



# Consumer Product Safety Improvement Act of 2008: P.L. 110-314

(name redacted)

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**CRS Report for Congress**

*Prepared for Members and Committees of Congress*

## Summary

Public alarm about the spate of recent product recalls throughout 2007, particularly of toys and other products used by children, has focused attention on the Consumer Product Safety Commission (the CPSC or the Commission). This scrutiny led to consideration of major amendments to the Consumer Product Safety Act (CPSA), which established and authorized the CPSC in 1972 in response to growing concerns about protecting the public from unsafe, defective consumer products. Jurisdiction over the administration and enforcement of several existing consumer safety statutes was transferred from other agencies to and consolidated under the CPSC. However, in the years since its establishment, the staff and resources of the CPSC have been considerably reduced, leading many observers to doubt its ability to fulfill its mission effectively.

Consequently, Congress considered major reform legislation to address organizational and systemic deficiencies. Legislative proposals in the 110<sup>th</sup> Congress included provisions targeting specific consumer product defects and hazards. On July 29, 2008, H.Rept. 110-787, the Conference Report for H.R. 4040, the Consumer Product Safety Improvement Act of 2008 (CPSIA), was released after several months of negotiations in the conference committee to reconcile differences between the House and Senate versions of the bill. The bill passed the House of Representatives and the Senate on July 30, 2008 (424-1) and July 31, 2008 (89-3), respectively. On August 14, 2008, President Bush signed the bill into law as P.L. 110-314. CPSC Chairman Nord and Commissioner Moore each expressed approval of the final legislation, with Chairman Nord expressing a desire for Congress to appropriate further funding to carry out the new mandates of the legislation.

This report provides an overview of the prior authority of the CPSC to establish consumer product safety standards and to inspect and recall unsafe consumer products, and discusses P.L. 110-314, the Consumer Product Safety Improvement Act of 2008, reforming the CPSC and strengthening enforcement of consumer product safety standards. It supersedes CRS Report RL34399, *Consumer Product Safety Improvement Act of 2008: H.R. 4040*, by (name redacted) (out of print but available from author). For an overview of issues regarding safety of consumer products imported from China, see CRS Report RS22713, *Health and Safety Concerns Over U.S. Imports of Chinese Products: An Overview*, by (name redacted). For an overview of the issue of phthalates in children's products, see CRS Report RL34572, *Phthalates in Plastics and Possible Human Health Effects*, by (name redacted) and (name redacted).

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## Background

Public alarm about the spate of product recalls during 2007, particularly of toys and other products used by children, has focused attention on the Consumer Product Safety Commission (CPSC). P.L. 110-314, 122 Stat. 3016 (2008), the Consumer Product Safety Improvement Act of 2008 (CPSIA), was enacted as a result of Congress's consideration of major reform legislation to address organizational and systemic deficiencies, as well as specific consumer product defects and hazards. This report provides an overview of the prior authority of the CPSC to establish consumer product safety standards and to inspect, recall, and restrict importation of unsafe consumer products, and summarizes changes made by the CPSIA to reform the CPSC and strengthen enforcement of consumer product safety standards.

The Consumer Product Safety Act (CPSA, 15 U.S.C. §§2051 et seq.) established and authorized the CPSC in 1972 in response to growing concerns about protecting the public from unsafe, defective consumer products. However, in the years since its establishment, the staff and resources of the CPSC have been considerably reduced to the detriment of its ability to fulfill its mission effectively. Aside from the issue of adequacy of resources, the highly publicized recalls of children's toys in 2007 focused attention on alleged weaknesses in the CPSA and the authority of the CPSC to establish consumer product safety standards and to inspect, recall domestically, and block imports of unsafe consumer products.

The CPSC is the central, federal authority for the promotion and enforcement of consumer product safety. The system is designed to be a collaborative effort among the CPSC, the industries producing the broad range of consumer products, and the consuming public. The CPSC researches and promotes best practices for the industries, producing guidelines for manufacturers, importers, distributors and retailers. Although the CPSA authorizes the CPSC to promulgate mandatory consumer product safety standards, it mandates reliance upon voluntary standards whenever compliance with voluntary standards would eliminate or adequately reduce the risk of injury and substantial compliance with voluntary standards is likely.

Besides the CPSA, the CPSC also administers several other statutes whose authorities and functions were transferred to the CPSC upon its creation. The Federal Hazardous Substances Act (FHSA, 15 U.S.C. §§1261 et seq.) provides for warning/informational labeling of hazardous substances and for the banning of certain hazardous substances for which labeling would not provide adequate protection for the public against the potential hazards posed by the substances. The Flammable Fabrics Act (FFA, 15 U.S.C. §§1191 et seq.) provides for the establishment of safety standards regarding fabric flammability. It also prohibits the manufacture, sale, importation, transportation, or delivery in commerce of a product, fabric, or related material or of a product made of a fabric or related material that does not comply with the standards and deems that such practices constitute unfair methods of competition and unfair and deceptive acts or practices under the Federal Trade Commission Act. The Poison Prevention Packaging Act (PPPA, 15 U.S.C. §§1471 et seq.) authorizes the CPSC to establish special packaging standards for a household substance if such standards are required to protect children from serious injury or illness from using, handling or ingesting such substance, with exceptions for noncomplying packages for elderly/handicapped persons and packaging at the direction of a licensed medical practitioner. The Refrigerator Safety Act (RSA, 15 U.S.C. §§1211) prohibits the introduction into interstate commerce of any household refrigerator that does not conform with certain safety standards.

Prior to amendment by the CPSIA, some of these statutes provided for powers that were similar but not identical to those established under the CPSA. Therefore, the regulatory procedures and other actions which the CPSC is authorized to carry out with regard to the products regulated under these other statutes differed (and may still differ in some respects) from those authorized under the CPSA. Before the CPSIA, the CPSC could choose to regulate under the CPSA a consumer product that could be regulated sufficiently under these other statutes only if the CPSC determined that it was in the public interest to do so. The differences among the different statutory standards and procedures and enforcement authority arguably led to inconsistency in the enforcement of different product standards. For example, injunctive enforcement authority for states attorneys general is expressly provided by the FHSA and the FFA, but was not expressly provided by the CPSA before amendment by the CPSIA. The apparent ambiguity of the CPSA on this point led to amendments in the CPSIA to provide express authority.

The CPSC has the authority to establish consumer product safety standards for consumer products generally, defined as “any article or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise.”<sup>1</sup> There are express exemptions for products covered under other statutes, including tobacco and tobacco products, motor vehicles and motor vehicle equipment, pesticides, firearms/antique firearms and ammunition/supplies (except for fireworks), aircraft and components, boats and other marine vessels, drugs, medical devices, cosmetics, food, or any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer. The CPSC also has jurisdiction over amusement rides that are not permanently fixed to a site but rather are part of a travelling carnival or show, but does not have jurisdiction over rides that are permanently fixed to a particular site.<sup>2</sup> Furthermore, the CPSC has no jurisdiction to regulate a particular consumer product if the risk of injury associated with that product could be eliminated or sufficiently reduced by actions taken under the Occupational Safety and Health Act of 1970 (Occupational Safety and Health Administration), under the Atomic Energy Act of 1954 (the Energy Research and Development Administration [now Department of Energy] and the Nuclear Regulatory Commission), or under the Clean Air Act (the Environmental Protection Agency). The CPSC has no authority to regulate any risk of injury associated with electronic product radiation emitted from an electronic product if such risk may be regulated under the Public Health Act (the Food and Drug Administration).

Manufacturers, distributors, retailers, and importers are obligated to report consumer product safety problems to the CPSC, which may order a recall or import ban. The CPSA provides the general authority of the CPSC over inspections, recalls and import bans for consumer products generally, with the exceptions noted above, unless other statutes provide other agencies with authority over specific products. Although some of the other statutes enforced by the CPSC contain provisions specifically addressing notice/recall, import bans, and other remedies similar to those contained in the CPSA, not all do.

The CPSC is authorized to inspect domestic facilities where a consumer product is manufactured and the conveyances by which it is transported and which may be relevant to the safety of such

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<sup>1</sup> CPSA §3 (codified at 15 U.S.C. §2052).

<sup>2</sup> State agencies have jurisdiction over fixed rides that are located in a park in their jurisdiction.

product.<sup>3</sup> It is unlawful for a person to fail or refuse to permit inspection as required under the CPSA.<sup>4</sup> For purposes of the CPSA, including inspection and testing, the CPSC may purchase any consumer product and it may require any manufacturer, distributor, or retailer of a consumer product to sell the product to the CPSC at cost.<sup>5</sup> The CPSC is authorized to establish and maintain a permanent product surveillance program, in cooperation with other appropriate Federal agencies, for the purpose of carrying out the CPSC's responsibilities under the CPSA and the other Acts it administers and preventing the entry of unsafe consumer products into the United States.<sup>6</sup> The U.S. Customs and Border Protection (CBP)<sup>7</sup> is authorized to obtain and deliver samples of consumer products being offered for importation to the CPSC, upon its request, for the purpose of inspecting such samples for compliance with the CPSA.<sup>8</sup> Similarly, under FHSA § 14 (15 U.S.C. § 1273), the CBP is authorized to obtain and deliver samples of hazardous substances being imported or offered for importation to the CPSC, upon its request, for the purpose of inspecting such samples for compliance with the FHSA.

Under CPSA § 19,<sup>9</sup> it has been unlawful, among other things, to manufacture, sell, distribute in commerce, or import into the United States any consumer product which does not comply with an applicable consumer product safety standard or which has been declared a banned hazardous product by a rule under the CPSA. Other consumer-product-related statutes contain similar provisions concerning prohibited or unlawful acts. The CPSIA has expanded the scope of prohibited acts.

Under CPSA § 15,<sup>10</sup> every manufacturer (defined to include importers), distributor, or retailer of a consumer product distributed in commerce who obtains information reasonably supporting the conclusion that such product (1) fails to comply with an applicable consumer product safety rule or with a voluntary consumer product safety standard; (2) contains a defect which could create a substantial product hazard; or (3) creates an unreasonable risk of serious injury or death, shall immediately inform the CPSC, unless such manufacturer, distributor, or retailer has actual knowledge that the CPSC has been adequately informed of such defect, failure to comply, or risk. If the CPSC determines after a hearing that a product presents a substantial product hazard and that notification is required in order to adequately protect the public from such substantial product hazard, the CPSC may order the manufacturer or any distributor or retailer of the product to take any one or more of the following actions: (1) to give public notice of the defect or failure to comply; (2) to mail notice to each person who is a manufacturer, distributor, or retailer of such product; or (3) to mail notice to every person to whom the person required to give notice knows such product was delivered or sold. The CPSIA expanded the scope of these provisions to cover noncompliance with rules under all acts under CPSC jurisdiction and to provide additional means of providing public notice.

