

News & Updates

Amended Consumer Product Safety Law: Addresses Claims of Inaccuracy in Public Database Reports and Potential Exemptions from Testing Requirements

On August 12, 2011, President Barack Obama signed into law H.R. 2715, which amends the Consumer Product Safety Improvement Act (CPSIA). A concurrently issued White House Press Release said the new law “provide[s] the Consumer Product Safety Commission with greater authority and discretion to implement current law without overburdening certain manufacturers.” The amendments to the 2008 CPSIA address the CPSC’s public database, lead limit requirements, phthalates testing, tracking labels, third party testing, exemptions for small manufacturers and CPSC subpoena power.

The key provisions of the amendments are as follows:

- **CPSC will have the ability to spend an additional 5 days to investigate claims of inaccuracy in the public database, and to seek additional information from consumers.**

The CPSIA required the CPSC to publish a consumer incident report in its public database within 10 days after the CPSC transmitted the report to the manufacturer. The manufacturer could object to the publication of the incident report if it contained material inaccuracies. If the CPSC agreed with the manufacturer, the report would not be published. Under the CPSIA, the CPSC believed that, it was required to publish the consumer report on its database within 10 days, even if the CPSC was still in the process of evaluating a manufacturer’s claim that the consumer report was materially inaccurate. Under the amendments, if the CPSC receives notice that a report is inaccurate, the CPSC may stay publication of the report for five additional days. The amendments also require the CPSC to seek a model or serial number of the consumer product involved in the reported incident, or a photograph if these are not available, however, the lack of such information will not prevent the consumer report from appearing in the database.

- **100 parts per million lead content limit for children’s products will be applied prospectively rather than retrospectively.**

Section 101(a) of the CPSIA banned the sale of children’s products containing more than 100 parts per million lead content after August 14, 2011, regardless of the date these products were manufactured. The amendments add a new section 101(a)(3) that applies the 100 parts per million lead limits only to products *manufactured* after August 14, 2011, rather than to products *sold* after August 14, 2011.

- **Only accessible plasticized parts of a children’s toy or child care article must comply with phthalate limit requirements.**

Under the CPSIA, inaccessible components of children’s products did not have to be tested for lead content, but these inaccessible components of toys and child care products did have to be tested for phthalates. The amendments provide that the phthalate

requirements do not apply to inaccessible parts of children's toys or child care articles, and only apply to plasticized parts of the products that may contain phthalates.

- **CPSC will have authority to exempt children's products from tracking label requirements.**

The CPSIA required all children's products to have permanent tracking labels "to extent practicable" The amendments permit the CPSC to issue regulations that exempt specific products, or class of products from the tracking label requirements, or to establish alternate tracking label requirements for such products.

- **CPSC is given more flexibility to exempt children's products from lead content limits requirements.**

Section 101(b)(1) of the CPSIA permitted the CPSC to exempt specific products or materials from the lead limit requirements, only by regulation, if it was determined that use, abuse or aging of the product would result in no absorption of *any* lead into the body and no adverse impact on public health or safety. The amendments replace this entire section with a new section that permits the CPSC to exempt products, materials, as well as classes of products and component parts if it is determined that it is not practicable to make the product without lead, the product is not likely to be mouthed, and the exemption will have no measurable effect on public health or safety. The amendments also provide clearer guidance on the definition of "measurable effect on public health and safety."

- **Some books and paper-based printed materials are excluded from third party testing requirements.**

The CPSIA contained no exclusion for books or other printed materials. Under the amendment, third-party testing requirements will not apply to ordinary books or ordinary paper-based printed materials, such as magazines, posters and greeting cards. Books intended for children under 3 and books printed on material other than paper are not excluded and still must be tested.

- **ATVs, snowmobiles and other off-highway vehicles are exempt from the lead content requirements.**

Section 101(a) of the CPSIA had limited the lead content in all children's products, without any product category exceptions. The amendments in H.R. 2715 contain a new provision at Section 1(b)(5) making the lead limits contained in Section 101(a) inapplicable to off-highway vehicles, including snowmobiles and ATVs.

