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CPSIA Amended, Disaster Averted

Law360, New York (August 5, 2011) -- On Aug. 1, 2011, after years of controversy, Congress voted nearly unanimously to amend the 2008 Consumer Product Safety Improvement Act.

H.R. 2715 gives the Consumer Product Safety Commission new authority and discretion in how it enforces consumer product safety laws. The act addresses certain unintended consequences of the CPSIA, which imposed costly and extensive regulations that have severely affected American businesses. The bipartisan bill is expected to be signed into law by the president in a matter of days. The timing of the bill's passage was critical to prevent businesses from having to destroy large quantities of inventory by Aug. 14, 2011.

The act modifies several selected provisions of the CPSIA by providing specific exclusions for certain products and businesses, while also furnishing the commission with the authority to grant other regulatory relief to businesses. The majority of the act's provisions give companies relief from strict lead content restrictions and costly third-party testing requirements applicable to children's products. The act also makes minor changes to the new public consumer product complaint database, enhances the commission's subpoena power and makes other modifications.

Several bills have been introduced in Congress over the past few years that attempted to address problems with the CPSIA. Until now, no "reform legislation" progressed very far. That changed dramatically with this bipartisan bill. H.R. 2715 — the clear product of compromise — passed both the House and Senate the day it was introduced. The act did so by preserving the core fundamentals of the existing CPSIA while also providing the commission with new flexibility in how it can enforce the law.

Major Provisions

Limitations on Lead

The section of the act most important to manufacturers, distributors and retailers of children's products is the provision that makes the Aug. 14, 2011, lead limit reduction prospective. The CPSIA progressively lowered allowable lead content in children's products to 600 ppm, 300 ppm, and on Aug. 14 the limit was scheduled to be reduced even further to 100 ppm.

Previously the commission applied the reductions in the lead limits retroactively. In practice, that meant each time the lead limit was lowered, businesses had to destroy large quantities of existing inventory that had complied with existing laws when they were manufactured. Because the Aug. 14 reduction was contingent on the commission's very recent determination that the 100 ppm limit was "technologically feasible," companies were uncertain what inventory could be sold under CPSIA after Aug. 14. The act eliminates this uncertainty and makes the 100 ppm lead limit prospective.

Only children's products manufactured after Aug. 14, 2011, will need to meet the new limit. Existing compliant inventory may be sold even if it exceeds the 100 ppm limit. Congress, apparently driven by the troubled state of the economy, did not want to be responsible for further stress on already challenged businesses.

The act also addressed regulatory stress on businesses by creating the "Functional Purpose Exception." This provision is designed to give the commission the authority to grant exceptions for products that require the inclusion of lead because it is not feasible to make the product by removing the excessive lead or making the lead inaccessible.

In order for a product to qualify for this exception, it must be proven that the product is not likely to be mouthed or ingested by children, and the product must not have a measurable adverse impact on public health or safety. The party seeking the exception has the burden of proof to convince the commission that the product meets all of the necessary requirements. This section modifies a CPSIA requirement that disallowed requests for exclusions where the product caused the absorption of any amount of lead into the human body. In the past, the commission found this standard simply could not be met because even a de minimus amount of lead violated the standard.

Youth off-highway vehicles (ATVs), bicycles (and related products), as well as used children's products, all receive special exceptions or exclusions from lead content limits otherwise applicable to children's products. The used children's products exclusion specifically includes children's products donated for charitable distribution or resale to support charitable purposes. Goodwill, the Salvation Army, and other such charities in the past were all significantly impacted by the inflexible rules of the CPSIA. The act gives relief to these charities that previously could not accept donated children's products without running the risk of violating the CPSIA if the charities resold the products.

Third-Party Testing Requirements

H.R. 2715 also addresses problematic CPSIA testing requirements. In the past, third-party testing requirements for children's products were so expensive that many small businesses found that the cost of CPSIA testing exceeded the price of the product. Companies often either went out of business or dropped children's products from their line of inventory. The act provides the prospect of reducing third-party testing burdens but it does not give businesses any immediate relief.

The act requires the commission to seek public comment on ways to reduce the cost of third-party testing requirements "consistent with assuring compliance [with applicable consumer product safety laws.]" Potential areas of relief include the use of materials already regulated by another government agency or already in conformity with other national or international standards, as well as component testing, sampling and other techniques.

After the public comment period, the commission may prescribe new regulations that reduce costs consistent with assuring compliance. This section maintains the overall thrust of the act, which gives the commission discretionary powers that may or may not result in tangible relief to businesses.

The act also creates "special rules for small batch manufacturers." These "Mom and Pop" small manufacturers have especially suffered under CPSIA, which makes no distinction between multinational corporations and individual crafters of homemade children's products. Consistent with the other sections of the act, these special rules grant the commission new powers to create alternatives or exemptions to existing burdensome regulations.

Small batch manufacturers (less than $1 million in total gross revenue) may register with the commission and utilize alternative testing requirements or exemptions as determined by the commission. The act tasks the commission with deciding if alternative testing requirements are available or economically practicable for these manufacturers. How the commission will exercise its discretion in making these determinations is of course unknown at this time.

Books were another problem area under the CPSIA that have been addressed by the act. Because the ink in books could contain lead, children's books (arguably even those in libraries) were subject to expensive third-party testing limits. Under the act, "ordinary books" are now excluded from the onerous third-party testing requirements. The act does not explain why special treatment has been given to books and not to other categories of children's products.

Additional CPSIA Modifications

The act also addresses the application of updated "Durable Nursery Products" (e.g., cribs), standards and phthalate limits. In addition, the act allows the commission to exclude products from tracking requirements if the commission determines that it is not practicable to require tracking labels on the product. The CPSIA requires tracking labels to be placed on children's products. These labels must contain such information as the manufacturer, the location, date of production and so forth. For some children's products (especially small individualized products) this was simply not feasible.

Lastly, the legislation makes some minor revisions to the consumer product safety complaint database, enhances the commission's subpoena powers and makes technical amendments.

Future Implications

H.R. 2715 is Congress's response to the commission's argument that the CPSIA did not grant the commission enough flexibility to rationally implement and enforce the CPSIA. The commissioners often argued that the strict language of the CPSIA tied their hands and prevented them from providing businesses with relief from unreasonable rules. To a degree, the act puts the reigns back in the hands of the commission. While some parts of the act simply give relief for selected products or groups, other provisions give the commission the power to grant exceptions where it previously had no ability to do so.

What does this mean for American businesses? For some specific businesses, it means immediate and tangible relief from costly regulations. For the majority of American companies, however, the real and practical effect of this legislation will only be understood when the commission actually applies its new powers to the petitions for relief. Nonetheless, the act at least opens up the possibility of exceptions where none previously existed.

In the meantime, it is unlikely that there will be any other legislative changes to the CPSIA in the foreseeable future. Businesses and consumers must therefore prepare themselves to operate within what will likely be evolving parameters of the revised CPSIA.

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