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<sup>3</sup> CPSA § 16 (codified at 15 U.S.C. § 2065) and 16 C.F.R. § 1118.2.

<sup>4</sup> CPSA § 19(a)(3) (codified at 15 U.S.C. § 2068(a)(3)).

<sup>5</sup> CPSA § 27 (codified at 15 U.S.C. § 2076).

<sup>6</sup> CPSA § 17(h) (codified at 15 U.S.C. § 2066(h)).

<sup>7</sup> The statute and regulations refer to the Secretary of the Treasury although such functions are now undertaken by Department of Homeland Security (U.S. Customs and Border Protection (CBP)) pursuant to the Homeland Security Act and 19 C.F.R. §§ 0.1-0.2.

<sup>8</sup> CPSA § 17(b) (codified at 15 U.S.C. § 2066(b)).

<sup>9</sup> Codified at 15 U.S.C. § 2068.

<sup>10</sup> Codified at 15 U.S.C. § 2064.



Prior to the CPSIA, if the CPSC determined after a hearing that a product presented a substantial product hazard and that action under that provision was in the public interest, it could order the manufacturer or any distributor or retailer of such product to take whichever of the following actions it elected to take: (1) to bring the product into compliance with the applicable product safety rule or repair the defect; (2) to replace the product with an equivalent product that does comply or is not defective; or (3) to refund the purchase price. The CPSIA removed the ability of the manufacturer, distributor or retailer to choose the remedial action to be taken and provides for the CPSC to determine which action should be taken.

In addition to its authority with regard to a substantial product hazard, under CPSA §12, the CPSC may bring an action in federal district court to have a product declared an imminent hazard, defined as a consumer product which presents imminent and unreasonable risks of death, serious illness, or severe personal injury, and to seize the product. If the court determines that a product constitutes an imminent hazard, it may grant any relief necessary to protect the public, including an order requiring public notification, recall, and remedies including repair, replacement, or refund of such product.

Under the FHSA §15,<sup>11</sup> the CPSC may order a manufacturer, distributor, or dealer to take remedial action with respect to a banned hazardous substance similar to remedies under the CPSA, including (1) giving public notice that an article or substance is a banned hazardous substance; (2) mailing notice to each person who is a manufacturer, distributor, or dealer of such article or substance; and (3) mailing such notice to every person to whom the person giving the notice knows such article or substance was delivered or sold. The CPSC may also order the repair of such article or substance, replacement with an equivalent compliant article or substance, or refund. Similar notification and remedial actions may be ordered with respect to any toy or other article intended for use by children that is not a banned hazardous substance but that contains a defect which creates a substantial risk of injury to children.

The CPSC does not pay for the costs of a notice of product hazard or defect or any ordered repair, replacement, or refund; costs are born by the manufacturer, distributor, or retailer. An order issued under CPSA §15<sup>12</sup> with respect to a product may require any person who is a manufacturer, distributor, or retailer of the product to reimburse any other person who is a manufacturer, distributor, or retailer of such product for such other person's expenses in connection with carrying out the order, if the CPSC determines such reimbursement to be in the public interest. Also, no charge shall be made to any person (other than a manufacturer, distributor, or retailer) who avails himself of any remedy provided under an order concerning repair, replacement, or refund, and the person subject to the order shall reimburse each person (other than a manufacturer, distributor, or retailer) who is entitled to such a remedy for any reasonable and foreseeable expenses incurred by such person in availing himself of such remedy. FHSA §14(d)<sup>13</sup> contains reimbursement provisions similar to CPSA §15.<sup>14</sup> Any person who is a manufacturer, distributor, or dealer of a noncompliant toy, article, or substance may be ordered to reimburse any other person who is a manufacturer, distributor, or dealer of such toy, article, or substance for such other person's expenses in connection with carrying out a remedial or notification order, if the CPSC determines such reimbursement to be in the public interest. Also, no charge shall be

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<sup>11</sup> Codified at 15 U.S.C. §1274.

<sup>12</sup> Codified at 15 U.S.C. §2064.

<sup>13</sup> Codified at 15 U.S.C. §1273(d).

<sup>14</sup> Codified at 15 U.S.C. §2064.



made to any person (other than a manufacturer, distributor, or dealer) who avails himself of any remedy provided under a remedial order and the person subject to the order shall reimburse each person (other than a manufacturer, distributor, or dealer) who is entitled to a remedy for any reasonable and foreseeable expenses incurred in seeking such remedy.

CPSC has the authority to establish import standards and policy with regard to statutes and products under its jurisdiction.<sup>15</sup> Under the CPSA, importers are made subject to the same responsibilities as domestic manufacturers in protecting American consumers from unreasonably hazardous products. This is explicitly stated in the definition of “manufacturer” as any person who manufactures or imports a consumer product.<sup>16</sup> Like the CPSA, the FHSA and the FFA assign responsibilities to importers comparable to those of domestic manufacturers and distributors.<sup>17</sup> Various statutory provisions authorize the CPSC to ban noncompliant imports. If the CPSC determines after a hearing that a product presents a substantial product hazard and that action under that provision is in the public interest, it may issue an order prohibiting the importation into the United States of that product.<sup>18</sup> An imported consumer product may be refused admission to the United States if it does not comply with an applicable consumer product safety rule; does not comply with labeling and certification requirements relating to applicable product safety standards; is an imminently hazardous product; or has a product defect which constitutes a substantial product hazard.<sup>19</sup> The CPSC may then inform the CBP<sup>20</sup> that an imported consumer product fails to comply with an applicable consumer product safety rule and/or has a product defect which constitutes a substantial product hazard and may request the CBP to refuse admission to any such consumer product.<sup>21</sup> As discussed in this report, the CPSIA has expanded grounds for refusing admission to a product. Under FHSA § 14,<sup>22</sup> a misbranded hazardous substance or banned hazardous substance being imported or offered for import shall be refused importation. Section 9 of the Flammable Fabrics Act (FFA)<sup>23</sup> provides that imported products subject to flammability standards under the FFA shall not be released from customs custody except in accordance with § 499 of the Tariff Act of 1930<sup>24</sup> providing for release only after inspection by CBP for compliance with U.S. laws. The CBP also has authority for the redelivery or recall of products already released under bond but later found not to comply with flammability standards and for obtaining liquidated damages for breach of a condition of the bond arising out of a failure either to correct the product to comply or to redeliver it.

Such noncompliant or defective products must be destroyed or exported from the United States unless they can be modified by the owner or consignee in a manner that will enable them to be granted admission into the United States.<sup>25</sup> The CPSC and the CBP have the authority to give the owner or consignee the opportunity to make such modifications and to monitor such

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<sup>15</sup> Its policy on imported products, importers, and foreign manufacturers is set out at 16 C.F.R. § 1009.3.

<sup>16</sup> CPSA §3(a)(4) (codified at 15 U.S.C. §2052(a)(4)).

<sup>17</sup> See FHSA §15(f) (15 U.S.C. §1274(f)); FFA §9 (15 U.S.C. §1198).

<sup>18</sup> CPSA §15(d) (codified at 15 U.S.C. §2064(d)).

<sup>19</sup> CPSA §17 (codified at 15 U.S.C. §2066).

<sup>20</sup> CPSA §17(b) (codified at 15 U.S.C. §2066(b)).

<sup>21</sup> 16 C.F.R. §1115.21(d).

<sup>22</sup> Codified at 15 U.S.C. §1273.

<sup>23</sup> Codified at 15 U.S.C. §1198.

<sup>24</sup> Codified at 19 U.S.C. §1499.

<sup>25</sup> CPSA §17(c and e) (codified at 15 U.S.C. §2066(c and e)).

modifications.<sup>26</sup> Prior to the CPSIA, such products could also be ordered destroyed at the discretion of the CPSC. The CPSIA made destruction mandatory, unless the CBP permits export in lieu of destruction and the product is exported within 90 days of such permission.<sup>27</sup> Before the CPSIA, at its discretion, the CPSC could condition importation of a consumer product on the manufacturer's/importer's compliance with the inspection and recordkeeping requirements of the CPSA. The CPSIA makes compliance with such requirements mandatory, meaning that an imported product must be refused entry into the United States if the importer does not comply with requirements related to its product.<sup>28</sup> The CPSC may seek an injunction or seizure of a consumer product that does not comply with a consumer product safety rule or that is being manufactured, sold, distributed, or imported in violation of a CPSC order for remedial action or prohibiting importation.<sup>29</sup>

With regard to imported products that are admitted and subsequently become the subject of a recall, if the CPSC is not able to exercise jurisdiction over a foreign manufacturer that has no U.S. subsidiary/presence, the CPSC may order the importer to undertake a recall and to be responsible for the expense of a mandatory recall, since "manufacturer" is defined to include importers under the CPSA.<sup>30</sup> The importer cannot obtain reimbursement under the CPSA, but might be able to obtain reimbursement from the foreign manufacturer as a contractual matter.<sup>31</sup> Under CPSA §17(f),<sup>32</sup> the owner or consignee of an imported consumer product denied entry into the United States must pay for all expenses in connection with its storage or destruction. In default of such payment, these expenses shall constitute a lien against any future importations made by such owner or consignee. Under FHSA §14(c),<sup>33</sup> the owner or consignee must pay for all expenses (including travel, per diem, or subsistence, and salaries of officers or employees of the United States) in connection with the destruction of a hazardous substance denied importation into the United States; the supervision of the relabeling or other action authorized to bring a hazardous substance denied importation into compliance with the FHSA so that it may be granted importation; and the storage for any hazardous substance denied importation. In default of such payment, the FHSA, like the CPSA, provides that such expenses shall constitute a lien against any future importations made by such owner or consignee.<sup>34</sup>

The Office of Compliance and Field Operations within the CPSC conducts compliance and administrative enforcement activities under all administered acts, provides advice and guidance on complying with all administered acts, and reviews proposed standards and rules with respect to their enforceability.<sup>35</sup> Among other things, it reviews consumer complaints, conducts inspections and in-depth investigations, and analyzes available data to identify those consumer

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<sup>26</sup> CPSA §17(c and d) (codified at 15 U.S.C. §2066(c and d)).

<sup>27</sup> CPSA §17(e) (codified at 15 U.S.C. §2066(e)).

<sup>28</sup> CPSA §§16(d) and 17(g) (codified respectively at 15 U.S.C. §§2065(d) and 2066(g)).

<sup>29</sup> CPSA § 22 (codified at 15 U.S.C. §2071).