- **Stay of enforcement for bicycles is extended and third party testing limited.**

The stay on the applicability of lead content limits for children's bicycles set forth in 74 Fed. Reg. 31254 will remain in place until December 31, 2011 for metal components. Thereafter, there shall be no more than 300 ppm for any metal component on a bicycle. Under the amendments, third party testing for lead content for metal components of bicycles is not required.

- **CPSC must solicit public comments on opportunities to reduce costs of third party testing and may implement regulations to do so.**

The CPSIA provided little flexibility for the CPSC to modify third party testing requirements to avoid redundancy and reduce cost.

The amendments contain a new Section (2)(a)(2) entitled "Reducing Third Party Testing Burdens" that requires the CPSC to actively solicit public comments regarding means to reduce the cost of third party testing including possible reliance on regulations of another government agency; joint testing of the same product by two or more importers; alternative sampling procedures; reliance on international standards and reliance on alternate testing techniques. The CPSC may issue new regulations within 12 months. In the event the CPSC determines it lacks authority to reduce costs, it must report to congress any recommendations for modified legislation that would permit it to do so.

- **Revisions to CPSC- adopted voluntary durable nursery product standards become mandatory consumer product safety standards within 180 days.**

After the CPSC has adopted a voluntary durable nursery product standard as a consumer product safety standard, if the voluntary standards organization adopts any revisions to that standard, the revised standard shall be considered to be a standard issued by the CPSC effective in 180 days, unless the CPSC determines within 90 days that the proposed revision does not improve the safety of the product.

- **Future cribs standard revisions will be applied only to manufacturers and importers, or only prospectively with 12 month notice.**

The CPSIA applied crib standards to all manufacturers and sellers of new and used cribs, including child care facilities and hotels. The amendments provide that any further revisions to the crib standards be applied only to manufactures or importer. If the CPSC determines that the standard will protect against an unreasonable risk to health or safety, and must apply to others, including retailers, it must provide at least 12 months for these others to come into compliance.

- **Certain used products are excluded from lead limits requirements.**

The CPSIA made no distinction between newly manufactured products and used products sold in thrift stores and lawn sales. Under the amendments, lead content limits requirements shall not apply to used children's products obtained by the seller for use and not resale, nor to used children's products that were donated for charitable distribution or resale for charitable purposes. This exception will not apply to children's metal jewelry, children's products that the seller knows to be in violation of lead limits, nor any other children's product the CPSC determines to be an unreasonable risk to children's health.

- **Small batch manufacturers may be exempt from some testing requirements under certain circumstances.**

The CPSIA imposed the same third party testing requirements and certification on manufacturers of mass produced goods as it did on crafters and small-batch companies. The amendments include special consideration for or exemption from third-party testing for small-batch products (no more than 7,500 similar units made in a calendar year) made by small manufacturers that had no more than \$1 million total gross revenue from all consumer product sales in the previous calendar year. Upon notice and a hearing, the CPSC is to provide alternate testing requirements for these products made by small-batch manufacturers. If it is determined that no

alternative testing is available or not economically viable, the CPSC must exempt small-batch manufacturers from third-party testing. No alternate testing or exemptions will be permitted for lead paint and small parts tests, nor for tests of children's metal jewelry and juvenile products. Small batch manufacturers must register with the CPSC to be eligible for exemptions or alternate testing.

- **CPSC may subpoena evidence as well as documents.**

Finally, 15 U.S.C. 2076(b) was amended to permit the CPSC to specifically subpoena physical evidence in addition to documentary evidence, and to delegate subpoena authority to its general counsel to subpoena governmental agencies.

If you have questions about how this may impact your business, please contact a member of the Goldberg Segalla Product Liability Practice Group.

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