

Sweeping CPSC Legislation Moves Closer to Enactment

Today the House of Representatives passed legislation that reauthorizes the Consumer Product Safety Commission (“CPSC”), imposes much greater fines than permitted under current law, allows state attorneys general to seek injunctive relief under the Consumer Product Safety Act (“CPSA”) in federal court, reduces some of the confidentiality protections that currently cover information submitted to the CPSC, and increases the CPSC’s funding. The bill also reduces the amounts of lead permissible in children’s toys and forbids the sales of recalled products.

The House of Representatives passed H.R. 4040, the “Consumer Product Safety Modernization Act,” by a vote of 407 to 0 under a procedural motion called “suspension of the rules.” Because it was considered under “suspension,” no amendments were permitted during House consideration. Debate of the bill was limited to 40 minutes and the bill required a 2/3 majority vote for passage.

Although the bill, which the House Energy and Commerce Committee approved yesterday unanimously requires significant changes to current consumer product testing and labeling standards, H.R. 4040 is viewed as a bipartisan bill that was carefully crafted by its sponsors, House Energy and Commerce Committee Chairman John Dingell (D-MI) and Ranking Republican Member Joe Barton (R-TX) and the Committee’s Chairman and former Ranking Republican Member of its Subcommittee on Commerce, Trade, and Consumer Protection Representatives Bobby Rush (D-IL) and Cliff Stearns (R-FL) respectively.

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 covers many of the same topics as H.R. 4040, but includes additional provisions that are deemed more problematic by industry representatives. S. 2045 has not seen Senate floor action as the bill’s sponsor, Senator Mark Pryor (D-AR), Chairman of the Senate Commerce Committee’s Subcommittee on Consumer Affairs, Insurance and Automotive Safety, is working to resolve approximately 5 issues of contention that stand between the bill and its passage. Senator Pryor has indicated that he is intent on reaching a bipartisan deal that will allow for passage.

If the Senate does not take up H.R. 4040 as passed by the House and instead passes S. 2045, differences between the two pieces of legislation will have to be resolved in conference before a bill goes to the White House. That process could take several weeks.

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

- *Increased Civil Penalties:* Both bills increase the civil penalties the CPSC can obtain for violations of the CPSA. H.R. 4040 increases the cap on civil penalties to \$10 million. S. 2045 increases maximum civil penalties to \$100 million (increase is up 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 permitted to bring actions in appropriate U.S. district court to seek injunctive relief. The House version of the bill is not an extension of this authority, but merely a clarification. The Senate bill however, extends the authority to permit state attorneys general to seek penalties and injunctive relief under the CPSA in state or federal court.

- *Confidentiality Protections:* Both 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. However, from there, the two bills differ. H.R. 4040 permits the CPSC to release information that a manufacturer contends is inaccurate, but requires at least 5 days notice be given to the manufacturer. S. 2045 requires the CPSC to notify manufacturers of its intent to disclose confidential information, but permits the manufacturer to appeal the release. S. 2045 requires that the General Counsel of the CPSC act on a manufacturer's appeal within 30 days and grants the CPSC Commissioners 15 days to act on that appeal.
- *Increased Funding:* Both bills increase funding for the CPSC and authorize additional sums for the renovation, repair, and reequipping of the CPSC testing facility. The House bill authorizes increases in funds gradually to \$100 million by fiscal year 2011. S. 2045 authorizes an increase in funds gradually to \$141.725 million by FY 2015.
- *Lead in Children's Products:* Both H.R. 4040 and S. 2045 ban children's products that contain lead. Otherwise the two bills differ. H.R. 4040 requires that children's products have a reduced lead content of 100 parts per million (PPM) within four years. Under H.R. 4040, "children's product" is defined to include products designed or intended to be used by children 12 years or younger. The House bill would permit the CPSC, by regulation, to exclude certain products from the lead ban if the CPSC concludes that the lead content in the products will not threaten public health or safety. The Senate bill, however, bans children's products containing lead above 200 PPM for jewelry and 400 PPM for non-jewelry. Under S. 2045, those standards must be met within 180 days of enactment of the bill and there is no exception that permits lead in children's products if the lead content will not threaten people's health. Moreover, unlike H.R. 4040, S. 2045 defines children's products as products designed or intended to be used by children 7 years or younger. Both bills lower the lead paint standard for children's products and furniture from 600 PPM to 90 PPM, however the House bill gives manufacturers 180 days to comply with the new standard while the Senate bill requires that manufacturers comply within 30 days from the bill's enactment.
- *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 date of

production of the product.

- *Registration Cards for Durable Nursery Products:* Both bills require the CPSC to undertake a rulemaking that requires manufacturers of “durable nursery products” (1) to provide consumers with a postage paid consumer registration form for each product; (2) to maintain a record of the names and other contact information of consumers who register their ownership of such products; and (3) to 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 H.R. 4040 and S. 2045 amend the CPSA to require every manufacturer of a children’s product to have the product tested by an 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 bills require cautionary statements on any advertisement of a retailer, manufacturer, importer, distributor, private labeler or licensor that provides a direct means for the purchase or ordering of any toy, game, balloon, small ball, or marble (including ads on websites and catalogues).
- *Prohibition on Sale and Exports:* Both 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:* The House and Senate bills also require the CPSC to return to the 5 commissioner quorum authorized by the CPSA, albeit upon different timelines.
- *Criminal Penalties/Forfeiture:* The two bills also increase the criminal penalties of the CPSA. H.R. 4040 expands the penalties for criminal violations of the act to forfeiture of assets associated with the violation. S. 2045 also expands the penalties for criminal violations of the act to forfeiture of assets associated with the violation but also includes imprisonment up to a year for a knowing violation and up to 5 years for a knowing and willful violation.

Each bill also has unique provisions that are not addressed in the bill being considered in the other chamber. Before it was reported by the Energy and Commerce Committee yesterday, the Committee agreed to an amendment that gives the CPSC mandatory recall authority for products that are an “imminent threat.” As amended, H.R. 4040 requires the CPSC to give notice to

the manufacturer first that a product is considered an “imminent threat.” The CPSC would then be permitted to file a claim in a U.S. district court that the product is such a threat, and could that same day, require a mandatory recall of the product. Currently the CPSA defines an “imminently hazardous consumer product” as a consumer product that presents imminent and unreasonable risk of death, serious illness, or severe personal injury.

The Senate bill would also bar manufacturers from discharging or otherwise discriminating against employees because they provided information to, testified to, or assisted the Federal Government, or a state attorney general relating to any violation or alleged violation of the CPSA or other laws enforced by the CPSC. Moreover, S. 2045 would permit whistleblowers to receive anywhere from 10 to 25% of civil penalties collected. The Senate bill also specifically addresses a number of consumer products including cigarette lighters, garage door openers and all-terrain vehicles.

We will continue to track both bills and issue additional Client Advisories as appropriate.

KELLEY DRYE COLLIER SHANNON
CONSUMER PRODUCT SAFETY
PRACTICE

Members of Kelley Drye Collier Shannon’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 Collier Shannon’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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