<sup>30</sup> CPSA §15(e) (codified at 15 U.S.C. §2064(e)) for recall reimbursement and CPSA §3(a)(11) (codified at 15 U.S.C. §2052(a)(11)) for definition of "manufacturer."

<sup>31</sup> See CPSA §15(e) (codified at 15 U.S.C. §2064(e)) and *Riegel Textile Corp. v. Celanese Corp.*, 493 F. Supp. 511 (S.D.N.Y. 1980) (manufacturer has no cause of action against supplier under CPSA or FHSA for violation of those statutes, but state cause of action under state laws may remain).

<sup>32</sup> Codified at 15 U.S.C. §2066(f).

<sup>33</sup> Codified at 15 U.S.C. §1273(c).

<sup>34</sup> *Id.*

<sup>35</sup> 16 C.F.R. §1000.21.

products containing defects that pose a substantial risk of injury or do not comply with existing safety requirements. The Office negotiates and monitors corrective action plans for products that are defective or fail to comply with specific regulations.

The Office of International Programs and Intergovernmental Affairs within the CPSC was established to enable a more coordinated and comprehensive approach to international cooperation with regard to harmonization of safety standards internationally and the ensuring of compliance with U.S. safety standards for products imported into the United States. Memoranda of understanding have been concluded with CPSC counterparts in various countries or regional groups, including the People's Republic of China, the European Union, and Canada.

The CPSC held a public meeting on September 4, 2008, to explain their plans to implement the CPSIA and will continue to hold a series of such meetings.<sup>36</sup>

## **Current Legislation: P.L. 110-314**

There have been a number of proposals in the 110<sup>th</sup> Congress to address a range of consumer product safety issues. In addition to the two major CPSA reform bills that ultimately resulted in P.L. 110-314, H.R. 4040 and S. 2045/S. 2663,<sup>37</sup> there have been other comprehensive reform bills and bills addressing discrete issues, including safety standards for cigarette lighters, All-Terrain Vehicles or ATVs, furniture, swimming pools, portable gasoline containers, durable infant or toddler consumer products such as strollers and cribs, and other products; certification of safety-standard compliance; the enactment of lead content standards for consumer products and more stringent lead in paint standards; third-party testing for product safety and compliance; increases in civil and/or criminal penalties; increases in CPSC personnel assigned to ports-of-entry; the prohibition of sales or resales of products that are the subject of a recall; expanded jurisdiction of the CPSC to cover amusement park rides at a fixed site; greater coordination among the various agencies involved in consumer safety issues; and others. Language from some of the free-standing bills addressing specific issues was incorporated into the CPSIA.

The following sections will summarize the provisions of P.L. 110-314. The final text was the result of a lengthy conference negotiation. The Senate-passed version of H.R. 4040 [hereinafter Senate Text]<sup>38</sup> and the House-passed version of H.R. 4040 [hereinafter House Text]<sup>39</sup> contained many similar provisions strengthening the authority and resources of the CPSC and also establishing standards concerning lead content in children's toys. However, the Senate Text contained additional reform provisions, such as whistleblower protection and several provisions concerning consumer product safety standards for specific items such as all-terrain vehicles and garage door openers. Conversely, most of the provisions of the House Text had parallel provisions in the Senate Text; the major exception was the provision adding a prohibition on industry-sponsored travel by members or employees of the CPSC, a response to the much-criticized

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<sup>36</sup> Video and slide presentations for the meeting on September 4, 2008, and information on future meetings about testing and certification and standards for all-terrain vehicles, lead, and phthalates, is available at <http://www.cpsc.gov/about/cpsia/cpsia.html>, last visited September 22, 2008.

<sup>37</sup> After the House passed H.R. 4040, the Senate took up S. 2663, a compromise version of S. 2045, and amended it on the Senate floor, then amended H.R. 4040 to substitute the text of S. 2663 and passed it.

<sup>38</sup> The short title for the Senate version of the bill is the CPSC Reform Act.

<sup>39</sup> The short title for the House version of the bill is the Consumer Product Safety Modernization Act.

practice by the CPSC of accepting travel and lodging expenses from industry sponsors for trips related to CPSC business, that was widely reported after the S. 2045 markup. On July 29, 2008, H.Rept. 110-787, the Conference Report for H.R. 4040, the Consumer Product Safety Improvement Act of 2008, was released after several months of negotiations in the conference committee to reconcile differences between the House and Senate versions of the bill. The bill passed the House of Representatives and the Senate on July 30, 2008 (424-1) and July 31, 2008 (89-3), respectively. On August 14, 2008, President Bush signed the bill into law as P.L. 110-314. CPSC Chairman Nord and Commissioner Moore each expressed approval of the final legislation, with Chairman Nord expressing a desire for Congress to appropriate further funding to carry out the new mandates of the legislation.<sup>40</sup>

## **Children's Product Safety**

### **Lead Content and Measurement (§101)**

Under CPSIA §101, 15 U.S.C. §1278a, in products for children aged 12 and younger, the permissible lead level will be phased in over three years at 600 parts per million (ppm) within 180 days of enactment, 300ppm after one year, and 100ppm after three years. If 100ppm is not technically feasible, the CPSC must set the lowest level that is technologically feasible. After promulgation of either the 100ppm level or the lowest level technologically feasible, the CPSC is required to periodically review and lower the limit at least every five years. There are exceptions for certain materials or products and inaccessible component parts. If the CPSC determines that it is not technologically feasible for certain electronic devices to comply with the lead standard, it must also issue requirements to minimize exposure or accessibility to lead in those devices. The permissible lead level in paint is reduced to 0.009 percent (90 ppm) from 0.06 percent (600ppm), subject to subsequent periodic review and reduction to the lowest lead level technologically feasible. A CPSC Office of General Counsel memorandum clarifies that inventory of noncompliant products may not be sold after this provision's effective date of February 10, 2009.<sup>41</sup> Although the CPSIA does not expressly ban such sale or distribution, the Office of General Counsel concludes that a reading of the CPSIA as a whole indicates such an interpretation.

### **Third-Party Testing and Certification of Children's Products (§102)**

Section 102 of the CPSIA amends CPSA §14 (codified at 15 U.S.C. §2063) to require manufacturer certification of safety testing by accredited third-party laboratories of products designed or intended primarily for children aged 12 and younger. The CPSC must issue accreditation requirements for such laboratories and maintain a list of accredited laboratories; deadlines for the publication of such requirements differ according to the type of product being tested by the laboratory. Specific deadlines for publication of accreditation requirements after CPSIA enactment are established for the testing of lead paint (30 days of enactment),<sup>42</sup> cribs and

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<sup>40</sup> See CPSC Press Release 08-349, Chairman Nord's statement, dated July 31, 2008, available at <http://www.cpsc.gov/cpscpub/prerele/prhtml08/08349.html> (last visited September 19, 2008), and Commissioner Moore's statement, dated July 31, 2008, available at <http://www.cpsc.gov/pr/Moore073108cpsia.pdf> (last visited September 19, 2008).

<sup>41</sup> Cheryl A. Falvey, CPSC General Counsel, the CPSC Office of General Counsel, Memorandum on Retroactive Application of CPSIA to Inventory (September 12, 2008).

<sup>42</sup> Third Party Testing for Certain Children's Products: Notice of Requirements for Accreditation of Third Party (continued...)

pacifiers (60 days of enactment), small parts (90 days of enactment), children's metal jewelry (120 days of enactment), and baby bouncers/walkers/jumpers (210 days of enactment). Accreditation requirements related to the testing of other children's products must be published as early as practicable, but no later than 10 months after CPSIA enactment or, for safety rules established or revised one year or more after CPSIA enactment, not later than 90 days before such rules take effect.

For three years after enactment, CPSC proceedings for promulgating accreditation requirements are exempt from requirements of the Regulatory Flexibility Act and the rulemaking requirements of the Administrative Procedure Act. Upon request, proprietary labs insulated from the influence of the manufacturer/private labeler-owner may be accredited by the CPSC and permitted to test products if they provide equal or greater protection than available third-party labs. CPSC personnel are authorized to enter and inspect any accredited proprietary lab (CPSIA §215(a)). The CPSC is required to establish requirements for the periodic audit of third-party testing labs as a condition of continuing accreditation. The CPSC is authorized to revoke accreditation if necessary after an investigation finding that a lab failed to follow a requirement established by the CPSC or is unduly influenced by a manufacturer or government entity.

It is unclear which preemption provisions in the CPSA, as amended by the CPSIA, if any, apply to this provision concerning third-party testing and certification. There are two preemption provisions that are possible applicable. The new provision added by CPSIA §106(h), discussed below, exempts from federal preemption any state/local toy safety standards in effect on the date of CPSIA enactment, if the state/locality applies for exemption within 90 days of CPSIA enactment. Under this provision, states/localities may also apply for exemption of future proposed state/local toy safety standards. If the preemption provisions of CPSIA §106 do not apply, the general preemption provisions under CPSA §26, which predate the CPSIA, might apply to the testing and certification provisions, which are amendments to the CPSA. These provisions permit states/localities to apply for exemption of a proposed safety standard or regulation which is designed to protect against a risk of injury associated with a consumer product subject to a consumer product safety standard under the CPSA. These provisions do not permit exemption of existing state/local product safety standards or regulations which prescribe requirements for the performance, composition, contents, design, finish, construction, packaging, or labeling and which are designed to deal with the same risk of injury as the federal standard, unless such requirements are identical to the those of the federal standard. It is unclear whether testing and certification requirements may be considered consumer product safety standards for the purpose of these preemption provisions.

### **Tracking Labels for Children's Products (§103)**

Effective one year after the CPSIA enactment, CPSIA §103 amends CPSA §14 (codified at 15 U.S.C. §2063) to require a manufacturer to place tracking labels on children's products and packaging, to the extent practicable, containing information (manufacturer, production date, and production batch/run of the product) enabling the retailer and ultimate purchaser to identify recalled products and enhancing the ability of the manufacturer to track unsafe products to their precise sources. Advertisements, labels, and packaging for a consumer product will be prohibited

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(...continued)

Conformity Assessment Bodies To Assess Conformity With Part 1303 of Title 16, Code of Federal Regulations, 73 Fed. Reg. 54564 (2008).



from referring to a mandatory consumer product safety rule or a voluntary standard unless the product complies with such rule or standard.

