to \$155.9 million by fiscal year 2015.
- *Prohibition on Lead in Children's Products:* While both the House and Senate bills ban children's products that contain lead, they differ on the other provisions regarding lead. The House bill requires a reduced lead content of 100 parts per million ("PPM") in children's products within four years. The House bill permits lead in children's products if the lead content will not threaten public health. The Senate bill, however, bans children's products containing lead if any part of the product contains lead or lead compounds and the lead content of such part is greater than 300 PPM of the total weight of such part. After three years, that standard drops to 100 PPM of the total weight for parts that contain lead. The Senate bill requires the CPSC to issue regulations exempting children's products containing a lead component that is not accessible to a child because of a sealed covering or casing, and that will not become exposed through normal and reasonably foreseeable use and abuse of the product. The Senate bill provides similar exemptions for electronics and lead crystal if the lead is not accessible. "Children's product" is defined to include products designed or intended to be used by children 12 years or younger.
- *Tracking Labels for Children's Products:* Both bills require tracking labels on children's products that enable the manufacturer and ultimate purchaser to ascertain the location and production date.
- *Registration Cards for Durable Nursery Products:* Both bills require the CPSC to undertake a rulemaking that requires manufacturers of "durable nursery products" to:
  1. Provide consumers with a postage-paid consumer registration form for each product;
  2. Maintain a record of the names and contact information of consumers who register their ownership of such products;

3. Provide a mechanism for consumers to submit electronic versions of registration forms to the manufacturer via the Internet; and
  4. Permanently place the manufacturer name and contact information, model name and number, and date of manufacture on each durable infant or toddler product.
- *Third Party Testing for Children's Products:* Both the House and Senate bills amend the CPSA to require every manufacturer of a children's product to have the product tested by a CPSC designated independent third party and require third party certification of such testing. Both bills permit the certification of proprietary laboratories owned or controlled by the manufacturer, but require their decertification upon a finding that a manufacturer or private labeler has exerted undue influence on the laboratory.
  - *Cautionary Statements in Advertising:* Both the House and Senate bills require cautionary statements on any advertisement that provides a direct means for the purchase or order of any toy, game, balloon, small ball, or marble (including ads on websites and in catalogues).
  - *Prohibition on Sale and Exports:* Both the House and Senate bills permit the CPSC to prohibit the export of any consumer product:
    1. Not in conformity with applicable consumer product safety standards;
    2. Subject to voluntary recall; or

3. Subject to an order under the CPSA.

In addition, both bills bar the sale, offer for sale, manufacture for sale, distribution in commerce, or import of a product:

1. Not in conformity with applicable consumer product safety standards;
2. Subject to voluntary recall; or
3. Subject to an order under the CPSA.

- *Commission Quorum:* Both the House and Senate bills also require the CPSC to return to the five-commissioner quorum authorized by the CPSA, albeit upon different timelines.
- *Criminal Penalties/Forfeiture:* Both the House and Senate bills increase the criminal penalties outlined under the CPSA. The House bill expands the penalties for criminal violations of the Act to include forfeiture of assets associated with the violation. The Senate bill also expands the penalties for criminal violations of the act to forfeiture of assets associated with the violation, but includes imprisonment up to one year for a knowing violation and up to five years for a knowing and willful violation.

### CONTROVERSIAL AND DISTINCT PROVISIONS OF THE SENATE BILL

The House and Senate bills have many divergent provisions. Two of the most controversial provisions include a publicly-available injury information database, and whistleblower protection language contained in the Senate bill.

- *Injury Information Database:* Under the Senate bill, injury information would

become more accessible. The Senate bill includes the establishment of a publicly-available, searchable database on the CPSC's website that includes any injuries, illness, death, or risk of such injury or death received by consumers, governmental agencies, health care professionals, hospitals and coroners, child service providers, public safety entities such as police and firefighters, or from retailers, manufacturers, or private labelers.

