

HOUSE AND SENATE APPOINT CONFEREES TO SWEEPING CPSC LEGISLATION: FINAL LAP FOR LEGISLATION WITH MAJOR IMPLICATIONS FOR MANUFACTURERS, IMPORTERS, AND RETAILERS

The United States House of Representatives and the Senate, respectively, have appointed conferees to the conference committee for H.R. 4040. This legislation reauthorizes the Consumer Product Safety Commission (“CPSC”) and has major implications for many manufacturers, distributors, importers, and retailers of consumer products.

The House appointed the following conferees on May 14, 2008: Rep. John Dingell (D-MI), Chairman of the House Energy and Commerce Committee; Rep. Bobby Rush (D-IL), Chairman of the Subcommittee on Commerce, Trade, and Consumer Protection of the House Energy and Commerce Committee; Rep. Diana DeGette (D-CO); Rep. Jan Schakowsky (D-IL), Vice Chairman of the Subcommittee on Commerce, Trade, and Consumer Protection; Rep. Henry Waxman (D-CA); Rep. Joe Barton (R-TX), Ranking Minority Member of the House Energy and Commerce Committee; Rep. Cliff Stearns (R-FL), former Ranking Minority Member of the Subcommittee on Commerce, Trade, and Consumer Protection; and Rep. Ed Whitfield, (R-KY), the new Ranking Member of the Subcommittee on Commerce, Trade, and Consumer Protection.

The Senate appointed the following conferees on April 29, 2008: Sen. Daniel Inouye (D-HI), Chairman of the Commerce, Science and Transportation Committee; Sen. Mark Pryor (D-AR), Chairman of the Subcommittee on Consumer Affairs, Insurance, and Automotive Safety of the Senate Commerce Committee; Sen. Barbara Boxer (D-CA); Sen. Amy Klobuchar (D-MN); Sen. Ted Stevens (R-AK), Vice Chairman of the Senate Commerce Committee;

Sen. Kay Bailey Hutchison (R-TX); and Sen. John Sununu (R-NH), Ranking Minority Member of the Subcommittee on Consumer Affairs, Insurance and Automotive Safety.

The conference committee, a temporary, ad hoc panel comprised of House and Senate conferees, is charged with reconciling the differences between the House and Senate passed bills.

ANTICIPATED TIMELINES

Although completion of the conference negotiations was initially targeted for the beginning of the Congressional Memorial Day recess, which begins May 22, 2008, the delay in the appointment of House conferees has eliminated all expectations for completion. Nonetheless, congressional staff members have begun informal negotiations on the two bills and are expected to have made some progress in advance of the formal conference.

RECONCILIATION OF CONTROVERSIAL PROVISIONS

The House and Senate bills have many divergent provisions. Some of the most controversial provisions include a publicly-available injury information database, whistleblower protection language, language banning certain plasticizers called phthalates, and state attorneys general enforcement, all of which are 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 injury, 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 Consumer Product Safety Act (“CPSA”) violations (on the part of corporations or the government), testify regarding such violations, or object to participating in any activities believed to be tantamount to 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 an investigation and opportunities for both parties to comment and respond to the complaints, the Department finds sufficient evidence that a violation did occur, the Secretary shall:
 1. Take affirmative action to abate the violation;
 2. Reinstatement of 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.

- *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. In addition, as a result of a spate of lawsuits, claims, and a report released by the National Toxicology Program regarding the impact that bisphenol A – an organic compound of certain polymers – has on the neurological system and behavior of fetuses, infants, and children, it is expected that the conference committee may expand the phthalates ban to include that compound. In fact, it has been suggested that conferees are inclined to address the issue in conference.
- *Enforcement by State Attorneys General:* Another point of contention for the conferees will be to resolve differing provisions found in the House and Senate bills pertaining to CPSA 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. The Senate bill, however, permits a state attorney general who prevails in a claim under the CPSA to recover reasonable costs and attorneys’ fees.

In addition, 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 600 parts per million (“PPM”) initially to 300 PPM in two years, and finally 100 PPM in children’s products within four years.

The Senate bill, however, bans children's products containing lead in two phases from 300 PPM initially to 100 PPM after three years. The House bill defines "children's product" to include products designed or intended for use by children twelve years or younger, while the Senate bill defines the term to include products designed or intended for use by children seven years or younger.

With respect to the regulatory standard for lead in paint, the Senate bill lowers the standard from 600 PPM of paint weight to 90 PPM of paint weight one year after the date of enactment of the bill. The House bill also lowers the regulatory standard from 600 PPM to 90 PPM, but does so 180 days following enactment of the bill. Additionally, the House bill lowers the paint standard for all children's products to .009 mg/cm². The intent of the House bill's use of an alternative measurement is to ensure that testing is not relegated to laboratories, but will be conducted at inspection sites and ports of entry.

The House and Senate bills cover many of the same topics, although there are notable differences in the bills' legislative language. These topics include:

- Exemptions to the lead standards;
- Increased civil penalties;
- Enforcement by state attorneys general;
- Decreased confidentiality protections;
- Increased funding;
- Prohibition on lead in children's products;
- Tracking labels for children's products;
- Registration cards for "Durable Nursery Products;"
- Third party testing for children's products;
- Cautionary statements in advertising;
- Certain prohibitions on sale and exports;
- Commission quorum; and
- Criminal penalties and forfeiture.

These issues are discussed in more detail in our previous advisory, "[Senate Passes Sweeping CPSC Legislation: Major Implications For Manufacturers, Importers, and Retailers.](#)"

Please be advised that we will continue to track legislative developments as the bill moves through conference, and are available to assist clients with developing strategies to address issues contained in this advisory.

CPSC LEAD ROUNDTABLE

In addition, on May 13, 2008, the Consumer Product Safety Commission held a roundtable discussion at its headquarters focusing on the pending lead legislation and current use of lead in consumer products. The CPSC staff provided an overview of the pending Congressional action on lead, particularly with respect to children's products, and highlighted the key differences between the current House and Senate bills, including differences in scope, limits, and timing for implementation. The roundtable also covered the various testing methodologies employed by the CPSC and provided industry members an opportunity to discuss lead issues relevant to their respective businesses. While the roundtable event invited feedback and questions from the industry and members of the audience, the CPSC staff did not provide specific information regarding interpretation of the bills, anticipated regulatory action, or recommendations for businesses.

CONSUMER PRODUCT SAFETY PRACTICE GROUP

Kelley Dye & Warren's Consumer Product Safety Practice Group is experienced in providing 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 & PUBLIC POLICY
PRACTICE GROUP**

Kelley Drye & Warren'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 our team to handle a variety of clients needs, including representation and strategic planning.

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