### **Standards and Registration Forms for Durable Nursery Products (§104)**

Under CPSIA §104 (15 U.S.C. §2056a), the Danny Keysar Child Product Safety Notification Act, the CPSC, in consultation with stakeholders and product engineers/experts, must establish mandatory safety standards for a variety of durable nursery products for use by children under five years of age. Such products include cribs, toddler beds, high chairs and booster/look-on chairs, gates and other enclosures, bath seats, play yards, stationary activity centers, infant carriers, strollers walkers, swings, bassinets, and cradles. The CPSC is required to periodically review and revise such standards to ensure the highest level of safety feasible for such products. Any commercial users (including child care centers and hotels/motels) are prohibited from manufacturing, selling, reselling, leasing, or providing for use any cribs that do not comply with these mandatory safety standards. Manufacturers of durable children's products must provide consumers with registration forms in a required format/mode facilitating registration and to maintain databases of registrants to be used to notify such consumers in the event of a product recall or safety alert. The CPSC is required to study whether registration forms should also be mandatory for other children's products and to periodically review and assess the effectiveness of alternative recall notification technologies.

### **Labeling for Certain Toy and Game Advertising (§105)**

CPSIA §105 amends FHSA §24 (codified at 15 U.S.C. §1278), requiring choking hazard labelling for certain toys and games, to require similar cautionary statements on or immediately adjacent to advertising that provides a direct means of purchase, including advertising on Internet websites, in catalogues, or other advertising materials. This requirement applies to advertisements by a retailer, manufacturer, importer, distributor, or private labeler. A manufacturer, importer, distributor, or private labeler is required to inform a retailer to whom it provides a product of any cautionary statement requirement applicable to that product. A retailer is not liable for violating the advertising requirement if it requested applicable cautionary statement information from a manufacturer, importer, distributor, or private labeler who failed to provide such information or provided false information. The statement must be displayed in a clear and conspicuous manner and in the language primarily used in the advertisement, website, or catalogue. Certain format and display requirements apply. The advertising requirements take effect for internet websites 120 days after enactment and for catalogues 180 days after enactment; the CPSC may grant a grace period for catalogues. The distribution of a noncompliant advertisement is a prohibited act under the CPSA.

### **Adoption of a Mandatory Toy Safety Standard (§106)**

CPSIA §106 (15 U.S.C. §2056b) provides that ASTM International Standard F963-07, *Consumer Safety Specification for Toy Safety*, the voluntary toy safety standard promulgated by the American Society for Testing and Materials (ASTM), an independent standard-setting organization, shall be deemed a mandatory interim consumer product safety standard, pending review, in the form current on the date of enactment, with certain exceptions. The exceptions are §4.2 and Annex 4 or any provision that restates or incorporates an existing mandatory standard or ban promulgated by the CPSC. Within two years of CPSIA enactment, the CPSC must promulgate this interim standard, with revisions to further enhance toy safety, by a final rule after

reviewing it. The CPSC is required to periodically review and revise the rule to ensure the highest level of toy safety.

ASTM is required to notify the CPSC if it proposes revisions to this standard. The proposed revision will be incorporated into the CPSC rule and the revised standard will then be considered a CPSC rule effective 180 days after the ASTM notification was received, unless the CPSC notifies ASTM within 90 days of receiving such notification that it has determined that the proposed revision does not improve the safety of the products covered by the standard. The existing standard, without the proposed revision, will then continue to be the CPSC rule.

CPSIA §106(h) provides that nothing in the federal toy standard or in the CPSA statute concerning preemption shall prevent a state or local safety requirement for toys or children's products from remaining in effect if it was in effect on the day before the date of CPSIA enactment and the state or locality has filed the requirement with the CPSC within 90 days after CPSIA enactment. Upon such application, the CPSC shall consider a proposed state or local safety standard and shall grant the exemption if the state or local standard provides a significantly higher degree of protection than the federal standard and does not unduly burden interstate commerce.

### **Study of Disparities in Injury/Death Rates of Minority Children (§107)**

Section 107 of the CPSIA requires the U.S. Government Accountability Office (GAO), within 90 days of the date of enactment of this legislation, to initiate a study, by itself or an independent contractor, assessing racial/ethnic disparities in the risks and incidence of preventable injuries and deaths related to suffocation, poisonings, and drownings, including those linked to the use of cribs, mattresses, swimming pools, toys, and other products intended for use by children. Minority populations in the study include Black, Hispanic, American Indian, Alaskan Native, Native Hawaiian, and Asian/Pacific Islander children in the United States. GAO shall consult with the CPSC as necessary. GAO is required to report its findings to the relevant congressional committees not later than one year after the date of enactment of this legislation, including recommendations for minimizing risks of preventable deaths and injuries among minority children, for awareness and prevention campaigns targeting minority populations, and for education initiatives to reduce current statistical disparities.

### **Ban on Specified Phthalates and Certain Alternatives in Certain Children's Products and Child Care Articles (§108)**

Beginning 180 days after enactment of the CPSIA, §108 of the CPSIA (15 U.S.C. §2057c) permanently bans the three phthalates (chemical plasticizers used in toys and other children's products) whose toxicity is not disputed and temporarily bans three other phthalates, pending a review by a Chronic Hazard Advisory Panel (CHAP).<sup>43</sup> It prohibits children's toys or child care articles that contain more than 0.1% di-(2 ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP). The sale of children's toys or child care articles containing concentrations of more than 0.1% of diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP) are prohibited on an interim basis until a review by a CHAP. After

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<sup>43</sup> For an analysis of this issue, see CRS Report RL34572, *Phthalates in Plastics and Possible Human Health Effects*, by (name redacted) and (name redacted).



the CPSC receives the report from the CHAP, it must determine, by rule, whether to continue the interim ban; evaluate the CHAP findings and recommendations; and declare any children's product containing phthalates to be a banned hazardous product if it determines this necessary to protect children's health. This provision clarifies that it does not preempt state laws regulating the use of phthalate alternatives not specifically regulated in a standard under the CPSA. "Children's toy" is defined as a product designed or intended for a use by a child 12 years of age or younger, and "child care article" is defined as a product designed or intended for a child three years of age or younger to facilitate sleep, feeding, sucking, or teething.

## Strengthening Commission Administration and Resources

### Reauthorization Years and Funding (§201)

Section 201(a) of the CPSIA amends CPSA §32(a) to authorize progressively increasing appropriations annually. Out of these amounts, funding shall be made available for travel, subsistence, and related expenses incurred for official duties of the Commissioners and employees in attending meetings. This travel money is to be used in lieu of accepting funds from outside sources, as further discussed below.

**Table 1. Authorized Total Appropriations and Travel Component for CPSC, FY2010-FY2014**

Fiscal Year	Authorized Amount	Authorized Travel Amount
FY2010	\$118,200,000	\$1,200,000
FY2011	\$115,640,000	\$1,248,000
FY2012	\$123,994,000	\$1,297,000
FY2013	\$131,783,000	\$1,350,000
FY2014	\$136,409,000	\$1,403,000

**Source:** Section 201(a) of the CPSIA.

In addition to requiring the CPSC to report on personnel development efforts, CPSIA §201(b) requires the CPSC to submit a report on funding allocation plans to the appropriate congressional committees, not later than 180 days after enactment of the act. This report must include the efforts of the CPSC to reach and educate second-hand retailers of consumer products, particularly with regard to recalls of durable nursery products. Such education efforts shall include the development of educational materials for distribution not later than one year after enactment of the CPSIA.

### Full Commission Funding and Interim Quorum (§202)

Under CPSA §4(d) (codified at 15 U.S.C. §2053), three commissioners of the five constitute a quorum; two can constitute a quorum if necessary due to a vacancy on the Commission, but only for six months after the vacancy occurs. Title III of Pubic Law 102-389<sup>44</sup> limited funding to three

<sup>44</sup> 106 Stat. 1571, 1596 (1992) (codified as amended at 15 U.S.C. §2053 note).

Commissioners from FY1993 and thereafter. This limitation impeded the Commission's ability to meet the quorum necessary to take certain actions. The limitation dated back to the mid-1980s when Congress was contemplating restructuring the CPSC as a three-member commission or replacing the Commission with a single administrator, which had been the Senate's original proposed scheme in its 1972 version of the legislation that ultimately became the CPSA.<sup>45</sup> During consideration of the 1990 reauthorization of the CPSC, the Senate bill would have permanently reduced the CPSC to three members with a quorum of two, but ultimately the authorization of a temporary quorum of two was adopted.<sup>46</sup> If a vacancy lasted longer than six months, as had been the case recently, the Commission could not establish mandatory standards or engage in other rulemaking or procedures, including taking certain enforcement actions requiring decisions by the Commissioners, mandatory recalls, and corrective actions. The quorum requirements were temporarily superseded by §2204 of P.L. 110-53,<sup>47</sup> permitting two Commissioners, if they were not affiliated with the same political party, to constitute a quorum for six months beginning on the date of enactment of the act (August 3, 2007); this authority expired on February 3, 2008.

Section 202(a) of the CPSIA provides that, if they are not affiliated with the same political party, two members shall constitute a quorum for one year beginning on the date of enactment of the act. CPSIA §202(b) repeals the funding limitation, effective one year after enactment of the act, in order to restore the CPSC to its full five-member size and prevent the recent quorum problems.

### **Personnel (§202(c))**

Section 202(c) of the CPSIA (15 U.S.C. §2053 note) requires the CPSC to increase the number of fulltime Commission employees to at least 500 by October 1, 2013, subject to the availability of appropriations and, out of this number, requires the addition of an unspecified number of personnel to be assigned to U.S. ports of entry or to inspect overseas production facilities.<sup>48</sup>

Under CPSIA §201(b), requiring a CPSC report to the appropriate congressional committees on funding allocation plans, the CPSC must include the number of full-time investigators and other full-time equivalents the CPSC intends to employ. This report must also include CPSC efforts to develop standards for training product safety inspectors and technical staff and CPSC efforts and policies encouraging scientific staff to seek appropriate publishing opportunities in peer-reviewed journals and other media.

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<sup>45</sup> The funding limitation dates back to §101(b)(1) of P.L. 99-434, which incorporated by reference H.R. 5313, the Department of Housing and Urban Development-Independent Agencies Appropriations Act, 1987, as passed by the House, which contained the limitation. At that time, based on discussions with the authorizing committee and consumer groups, the House Committee on Appropriations concluded that the five-member structure could not be justified any longer and urged consideration of a change to a single administrator heading the agency. The committee's apparent interim solution was in effect to have a three-member Commission. H.Rept. 99-731 [for H.R. 5313] at 21 (1986). See also GAO Report HRD-87-47, *Consumer Product Safety Commission: Administrative Structure Could Benefit From Change* (1987); Robert S. Adler, *From "Model Agency" to Basket Case—Can the Consumer Product Safety Commission Be Redeemed?*, 41 Admin. L. Rev. 61, 82-92 (1989).

<sup>46</sup> H.R. 914, at 18 (1990).

<sup>47</sup> Implementing Recommendations of the 911 Commission Act of 2007, 121 Stat. 266, 543.