- *Whistleblower Protections:* The Senate bill includes "whistleblower protections" designed to prevent manufacturers, private labelers, distributors, and retailers, as well as federal, state, and local governments from discharging or discriminating against employees who, whether on their own initiative or in the course of their duties, provide information relating to CPSA violations (on the part of corporations or government), testify regarding such violations, or object to participating in any such violations. Employees who feel they have been wrongfully discharged or discriminated against as a result of such actions can file complaints with, and seek recourse from, the Secretary of Labor. If, after investigation and opportunities to comment and respond by both parties, the Department finds sufficient evidence that a violation did occur, the Secretary shall:
  1. Take affirmative action to abate the violation;
  2. Reinstate the complainant to his or her former position; and
  3. Provide compensatory damages to the complainant.

If the Department does not act in a timely manner, complainants may bring

action in the courts seeking reinstatement and compensation. Federal employees, however, would be limited to the remedies currently available under the Whistleblower Protection Act. Moreover, language adopted during Senate debate would entitle employers to attorneys' fees up to \$1,000 for frivolous suits by employees.

The Senate bill also specifically addresses a number of consumer products including cigarette lighters, garage door openers and all-terrain vehicles that are not covered by the House bill. Additional differences between the House and Senate bills include some of the amendments to the Senate bill that were added during consideration:

- *Ban on Imports from "Persistent" Violators of CPSC Standards:* The Senate bill bans the importation of toys made by companies that have a persistent pattern of violating consumer product safety standards.
- *Phthalates Ban:* The Senate bill bans the manufacture, sale, or distribution in commerce of certain children's products and child care articles that contain specified phthalates. The amendment bans the use of the phthalates DEHP, DBP, or BBP at levels above 0.1 percent in children's products or child care articles and bans the phthalates DINP, DIDP, DnOP or any combination of the phthalates DEHP, DBP, BBP, DINP, DIDP, or DnOP in concentrations exceeding 0.1 percent in children's products or child care articles that can be placed in the mouth.
- *Formaldehyde in Textiles Study:* The Senate bill requires the CPSC to study the use of formaldehyde in the manufacturing of textiles and apparel articles and to prescribe consumer product safety standards for such textile

and apparel articles.

- *Lead in Crystal:* The Senate bill authorizes the CPSC to exempt, by rule, lead crystal from the ban on lead in children's products if the Commission determines that the lead content is not absorbable and does not have an adverse effect on public safety.
- *Attorney-Client Privilege Applicability:* The Senate bill provides that attorney-client privilege applies to private civil litigation in an action authorized by the CPSA, as amended, and requires that the courts review reasonableness of fees paid to private counsel retained in such an enforcement action.
- *Safety Inspector Training:* The Senate bill requires the CPSC to develop training standards for product safety inspectors.
- *Equestrian Helmets:* The Senate bill encourages the use of safe equestrian helmets.
- *Garage Door Standard Modification:* The Senate bill modifies the automatic residential garage door operators standards requirements.

We will continue to track legislative developments as the House and Senate work to reconcile the two bills and will issue additional Client Advisories as appropriate.

## KELLEY DRYE & WARREN LLP

### CONSUMER PRODUCT SAFETY PRACTICE

Members of Kelley Drye's Consumer Product Safety practice have a long and successful history representing clients before the CPSC. We have the experience to provide advice on the difficult issues of how and when potentially hazardous consumer products must be reported to the CPSC. If product recalls are necessary,

we work with our clients and CPSC staff to quickly develop and implement cost-effective communications programs that satisfy product liability concerns and minimize potential penalties. When the CPSC threatens or brings enforcement actions, we advise our clients on appropriate strategies.

### GOVERNMENT RELATIONS AND PUBLIC POLICY PRACTICE GROUP

Kelley Drye's Government Relations and Public Policy Practice Group helps clients interpret and shape governing laws, enabling them to achieve and maintain market leadership. The varied backgrounds of its government relations lawyers and lobbyists enable the team to handle a variety of clients needs including representation and strategic planning.

### FOR MORE INFORMATION

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