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Congress Approves – President Signs – The Consumer Product Safety Act of 2008

Contacts

Cheryl M. Nicolson

nicolson@nicolsonassoc.com

Leanne A. Waldie

waldie@nicolsonassoc.com

Melissa L. Yemma

yemma@nicolsonassoc.com

Rose Tree Corporate Center II

1400 N. Providence Road

Suite 6050

Media, PA 19063

610.891.0300

www.nicolsonassoc.com

Last month, the United States Senate and House of Representatives approved the Consumer Product Safety Act of 2008 (“the Act”). The Act was first introduced in November of 2007 following a number of high-profile recalls involving children’s toys. On August 8, 2008, President Bush signed the Act into law thereby giving the Consumer Product Safety Commission (“CPSC”) the most comprehensive make-over it has seen since its creation in 1972. The Act is intended to give the CPSC more muscle by providing greater funding for capital improvements and for the hiring of more employees for product analysis and enforcement activities.

Highlights of the specific provisions of the Act that will influence manufacturing and distribution activities include:

- **Lowered Lead Levels:** Permissible levels of lead content in products intended for children under the age of 12 will be incrementally reduced over the next three years starting with a level of 600 parts per million within 180 days, 300 parts per million within one year and 100 parts per million within three years. There is a special restriction for lead paint which reduces the permissible level to 90 parts per million.
- **Ban on Phthalates:** The Act bans the sale of children’s toys and child care items which contain more than 0.1% of di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP). This ban is effective 180 days after enactment. In addition, there is a temporary ban of children’s toys that are small enough to be placed in a child’s mouth (smaller than 5 cm) and all child care items that contain more than 0.1% of diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP) pending further analysis.
- **ASTM Toy Safety Standards:** Within 180 days from enactment, the now voluntary ASTM standard (F963-07) will become

mandatory during an interim period of further evaluation of the standard by the CPSC. Within a year following completion of the CPSC’s evaluation of the standard, they must promulgate their own regulations concerning the subject matter of the ASTM standard.

- **Infant and Toddler Product Standards:** Within one year, the CPSC must begin to establish new rules and standards for durable infant and toddler products, including cribs, high chairs, strollers, infant carriers, bath seats, gates, swings and other items that will require manufacturers to provide pre-paid postage registration cards and enable more efficient dissemination of recall and safety notices.
- **Testing by Independent Labs:** Independent lab testing is required of imported children’s products for compliance with safety standards. Manufacturers must submit their products for testing by independent labs that are certified by the CPSC before their products can be sold to the public. The CPSC will articulate requirements for accreditation of independent labs for particular classes of products. The independent testing requirement will apply to any children’s product manufactured 90 days after the accreditation requirements are published.
- **CPSC to Establish Standards for All-Terrain Vehicles:** The CPSC is required to establish a mandatory consumer product safety standard for four-wheeled all-terrain vehicles. The Act makes it unlawful for any manufacturer or distributor to import or distribute any new all-terrain vehicles unless the vehicle complies with the standard and bears a label certifying compliance.
- **Ban of Three-Wheel All-Terrain Vehicles:** The Act bans the importation of new three-wheeled all-terrain vehicles until a mandatory consumer product safety rule



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is promulgated.

- **Tracking Labels:** Permanent tracking labels indicating the manufacturer's name, contact information and batch/item production information are required within one year following the CPSC's promulgation of such requirements to better enable product recall identification and tracking.
- **Whistleblower Protection:** The Act provides protection for employees who report violations and/or provide assistance to the CPSC in connection with their enforcement activities.
- **Authority Given to State Attorney General:** The Act empowers State Attorney Generals to enforce CPSC standards and regulations through injunctive actions in an effort to quickly remove potentially harmful products from the market.
- **Civil Penalties:** Civil penalties for violations of the Act, the Flammable Fabrics Act and the Federal Hazardous Substances Act are increased: \$8,000 to \$100,000 for individual violations; and, \$1,825,000 to \$15,000,000 for a related series of violations.
- **Criminal Penalties:** The Act permits larger fines, up to five years imprisonment and forfeiture of assets and removes the requirement that directors, officers and agents be aware of violations before they can be criminally charged.
- **Preemption:** The Act prohibits any CPSC regulations from preempting damage claims arising under common law, state statutes or California Proposition 65.
- **Recall Notice Requirements:** The CPSC has 180 days within which to promulgate new requirements for the content and dissemination of recall notices and can require the notices be disseminated in

languages other than English.

- **Manufacturer's Right to Decide Manner of Recall Eliminated:** The Act takes away the right of the manufacturer recalling a product to elect whether they will offer a refund, repair or replacement of the recalled product and permits the CPSC to make the call based upon what it determines to be in the public's best interest.
- **Feasibility Study Concerning Establishment of Recall Escrow Funds:** The Act calls for the CPSC to conduct a study to determine the feasibility of requiring manufacturers, importers and retailers to establish escrow funds or otherwise provide evidence of financial ability to pay for recalls.
- **CPSC To Create Searchable Database:** The Act mandates that the CPSC establish a searchable database, available to the public that includes any reports received by the CPSC of injuries, illness, death, or risk of such injury, illness, or death related to the use of consumer products reported by consumers, government agencies and nongovernmental sources other than information provided to the CPSC from manufacturers and retailers.

As evidenced by the highlights of the specific provisions noted above, the Act is more than just a face-lift to our existing consumer product safety laws. The effects of the Act will, undoubtedly, increase manufacturing costs and be felt broadly by manufacturers, distributors, importers and retailers. The increase in CPSC funding and staffing will mean more people to focus and investigate more products which is likely to translate into more litigation.

If you have any questions about this update or would like more information, please contact Cheryl M. Nicolson.

Nicolson Associates LLC

Cheryl M. Nicolson has authored this Update.

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