<sup>48</sup> Actual staffing level was 393 full-time equivalent staff in FY2007; 420 was planned for FY2008; and 444 was requested for FY2009. CPSC, *2009 Performance Budget Request*, at 78 (February 2008).

## **Reports to Congress (§203)**

Section 3003 of P.L. 104-66 (the Federal Reports Elimination and Sunset Act of 1995, codified as amended at 31 U.S.C. §1113 note) provided that, with certain exceptions, reports required to be submitted to Congress, as listed in H. Doc. 103-7, were terminated.

Section 203 of the CPSIA (15 U.S.C. §2076 note) requires that after the date of enactment of the CPSIA, notwithstanding any rule, regulation or order to the contrary, the CPSC must comply with the requirement of CPSA §27(k) (codified at 15 U.S.C. §2076(k)) that it submit copies to Congress of budget recommendations, legislative recommendations and comments, and testimony that it submits to the President or the Office of Management and Budget. These copies are expressly exempted from the reporting limitations of P.L. 104-66.

## **Expedited Rulemaking Procedures (§204)**

Critics alleged that the prior rulemaking procedures under CPSA §9 and other acts under the CPSC's jurisdiction, the FHSA and the FFA, were unnecessarily onerous, requiring procedural steps beyond those required by the Administrative Procedures Act.

Section 204 of the CPSIA streamlines the rulemaking procedures under CPSA §9 and similar provisions under the FHSA and FFA by eliminating the requirement for an advanced notice of proposed rulemaking (ANPR), a step not required by the Administrative Procedure Act (APA). This ANPR was required to include an invitation for persons to submit existing standards as proposed consumer product safety standards or statements of intention to develop or modify a voluntary standard, as well as commentary. Amendments conforming to the elimination of this requirement are also made. CPSIA §204 clarifies that the elimination of the ANPR requirement does not preclude a person from submitting all or part of an existing standard as a proposed consumer product safety standard. The FHSA is also amended to eliminate the required use of additional rulemaking procedures under the Food, Drug, and Cosmetic Act.

Technical amendments to the FHSA replace references to the Secretary of Health, Education and Welfare (HEW) [now Health and Human Services (HHS)], which remained from the original authority of the Secretary of HEW and the Food and Drug Administration over the FHSA, with references to the CPSC. Technical amendments to the FFA replace references to the Secretary of Commerce and the Federal Trade Commission (FTC), which remained from their original authority over the FFA, with references to the CPSC. References to specific congressional committees in the rulemaking provisions of the FHSA and the FFA are changed to references to the "appropriate congressional committees."

## **Inspector General Audits and Reports (§205)**

Section 205 of the CPSIA (15 U.S.C. §2076b) requires the Inspector General of the CPSC to:

- conduct reviews and audits to assess the CPSC's capital improvement efforts, including upgrades of its information technology system and the development of the new public safety database, and the adequacy of the accreditation and monitoring process for third-party testing laboratories;
- within one year of enactment of the CPSIA, conduct a review of (1) CPSC employee complaints concerning failures of other employees to properly enforce

the rules and regulations of the laws enforced by the CPSC or otherwise carry out responsibilities if such failures raise issues of conflicts of interest, ethical violations, or the absence of good faith, and (2) CPSC actions to address such complaints and failures;

- submit annual reports with respect to the findings and recommendations resulting from these audits and reviews to the appropriate congressional committees beginning in FY2010;
- transmit a report to the appropriate congressional committees within 60 days of enactment of the CPSIA on the activities of the Inspector General, any barriers preventing robust oversight of the CPSC by the Inspector General, and any additional resources and authority needed for effective oversight.

This provision further requires the CPSC, within thirty days of enactment of the CPSIA, to establish and maintain (1) a direct link from the homepage of the CPSC to the webpage of its Inspector General, and (2) a mechanism on the Inspector General's website by which individuals may anonymously report cases of waste, fraud, or abuse with respect to the CPSC.<sup>49</sup>

### **Ban on Industry-Sponsored Travel (§206)**

The CPSC has been criticized for the ethical issues raised by its practice of accepting funds from industry groups to cover travel to meetings and conferences.<sup>50</sup> As noted above, CPSIA §201(a) amends the authorization of appropriations in the CPSA to provide funds annually from FY2010 to FY2014 for travel to attend meetings and similar functions in furtherance of the official duties of the Commissioners and employees. These funds are to be used in lieu of accepting payment or reimbursement for such expenses from any person seeking action from, doing business with, or conducting activities regulated by the CPSC or whose interests may be substantially affected by the performance (or nonperformance) of a Commissioner's or employee's official duties.

CPSC Chair Nord supported these amendments.<sup>51</sup> In the past, she had defended the practice of accepting such paid travel to seminars and conferences as enabling industry education and outreach concerning safety standards and CPSC procedures that otherwise would not have been possible under the previous CPSC budgets.

Section 206 of the CPSIA adds a new §39 to the CPSA (15 U.S.C. §2086) with parallel language prohibiting Commissioners and employees of the CPSC from accepting travel and related expenses for any meeting or similar function related to official duties from a person seeking action from, doing business with, or conducting activities regulated by the CPSC and whose interests may be substantially affected by the performance of the Commissioner's or employee's official duties.

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<sup>49</sup> The link is at the bottom of the CPSC home page at <http://www.cpsc.gov> and the anonymous report form is on the Inspector General website at <http://www.cpsc.gov/cgibin/igform.aspx>, both last visited September 19, 2008.

<sup>50</sup> 154 Cong. Rec. S1561-2 (March 5, 2008) (remarks of Senator Klobuchar).

<sup>51</sup> 154 Cong. Rec. S1575 (March 5, 2008) (remarks of Senator Klobuchar).

### **Information Sharing with Other Government Agencies (§207)**

Section 207 of the CPSIA amends CPSA §29 (codified at 15 U.S.C. §2078) by authorizing the CPSC to share information obtained under the CPSA with federal, state, local, or foreign government agencies, notwithstanding the public disclosure requirements of the CPSA, where there is a prior agreement or other written certification that such information will be maintained in confidence and used only for law enforcement or consumer protection purposes and certain other conditions apply. The CPSC may terminate such agreements if it determines that the other agency has failed to abide by the conditions of the agreement. The CPSC shall not be required to disclose information it obtained from a foreign government agency or foreign source, if such information was provided on the condition of confidentiality, or through a CPSC reporting mechanism sponsored in part by foreign government agencies. However, nothing in this provision authorizes the CPSC to withhold information from Congress or prevents the CPSC from complying with a federal court order in an action by the United States or the CPSC. Foreign government agencies include multinational organizations comprising foreign states and vested with law enforcement or investigative authority in civil, criminal, and administrative matters. The CPSC must notify each state's health department of any CPSC mandatory recall or any voluntary recall of which it has been notified.

### **Employee Training Exchanges (§208)**

Section 208 of the CPSIA (15 U.S.C. §2053a) authorizes the CPSC to engage in employee exchanges with foreign government agencies so that officers and employees of the CPSC and the foreign government agencies may receive or provide training. There is no requirement for reimbursement or reciprocity; any reimbursement for expenses incurred by the CPSC shall be credited to the appropriations account from which such expenses were paid. An officer or employee of a foreign government agency who is employed by the CPSC as part of a training exchange shall be considered a federal employee during such employment only for the purposes of federal laws governing work injury compensation for federal employees, tort claims liability of the Federal Government, federal employee ethics and government corruption crimes, and any other law or regulation governing the conduct of federal employees.

### **Repeal of CPSA §30(d) (§237)**

Section 237 of the CPSIA streamlines certain regulatory proceedings under the CPSA by repealing CPSA §30(d) (15 U.S.C. §2079). The FHSA, FFA, and PPPA existed at the time the CPSA was enacted in 1972 and separately provided for regulatory authority and proceedings. When the CPSA was enacted, it included a requirement in CPSA §30(d) that a product which could be regulated under the FHSA, FFA, or PPPA could only be regulated under the CPSA if the CPSC first issued a rule finding that it was in the public interest to regulate a product under the CPSA.

### **Cost-Benefit Analysis under the PPPA (§233)**

A GAO report concerning the effectiveness of cost-benefit analyses by the CPSC found, *inter alia*, that the CPSC often conducted such analyses in considering a consumer safety standard,

even when not legally required to do so.<sup>52</sup> GAO noted that although the CPSA, FHSA, and FFA required cost-benefit analyses in order to promulgate a standard, the PPPA did not. Nevertheless, CPSC had conducted such analyses on several occasions in considering special packaging standards under the PPPA. Apparently in response to such commentary, CPSIA §233 amends §3 of the PPPA, regarding establishment of special packaging standards, by clarifying that nothing in the act shall be construed to require a cost-benefit analysis of a potential safety standard under the act in order to promulgate such standard.

## Enhanced Enforcement and Cooperation

### Prohibition on Stockpiling (§213)

CPSA §9(g) (codified at 15 U.S.C. §2058(g)) authorizes the CPSC to prohibit manufacturers from stockpiling products prior to the effective date of a consumer product safety rule; that is, from manufacturing the product at a higher-than-normal rate between the date that a rule is promulgated and the date it takes effect, in an attempt to circumvent the rule. This authority only applied to safety standards and rules promulgated under the CPSA and not to standards or rules promulgated under other statutes under CPSC jurisdiction such as the FHSA or FFA.

Section 213 of the CPSIA amends this provision so that it authorizes the prohibition of stockpiling of products prior to the effective date of an applicable rule under any statute enforced by the CPSC.

### Prohibited Acts (§216)

Section 216 of the CPSIA increases the scope of acts prohibited under CPSA §19 (codified at 15 U.S.C. §2068) by adding new prohibited acts and by expanding the application of existing prohibited acts. The additional or amended prohibitions include

- the sale, manufacture, distribution, or importation of a product regulated by the CPSC that does not comply with an applicable consumer product safety rule under the CPSA *or any similar rule, regulations, standard or ban under any other act enforced by the CPSC* [prohibition extends to products regulated under other acts such as the FHSA];
- the sale, manufacture, distribution, or importation of a product that is the subject of a voluntary corrective action and recall of which either the CPSC has notified the public or the seller, distributor, or manufacturer knew or should have known;
- the sale, manufacture, distribution, or importation of a product that is the subject of a CPSC order for a recall or corrective action or a court order declaring an imminent hazard;
- the sale, manufacture, distribution, or importation of a banned hazardous substance, meaning a children's article or toy which is a hazardous substance or which contains a hazardous substance accessible to a child;

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<sup>52</sup> GAO Report GAO/HEHS-97-147, *Consumer Product Safety Commission: Better Data Needed to Help Identify and Analyze Potential Hazards*, at 21-22 (1997).



