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## Will Congress Amend The CPSIA?

Law360, New York (May 04, 2010) -- After addressing the many questions raised by industry groups, consumer groups, and others about the interpretation and applicability of the CPSIA, the CPSC has been working diligently to develop policies and guidance documents applying the CPSIA's new requirements. Yet just as the CPSC has begun to finalize many of these policies and interpretations, some of the complaints that have garnered the most media attention may soon be addressed by Congress.

In March and April 2010, three drafts of a House bill,[1] titled "Consumer Product Safety Enhancement Act of 2010" ("CPSEA") and aimed at amending the Consumer Product Safety Improvement Act of 2008 and the Consumer Product Safety Act, were circulated for discussion and comment. CPSC Commissioners Nancy Nord and Anne Northup submitted comments[2] on the first draft of the bill to Congressman Henry Waxman, D-Calif., Chairman of the Committee on Energy and Commerce.

On April 29, 2010, the Subcommittee on Commerce, Trade and Consumer Protection held a hearing regarding the CPSEA. Industry groups, such as the National Association of Manufacturers, and consumer protection groups, such as the Consumer Federation of America, participated in the hearing. This article explains some of the content of the third draft of the bill (the most recent at the time of this article) and the Commissioners' reactions.

### Relief for Small Batch Manufacturers

Under the draft bill, the CPSC could allow "small batch manufacturers" to meet alternative testing requirements for "covered products" instead of third-party testing requirements. However, the alternative testing requirements must assure compliance with the relevant safety standards. Third-party testing can be onerous and expensive, and thus, an alternative would be welcomed by most companies. However, what types of testing would "assure compliance" and exactly what manufacturers would be required to do in lieu of third-party

testing is unclear.

This relief for small batch manufacturers would come with multiple limitations. First, alternative testing would not be allowed for lead paint, small parts, children's metal jewelry, cribs, pacifiers, baby bouncers, walkers, jumpers and durable infant or toddler products. Also, who and what products would qualify for the alternative testing relief is restricted by the bill's definitions of "small batch manufacturer" and "covered product."

A "small batch manufacturer" is (i) one who, for at least 2/3 of its products, had no more than 7,500 units of the product manufactured or imported in the previous calendar year and had gross revenue from the product of no more than \$50,000 in the previous calendar year, and (ii) one who had no more than \$1,000,000 in total gross revenue in the previous calendar year.

A "covered product" is one in which the manufacturer had "(i) manufactured no more than 7,500 units of the product in the previous calendar year; (ii) had no more than \$50,000 in gross revenue from the sales of that product in the previous calendar year; and (iii) had no more than \$1,000,000 in total gross revenue in the previous calendar year." The dollar amounts would be adjusted annually according to the Department of Labor's Consumer Price Index percentage increase.

Thus, the only possible relief from third-party testing would be for a small batch manufacturer and only for its covered products, making this provision fairly limited in scope. Additionally, manufacturers able to meet these definitions would have to understand that this is not a "forever" forgiveness from third-party testing, unless they never exceed the limitations of the definitions of "small batch manufacturer" and "covered product."

As their businesses grow, manufacturers would have to monitor the application of these multipronged definitions to their increasing revenue and product sales. If a company's growth were to take it outside the parameters of these definitions, then it would have to meet the third-party testing requirements.

As a result, even falling within the offered protection for small batch manufacturers may not end the manufacturer's need to stay informed of the CPSC's requirements, which in and of itself can be an overwhelming and time consuming endeavor for businesses. In spite of that, the prospect of relief from third-party testing is likely music to the ears of those manufacturers who would qualify for it.

## **Relief for Thrift Stores**

The draft bill provides that lead limits under subsection (a) of CPSIA section 101 would not apply to a "used children's product." The bill defines a "used children's product" as a children's product "obtained by the seller for use and not for the purpose of resale" or those "obtained by the seller ... from a person who obtained such children's product for use and not for the purpose of resale."

In other words, the bill at least partially responds to the concerns of consignment shops, Goodwill, tot trades, and others that are involved in reselling products that individuals have bought for his or her use and then want to donate it or resell it. Included are children's products donated for distribution or resale to support charitable purposes.

The term "used children's product," however excludes children's metal jewelry, painted children's toys, items composed primarily of accessible vinyl, any children's product for which the donating party or seller has actual knowledge that the product violates lead limits, or any other children's product the CPSC designates as not being a used children's product.

This provision would offer protection for resale stores if they sell products violating lead limits, provided the store has no actual knowledge the "used children's product" is in violation of the lead restrictions. Notably, there is no protection for reselling products violating the phthalates limits or for reselling recalled products.