- failure to furnish a required compliance certification or issuance of a false compliance certification under any act enforced by the CPSC, including failure to comply with requirements for testing, certification, and tracking labels for certain children's products;
- sale, importation or distribution of a consumer product bearing a false safety compliance certification mark;
- misrepresentation to CPSC officers/employees of the scope of products subject to recall/corrective action or a material misrepresentation in a CPSC investigation;
- undue influence of a third-party laboratory with respect to testing a product for compliance with safety standards under any act enforced by the CPSC;
- the export for sale of any consumer product or substance regulated by the CPSC (except for the re-export of a product denied importation into the United States) that is the subject of a voluntary corrective action, a CPSC order for a recall or corrective action, a court order declaring an imminent hazard, or that is a banned hazardous substance (meaning a children's article or toy which is a hazardous substance or which contains a hazardous substance accessible to a child); and
- violation of a CPSC order prohibiting an export under new subsection 18(c) of the CPSA (see below).

In particular, the prohibition on the sale of products that are the subject of a mandatory or voluntary recall closes a gap in the prior law, which permitted the continued sale of inventory that is the subject of a recall. The export restrictions are also new, since previously there were no restrictions on exports of recalled products or banned hazardous substances, beyond a requirement to notify the CPSC and the receiving country that an export did not comply with a U.S. safety standard or was a banned hazardous substance. In general, these CPSIA amendments prohibit violations of the new requirements under the CPSIA. Section 216 also makes a conforming amendment to CPSA §17(a)(2) to prohibit the importation of a consumer product that does not have a required certificate or label or has a false certificate.

## **Penalties (§217)**

Section 217 of the CPSIA increases the civil and criminal penalties under the CPSA, the FHSA, and the FFA. The maximum civil penalty increases from \$8,000 to \$100,000 for each violation and from \$1.825 million to \$15,000,000 for a related series of violations.<sup>53</sup> Not later than December 1, 2011, and every five years thereafter, the maximum civil penalty must be adjusted for inflation. Several factors must be considered in determining civil penalties under the CPSA, the FHSA, and the FFA, including the nature, circumstances, extent and gravity of the violation, in addition to those currently enumerated in these acts. The CPSC must consider mitigation of undue adverse economic impacts on small businesses. Not later than one year after enactment, the CPSC must promulgate regulations providing its interpretation of the criteria to be considered in imposing civil penalties. The amendments to the civil penalties take effect on the earlier of the date on which the final criteria regulations are issued or the date one year after enactment.

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<sup>53</sup> In accordance with statutory guidelines, the amounts specified in the statute before amendment by the CPSIA, \$5,000 and \$1.25 million, were adjusted for inflation in 2004 to \$8,000 and \$1.825 million for individual violations and a related series of violations, respectively. 69 Fed. Reg. 68884 (2004).



The criminal penalties increase to a maximum of five years imprisonment, a fine pursuant to 18 U.S.C. §3571 (establishing the maximum monetary fines), or both, for knowing and willful violations of the CPSA and the FFA and for violations with intent to defraud or mislead or repeat offenses under the FHSA. Penalties may also include forfeiture of assets associated with the criminal violation of the CPSA or any other statutes enforced by the CPSC. Section 217 of the CPSIA also removes the requirement in the CPSA that directors, officers, and agents have knowledge of a notice of noncompliance in order to be subject to criminal penalties separate from those imposed on their corporation.

### **Enforcement by State Attorneys General (§218)**

Prior to its amendment by the CPSIA, CPSA §24 (codified at 15 U.S.C. §2073), entitled “Private Enforcement of Product Safety Rules and of Section 15 Orders,” provided for a cause of action that could be brought by “[a]ny interested person (including any individual or nonprofit, business, or other entity)” in a federal district court to enforce a consumer safety rule or corrective action order by an injunction. Despite the section heading and the absence of an express reference to state attorneys general, this provision apparently had been understood to authorize enforcement actions by state attorneys general, limited to injunctive relief. The FHSA and FFA were amended in 1990 to expressly authorize state attorneys general to enforce consumer safety rules under those statutes by obtaining injunctive relief. This amendment was justified and premised on the existence of similar authority under the CPSA.<sup>54</sup> However, it appears that this authority was rarely, if ever, used by state attorneys general, as there apparently was no reported case precedent for such an action; it appears that state attorneys general more typically took action under state consumer protections laws, while urging the CPSC to take action under federal laws.

Section 218 of the CPSIA amends CPSA §24 (codified at 15 U.S.C. §2073) by renaming the section “Additional Enforcement of Product Safety Rules and of Section 15 Orders” and adding a new subsection expressly authorizing state attorneys general (or other authorized state officer) to bring an action in any federal district court where the defendant is found or transacts business to obtain injunctive relief against certain prohibited acts under the CPSA.<sup>55</sup> Such actions are subject to certain conditions, similar to the procedures in CPSA §24 and other similar consumer protection statutes.<sup>56</sup> A state must give 30-day written notice to the CPSC before filing a civil

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<sup>54</sup> See H.Rept. 101-567 at 17 (1990), and H.Rept. 101-914 at 28 (1990), referring to private enforcement actions by interested parties including state attorneys general; see also *Consumer Federation of America and U.S. Public Interest Group v. Consumer Product Safety Commission*, 990 F.2d 1298, fn. 12 at 1304 (1993) (seventeen state attorneys general signed an amicus brief in which, *inter alia*, they “emphasize that they ‘have the authority under [the CPSA private enforcement provision] and [their states’] consumer protection statutes to enforce [a youth] ban on behalf of [their] citizens’” (the “youth ban” refers to a rule that would ban all new adult-size ATVs for use by children under 16 years old).

<sup>55</sup> These violations include prohibitions on the sale of noncompliant products or recalled products, failure to certify or label products, false certifications or labeling, false safety certification marks, stockpiling of products before the effective date of a new standard, and violation of a cellulose insulation standard. The CPSIA does not authorize state attorneys general to enforce certain violations that involve requirements specific to federal authorities, such as not making facilities or records available for inspection by CPSC officials and failure to provide certain information or notification to the CPSC as required.

<sup>56</sup> In addition to the aforementioned FHSA and FFA provisions, codified at 15 U.S.C. §1264(d) and 15 U.S.C. §1194(a), respectively, see e.g., 5 U.S.C. §15c (codified provision of the Clayton Antitrust Act); 15 U.S.C. §5712(a) (codified provision of the Telephone Disclosure and Dispute Resolution Act of 1992, providing for regulations concerning advertising for, operation of, and billing and collection procedures for, pay-per-call or “900 number” telephone services); 15 U.S.C. §1603 (codified provision of the Telemarketing and Consumer Fraud and Abuse Prevention Act, providing for regulations defining and prohibiting deceptive, coercive, and invasive telemarketing acts (continued...))

action, except when a state has determined that immediate action is necessary to protect its residents from a substantial product hazard as defined in CPSA §15(a). In such cases, a state may file a suit immediately after notifying the CPSC of such determination. The CPSC may intervene in such civil actions to be heard on all matters arising from such actions and to appeal decisions in such actions. A state cannot bring a civil action where the same alleged violation is the subject of a pending criminal or civil action brought by the Federal Government, aside from suits alleging a violation of the ban on selling, manufacturing, distributing, or importing a product that is noncompliant, subject to a mandatory/voluntary corrective action, or a children's product that is a banned hazardous substance.

Any outside private counsel retained to assist in such state civil actions is prohibited from sharing with parties in other private civil actions arising out of the same facts any information that is subject to a litigation privilege and was obtained during discovery in the state attorney general's action, or from otherwise using such information in the other private civil actions.

In addition to the new state civil enforcement authority in the CPSA, CPSIA §217 adds a conforming provision to the PPPA authorizing state civil enforcement of a standard or rule under that act, subject to the procedural requirements of the CPSA.

Nothing in the new CPSA authority for state civil enforcement actions or in the similar provisions in the FHSA, FFA, and PPPA shall be construed as preventing a state attorney general or other state officer from exercising his/her powers under the state laws or as prohibiting him/her from proceeding in state or federal court on the basis of an alleged violation of any civil or criminal state statute.

## Whistleblower Protections (§219)

Notwithstanding criticism of whistleblower protection by CPSC Acting Chair Nord,<sup>57</sup> CPSIA §219 adds a new §40 to the CPSA (15 U.S.C. §2087) to provide whistleblower protections for private sector employees. Such protections are *not* provided for federal, state, and local government agency employees; the compromise reached in the conference agreement eliminated proposed coverage of government employees.<sup>58</sup> New CPSA §40 establishes a remedy for an employee of a manufacturer, private labeler, distributor, or retailer, who believes that he/she has been subjected to adverse employment actions in retaliation for (1) providing information to the

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(...continued)

or practices); and 15 U.S.C. §6504 (codified provision of the Children's Online Privacy Protection Act, enabling parents to control what information is collected from their children online). These provisions authorize states or state attorneys general on behalf of their states and their citizens to bring civil suits to obtain violations of the relevant federal laws, in some cases, monetary damages as well as injunctive relief.

<sup>57</sup> Congress DailyPM (February 20, 2008), available at <http://nationaljournal.com/pubs/congressdaily/>.

<sup>58</sup> Federal employees have whistleblower protection under the Whistleblower Protection Act of 1989, P.L. 101-12, 103 Stat. 16 (codified as amended at 5 U.S.C. §1201 *et seq.* See also CRS Report RL33918, *The Whistleblower Protection Act: An Overview*, by (name redacted). State and local employees may have protection under the laws of their state. The report for S. 2045, an earlier version of the Senate bill concerning consumer product safety reform, described the earlier whistleblower provision as containing an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) because it would have required state and local governments to comply with whistleblower protections authorized in the bill. However, the Congressional Budget Office estimated that the costs to governments of complying with the mandate would be small and would not exceed the threshold established in the UMRA. S.Rept. 110-265 at 22 (2008).

employer, Federal Government, or a state attorney general relating to a violation of any laws, rules, orders, standards, or bans enforced by the CPSC; (2) testifying in or otherwise cooperating with a proceeding concerning such violation; or (3) objecting to or refusing to participate in any activity or policy that the employee reasonably believed would be a violation of laws, rules, orders, standards, or bans enforced by the CPSC. The remedy is not available to an employee who, of his/her own volition, intentionally caused a violation of any laws, rules, orders, standards, or bans enforced by the CPSC.

The employee can file a complaint with the Secretary of Labor within 180 days of the alleged retaliatory action. The Secretary must then notify the person named as responsible for the retaliation and give him/her an opportunity to respond to the allegations. The Secretary must dismiss a complaint unless the complainant shows that the whistleblowing activities were a contributing factor in the adverse employment action. If the complainant shows this, but the employer shows, by clear and convincing evidence, that it would have taken the same unfavorable action in the absence of the whistleblowing activities, then the Secretary cannot further investigate the complaint. Otherwise, within 60 days of the complaint filing, the Secretary of Labor must conduct an investigation to determine whether there is reasonable cause to believe the complaint has merit and issue findings in writing, with a preliminary relief order where merited. Within 30 days of notification of the findings, the defendant can object and request a hearing; otherwise, the order becomes final and not subject to judicial review. The new provision establishes the standards for burden of proof and evidence.

Within 120 days of the hearing, the Secretary of Labor must issue a final relief order or denial. If the Secretary determines that retaliation has occurred, the Secretary shall order the person responsible for the retaliation to take affirmative steps to redress the retaliation; to reinstate the complainant to his or her former position with compensation, including back pay, and other terms, conditions, and privileges of his/her employment; and to provide compensatory damages. At the request of the complainant, the Secretary can also assess a sum of the aggregate amount of all costs and fees reasonably incurred by the complainant for bringing the complaint.

If the Secretary of Labor finds that the complaint was frivolous or in bad faith, the employer may be awarded attorneys' fees to be paid by the complainant. If the Secretary has not issued a final decision within 210 days of the complaint filing or within 90 days of a written determination, the complainant can bring an action for *de novo* review in a federal district court with jurisdiction, without regard to the amount in controversy. The same burdens of proof for the administrative hearing apply to the judicial review. The court has jurisdiction to grant all relief necessary to make the employee whole, including injunctive relief and compensatory damages (including reinstatement with the same seniority status, back pay with interest, and special damages such as reasonable attorney's fees, expert witness fees, and litigation costs).

Except where a person has already sued in federal court as described in the above paragraph, any person adversely affected by a final administrative order can appeal to the federal appellate court having jurisdiction in the area where the violation allegedly occurred or in which the complainant resided when the violation allegedly occurred. Such appeal does not stay the relief order unless so ordered by the court. If such direct appeal is not made, the administrative order cannot be judicially reviewed in other proceedings.

The Secretary of Labor can file a civil action in a federal district court for the District of Columbia or where the violation occurred to enforce an order against a person who has failed to comply. The court can grant all appropriate relief, including, but not limited to, injunctive relief

and compensatory damages. Also, a person for whom an order of relief was granted may bring an action in a federal district court to require compliance, without regard to the amount in controversy or diversity of citizenship of the parties. The court may award court costs and fees as appropriate.

Any nondiscretionary duty imposed by this section is enforceable in a mandamus proceeding under 28 U.S.C. §1361.

## Federal Law Preemption (§231)

Certain provisions of the CPSA, FHSA, FFA, and PPPA establish the extent to which those acts preempt, limit, or otherwise affect any other federal, state, or local law or affect any cause of action under state or local law. Section 231(a) of the CPSIA (15 U.S.C. §2051 note) clarifies that these provisions may not be expanded, contracted in scope, limited, modified, interpreted, or extended in application in any rule, regulation, preamble, statement of policy, etc., of the CPSC. The CPSC may not construe the statutory preemption provisions as preempting any cause of action under state or local common law or state statutes regarding damage claims.

The purpose of these provisions apparently is to prevent the CPSC from issuing directives or statements purporting to preempt state common-law tort causes of action in the preambles to regulations that it promulgates, such as it did with the “Standard for the Flammability (Open Flame) of Mattress Sets.”<sup>59</sup> Pursuant to Executive Order 12988 of February 5, 1996,<sup>60</sup> the Federal Register notice issuing the final rule for the mattress standard explained the Commission’s understanding of the preemptive effect of the Flammable Fabrics Act. Citing congressional intent evidenced in the legislative history and statutory text, the “Commission intends and expects that the new mattress flammability standard will preempt inconsistent state standards and requirements, whether in the form of positive enactments or court created requirements.” Such preemption directives apparently have become more common in recent years, causing concern among opponents<sup>61</sup> and observations by some legal scholars that these directives have become a “backdoor” method of expanding federal objectives.<sup>62</sup> In the absence of express congressional, statutory direction with regard to preemption, agencies may interpret the preemptive intent through such directives and regulations.<sup>63</sup> Commentators have noted that the federal courts are divided on the issue of the level of deference the courts should give to such agency preemption directives.<sup>64</sup>

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<sup>59</sup> 71 Fed. Reg. 13472, 13496-7 (2006), promulgating 16 CFR Part 1633, with a preemption directive at § N of the notice for the final rule.

<sup>60</sup> Section 3(b)(1)(A) of the Executive Order, 61 Fed. Reg. 4729, 4732 (2006), requires agencies to make every reasonable effort to ensure that a regulation, as appropriate, “specifies in clear language the preemptive effect, if any, to be given to the regulation.”

<sup>61</sup> Catherine M. Sharkey, *Symposium: Is the Rule of Law Waning in America? Twelfth Annual Clifford Symposium on Tort Law and Social Policy: Article: Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DePaul L. Rev. 227, 233 (2007) (citing critics of preemption preambles inside and outside the Consumer Product Safety Commission); Christine H. Kim, *The Case for Preemption of Prescription Drug Failure-to-Warn Claims*, 62 Food Drug L.J. 399 (2007) (noting criticism of the Bush Administration for using preemption to accomplish “silent tort reform”).

<sup>62</sup> *Id.*

<sup>63</sup> Sharkey, *supra* note 61, at 245.

<sup>64</sup> Sharkey, *supra* note 61, at 242-7; Kim, *supra* note 61, at 419-421 (discussing cases in the context of Food and Drug Administration preambles with preemption directives); Thomas C. Galligan, Jr., *U.S. Supreme Court Tort Reform*: (continued...)

Section 231(b) of the CPSIA clarifies that nothing in the CPSIA or the FHSA shall be interpreted as preempting or otherwise affecting state warning requirements established under state laws in effect prior to August 31, 2003.

As discussed on page 11 of this report, the CPSIA includes certain preemption provisions regarding state toy standards. The CPSIA does not provide for federal preemption of state third-party testing and certification requirements.

## **Enhanced Inspection, Public Notice, and Recall**

### **Public Disclosure of Information (§211)**

The CPSIA reduces the previous protections for disclosure of product information by amending CPSA §6 (codified at 15 U.S.C. §2055). This section provides for certain safeguards for the public disclosure of information on products that are identified as specific products of named manufacturers. Proprietary/trade secret information may not be disclosed, and information protected from disclosure by the Freedom of Information Act (FOIA) may not be disclosed. The manufacturer must be notified and given the opportunity to review information to be disclosed with regard to confidentiality and accuracy within a minimum period of time prior to disclosure, unless the CPSC finds that public health and safety require a lesser period of notice and publishes this finding. If the CPSC disagrees with the manufacturer and decides to disclose allegedly confidential or inaccurate information over the objections of the manufacturer, the manufacturer may sue in federal district court to enjoin disclosure. Certain types of information disclosure are exempt from these safeguards, including information regarding an imminently hazardous product, a violation of the CPSA, a rulemaking proceeding, an adjudicatory proceeding, or other proceeding under the CPSA. Consumer advocates and retailer critics of this provision prior to amendments made by the CPSIA asserted that these safeguards unnecessarily hindered the disclosure of safety and recall information, while industry advocates sought stronger protections with regard to substantiation and disclosure of information on product categories with problems that are not common to all manufacturers.<sup>65</sup>

Section 211 of the CPSIA reduces prior disclosure protections in several ways:

- A manufacturer/private labeler must respond within 15 days after the CPSC notifies it of the opportunity to mark as confidential information that could permit the public to identify it as the manufacturer/labeler of a product. Although the CPSA previously did not specify a time within which the manufacturer/labeler must respond, CPSC regulations concerning disclosures under the Freedom of Information Act (16 C.F.R. §1015.18) require a response in

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*Limiting State Power to Articulate and Develop Tort Law—Defamation, Preemption, and Punitive Damages*, 74 U. Cin. L. Rev. 1189, 1223-43 (2006) (discussing leading cases re preemption of state tort claims); Howard L. Dorfman, Vivian M. Quinn & Elizabeth A. Brophy, *Presumption of Innocence: FDA's Authority to Regulate the Specifics of Prescription Drug Labeling and the Preemption Debate*, 61 Food Drug L.J. 585, 597-601 (2006) (discussing deference to agency interpretation of rules and regulations; the article generally discusses preemption issues re pharmaceuticals).

<sup>65</sup> See, e.g., GAO Report GAO/HEHS-97-147, *Consumer Product Safety Commission: Better Data Needed to Help Identify and Analyze Potential Hazards* 28-32 (1997), for a discussion of the disclosure rules and policies and the views of industry and consumer advocate groups.



five working days to a notice concerning information previously submitted to the CPSC by the manufacturer/labeler. These regulations also require that a response must accompany information submitted after a CPSC notice of the opportunity to request confidentiality (the submission may indicate a final confidentiality response within 10 working days of the new submission).

- The amendment reduces from 30 to 15 days before disclosure the time within which the CPSC must notify a manufacturer/labeler of an intended disclosure and provide the opportunity to comment on accuracy, and from 10 to five days the time within which the CPSC must notify a manufacturer/labeler that it will still disclose information claimed to be inaccurate based on a CPSC determination that the disclosure is accurate and fair.
- The CPSC is no longer required to publish in the Federal Register a finding that public health and safety require a lesser period of notice to the manufacturer, as it was before the CPSIA; it may publish this in any manner.
- Exemption of certain information from the disclosure protections is expanded to include violations of any rule or law enforced by the CPSC, not just the CPSA, and information for which the CPSC publishes a finding that public health and safety requires disclosure with a lesser period of notice and comment on accuracy than normally required.
- The CPSC is authorized to file a request for expedited consideration in a civil action in the federal district court for the District of Columbia to enjoin the disclosure of allegedly inaccurate information. However, such expedited consideration is not available in an action to enjoin disclosure on the grounds that it is protected or confidential under other laws. The Conference Report noted the Conferees' view that such expedited consideration should not delay action on other important matters before the court, such as Class A or B felonies.<sup>66</sup>

### **Establishment of a Public Consumer Product Safety Database (§212)**

Section 212 of the CPSIA adds a new section 6A to the CPSA (15 U.S.C. §2055a), establishing a publicly available, searchable, internet-accessible database on the safety of consumer products within two years of enactment. This provision resolves the issues some database opponents had with the database provision of the Senate-passed version of H.R. 4040. CPSC Acting Chair Nord previously had criticized the mandatory database under the Senate-passed version of H.R. 4040 (to be established without a study concerning feasibility, effectiveness, or other concerns) because it would have permitted publication of information and complaints received from consumers before the CPSC had the opportunity to vet the information for validity or accuracy and also because its implementation would have required 25 percent of the CPSC budget.<sup>67</sup> However, proponents of the database pointed out that the National Highway Transportation Safety Administration already has such a database including automobile complaints reported by consumers that is publicly accessible through its website.