Thus, even while offering some needed and appreciated improvement for resellers, the provision does not change that resale operations will have to sort through their products to determine what may contain phthalates, may have been recalled, or would qualify as children's jewelry or painted toys. For smaller resale companies with minimum-wage employees trying to make such determinations on the front lines, compliance with the CPSIA would remain a difficult challenge.

## **Functional Purpose Exception**

The draft bill includes a "functional purpose exception," allowing the CPSC to grant an exception to the lead content prohibitions for a specific product, material, or component part if the CPSC determines (1) the product, material, or component part must include lead because it is not practicable or not technologically feasible to manufacture it if the excessive lead is removed or if the lead is made inaccessible; (2) the product, material, or component part is not likely to be placed in the mouth or ingested; and (3) the exception would have no

measurable adverse effect on public health or safety.

The CPSC would have to allow a 60-day period for public comment and could consider materials presented by the party seeking the exception, as well as those submitted during the comment period, in making a determination. If the CPSC were to except a product under this provision, the CPSC could still require a reduction in the lead content of the product and could assign an expiration date for the exception.

The bill's drafting committee instructs that compliance should be impracticable where it "would place the viability and continuation of a class of products or materials in jeopardy, such as youth All Terrain Vehicles or youth bicycles made with recycled steel."<sup>[3]</sup> In fact, the ATV and bicycle manufacturers appear to have been the driving force behind this change.

Whether such an opportunity would exist under the functional purpose exception for other products is uncertain and would depend largely on the resources manufacturers could devote to an exception effort. Smaller companies and those who are not members of an organized industry group may struggle to find the time and extra money needed to undertake and submit to the CPSC the kind of science, testing and research that would be needed to convince the CPSC that the company's product fits squarely within the three-pronged test described above.

Also uncertain is whether the CPSC could find the flexibility it needs within the functional purpose exception's language to apply the exception in a logical manner. For example, how would "not practicable" be defined and applied? Would a smaller operation with a tightly-stretched bottom line be held to the same criteria or definition for what is practicable as would a huge, well-known company with a much more bountiful budget?

Efforts to remove lead or make lead inaccessible that could be deemed "practicable" for large companies may not be "practicable" for a smaller company, even for similar products. For the exception to be useful, the CPSC would need the flexibility to make the exception's application meaningful to companies of all sizes.

## **Commissioners' Comments**

CPSC Commissioners Northup and Nord submitted individual statements to Congressman Waxman in response to the first draft of the bill and have published their written statements, <sup>[4]</sup> both finding the functional purpose exception to be inadequate. As of the date of this article, the other three commissioners had not published statements in response to the draft

bill.

Both Commissioners Nord and Northup would have preferred that the draft bill provide the CPSC with additional flexibility. Commissioner Nord viewed the functional purpose exception as an empty exception, leaving "virtually everything outside the scope of the exception" because "all lead could be removed at some cost or effort." Additionally, both Commissioners Nord and Northup questioned why the fact that the item has no measurable effect on public health or safety would not be sufficient by itself, explaining that this is the only criteria that should apply to the functional purpose exception.

## **Conclusion**

The two Republican CPSC commissioners view the draft bill as presenting too few solutions. In all likelihood, many manufacturers and industry groups would agree that it falls short of addressing the CPSC's need for more flexibility in applying the CPSIA and in repairing the negative effects of the CPSIA on manufacturers. Manufacturers, private labelers, distributors, retailers and resellers would all appreciate relief from the challenges presented by the CPSIA's requirements, particularly as the CPSC shifts from installation mode to enforcement mode.

Whether this draft bill would provide such relief from the uncertainties and frustration manufacturers have been facing in understanding and complying with the CPSIA or it would just provide a too-small bandage, inadequate for correcting what some see as a flawed approach to achieving safer consumer products, remains to be seen. It, however, is the first significant step we have seen by Congress to begin to respond to the number of complaints and concerns that have arisen in the wake of the enactment of the CPSIA.

--By John F. Kuppens, Stacy K. Taylor and Paula M. Burlison, Nelson Mullins Riley & Scarborough LLP

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*The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360.*

[1] A copy of the third draft of the bill is posted at [www.learningresources.com/text/pdf/LR/CPSEA\\_committee\\_print\\_4\\_19\\_10.pdf](http://www.learningresources.com/text/pdf/LR/CPSEA_committee_print_4_19_10.pdf)

[2] Commissioners' statements are posted at [www.cpsc.gov/pr/statements.html](http://www.cpsc.gov/pr/statements.html)

[3] [www.learningresources.com/text/pdf/LR/Report\\_draft\\_4\\_19\\_10.pdf](http://www.learningresources.com/text/pdf/LR/Report_draft_4_19_10.pdf)

[4] [www.cpsc.gov/pr/statements.html](http://www.cpsc.gov/pr/statements.html)