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<sup>66</sup> H.Rept. 110-787 at 70.

<sup>67</sup> Congress DailyPM (for February 20, 2008, and for March 11, 2008), available at <http://nationaljournal.com/pubs/congressdaily/>.

The CPSC currently maintains the National Electronic Injury Surveillance System (NEISS),<sup>68</sup> which is accessible to the public through the CPSC website.<sup>69</sup> According to the CPSC website, “NEISS injury data are gathered from the emergency departments of 100 hospitals selected as a probability sample of all 5,300+ U.S. hospitals with emergency departments. The system’s foundation rests on emergency department surveillance data, but the system also has the flexibility to gather additional data at either the surveillance or the investigation level.”<sup>70</sup> The database mandated by the CPSIA is more comprehensive, drawing information from a variety of sources, including consumers. GAO has concluded that the current data systems, including NEISS, upon which the CPSC depends in prioritizing its regulatory and enforcement activities, are inadequate.<sup>71</sup>

Under new CPSA §6A, the CPSC must transmit to Congress, within 180 days of the enactment of the CPSIA, a detailed plan for establishing and maintaining this database, including integration of the database into the CPSC’s overall information technology improvement plans (the CPSC must expedite such plans). The plan shall include a detailed implementation schedule and plans for a public awareness campaign. Not later than 18 months after the plan is submitted, the CPSC must establish the database. The database shall include

- reports of harm (injuries, illness, death, or risks of injuries, illness, or death) relating to the use of consumer products, and other substances regulated by the CPSC, that are received by the CPSC from consumers, government agencies, health care professionals (such as physicians, hospitals and coroners), child service providers, and public safety entities (such as police and firefighters);
- information derived from a notice for a mandatory recall of a substantial product hazard or a notice for a voluntary corrective action;
- comments that a manufacturer/private labeler requests be included in the database to respond to information concerning its products; and
- any additional information the CPSC determines to be in the public interest.

The new section establishes requirements for information to be included in reports submitted to the CPSC and for the mode of submission. The information on the database must be organized and categorized so that the information is sortable and retrievable by the date of submission, the name of the consumer product, the model name, the manufacturer’s/private labeler’s name, and other information fields that are in the public interest. The CPSC shall provide a clear and conspicuous notice that the CPSC does not guarantee the accuracy, completeness, or adequacy of the database contents. The name and address of a person submitting a report of harm for a product may not be disclosed by the CPSC, except that such information may be provided to the manufacturer/private labeler of the product with the express written consent of such person for the purpose of verifying the report.

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<sup>68</sup> CPSA §5(a) (1) requires the maintenance of an Injury Information Clearinghouse “to collect, investigate, analyze and disseminate injury data and information relating to the causes and prevention of death, injury and illness associated with consumer products....”

<sup>69</sup> See <http://www.cpsc.gov/library/neiss.html>.

<sup>70</sup> From the CPSC website description of NEISS, available at <http://www.cpsc.gov/cpscpub/pubs/3002.html>.

<sup>71</sup> GAO Report GAO/HEHS-97-147, *Consumer Product Safety Commission: Better Data Needed to Help Identify and Analyze Potential Hazards* 13-19 (1997).



The safeguard restrictions of CPSA §6(a and b), briefly discussed in the previous section of this report, do not apply to the database disclosure of reports received from consumers, health-care providers, public safety entities, and government agencies. However, such safeguards apply to database information received via a report of a safety risk from a manufacturer, distributor or retailer under CPSA §15(b) or any other mandatory or voluntary reporting program established between the CPSC and a manufacturer, retailer, or private labeler.

Reports must be available on the database within 15 business days of receipt. Any information determined to be duplicative or inaccurate shall not be included when the report is added to the database or, if the report is already on the database, be removed or corrected within 7 business days of such determination. Within five business days of receipt, the CPSC is required to submit a report of harm to the manufacturer, who then has 10 business days to respond, to request the inclusion of its comments on the database, and to vet the report for and designate confidential or protected information. The CPSC must redact in the database any information it determines to be protected (trade secret or FOIA). If the CPSC determines that the designated information is not protected, it shall so notify the manufacturer or private labeler, who may bring an action seeking removal of such information from the database in the federal district court where it resides or has its principal place of business or in the District of Columbia.

The CPSC is required to submit an annual report to the appropriate congressional committees on the operation of the database, including the cost and the number of reports and comments received, posted, and corrected or removed. Within two years of the establishment of the database, the GAO shall submit a report to the appropriate congressional committees containing an analysis of the general usefulness of the database, including an assessment of whether a broad range of the public uses the database and finds it useful, and recommendations for measures to increase use of the database by consumers and to ensure use by a broad range of the public. The Conference Report notes that, as part of general authorizations for FY2010 to FY2014, the Conferees authorized \$25,000,000 to establish and maintain this database and to upgrade and integrate the CPSC information technology systems.<sup>72</sup>

### **Substantial Product Hazard Reporting Requirement (§214(a)(2))**

Section 15 of the CPSA (15 U.S.C. §2064) requires manufacturers, distributors, and retailers to inform the CPSC when they learn that a product they distributed fails to comply with a consumer safety rule/standard, poses a substantial product hazard, or creates an unreasonable risk of injury or death. Prior to amendment by the CPSIA, the language of the provision did not include notification of noncompliance with rules or standards promulgated by the CPSC under other acts in its jurisdiction.

Section 214(a)(2)(A) of the CPSIA expands the scope of CPSA §15(b) to require manufacturers, distributors, and retailers of any product or substance regulated by the CPSC, except for motor vehicle equipment, to notify the CPSC about products that do not comply with any rule, regulations, standard, or ban promulgated by the CPSC under any act.

Section 214(a)(2)(C) of the CPSIA further amends CPSA §15(b) to provide that a notification to the CPSC that a product fails to comply with a rule promulgated under the FHSA, FFA, or PPPA may not be used as the basis for criminal prosecution under the FHSA except for offenses

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<sup>72</sup> H.Rept. 110-787 at 68 (2008).

requiring a showing of intent to defraud or mislead. The Conference Report clarifies that the Conferees included this provision “to avoid an unjust result under a possible construction of section 5 that provides for strict liability for criminal enforcement without regard to any applicable requirement of knowledge, intent, or willfulness in such situations. . . . The Conferees do not intend for [this] to be used to shelter bad actors . . . but rather to ensure that there are no unintended impediments to the flow of information to the Commission.”<sup>73</sup> The House report, in discussing a similar provision in the House-passed version of H.R. 4040, clarifies that this applies when such notification constitutes the *sole* basis for criminal liability without a requirement of knowledge, willfulness, or intent.<sup>74</sup> The CPSA criminal offenses require knowledge and willfulness. The FFA offenses generally require willfulness, although the FFA offense of failure to notify the CPSC of the export of a non-compliant product does not. Other acts administered and enforced by the CPSC do not provide for criminal penalties.

### **Enhanced Public Notice of Substantial Product Hazards**

Section 214(a)(3) of the CPSIA improves public notification by amending CPSA §15(c) (codified at 15 U.S.C. §2064(c)) to authorize the CPSC to order a manufacturer, distributor, or retailer of a product presenting a substantial product hazard to give public notice of such hazard via its website, notice to third-party internet sellers of the product, announcements in languages other than English, and announcements on radio and television where the CPSC determines that a substantial number of consumers may not be reached by other types of notice. This section further clarifies that the CPSC may require any notices under CPSA §15(c)(1) to be distributed in a language other than English, if it determines that doing so is necessary to adequately protect the public.

### **Enhanced Authority for Corrective Action Plans and Recalls (§214)**

Section 214 of the CPSIA enhances the authority of the CPSC to order corrective action plans and recalls in several ways. Section 214(a)(1) of the CPSIA expands the definition of “substantial product hazard” under CPSA §15(a)(1) (codified at 15 U.S.C. §2064(a)(1)) to include failure to comply with a rule, regulation, standard, or ban under any act enforced by the CPSC, as well as with an applicable consumer product safety rule under the CPSA.

Section 214(a)(3 and 4) of the CPSIA amends CPSA §15(c and f) (codified at 15 U.S.C. §2064(c and f)) to enhance recall authority by

- expanding the scope of the hazard notification authority to include products against which an imminent hazard action has been filed in federal court as well as products determined by the CPSC to be a substantial hazard;
- authorizing the CPSC to order a manufacturer, distributor, or retailer to cease product distribution; notify other persons involved in transporting, storing, handling, or distributing the product to cease distribution; and to notify appropriate state and local health officials;

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<sup>73</sup> H.Rept. 110-787 at 71.

<sup>74</sup> H.Rept. 110-501 at 39 (2007).

- requiring the CPSC to rescind any order concerning an allegedly imminently hazardous product if a federal district court determines that the product is not an imminently hazardous product; and
- clarifying that the requirement for a hearing prior to the issuance of an order to cease distribution and notify the public of a substantial product hazard does not apply to an order concerning a product against which the CPSC has filed an imminent hazard action.

Section 214(b) amends CPSA §15(d) (codified at 15 U.S.C. §2064(d)) to strengthen CPSC authorities relating to corrective action plans by

- authorizing the CPSC to order public notice and corrective actions it determines are in the public interest and removes the ability of the manufacturer, distributor or retailer to choose which corrective action it may take;
- expanding and clarifying the scope of CPSC authority to include orders to conform with requirements of applicable rules, regulations, standards, or bans, not just applicable consumer product safety rules;
- requiring a CPSC corrective action order to include a requirement that the person to whom the order applies must submit a plan for such action to the CPSC for affirmative approval in writing, replacing the current passive requirement that the plan be satisfactory to the CPSC;
- authorizing the CPSC to order an amendment of a corrective action plan if it finds that the approved plan is ineffective or inappropriate and requiring it to consider whether a repair or replacement changes the intended functionality of the product; and
- authorizing the CPSC to revoke its approval of an action plan if it finds that a person has failed to comply substantially with its obligations under the action plan and prohibiting such person from distributing the product after receiving notice of such revocation.

### **Requirements for Recall Notice Content (§214(c))**

CPSIA §214(c) adds a new subsection 15(i) to the CPSA (15 U.S.C. §2064(i)) that requires the CPSC, within 180 days of enactment of the CPSIA, to establish guidelines for the information to be included in any recall/corrective action notice or imminent hazard notice that would aid consumers in identifying/understanding the specific product recalled, the nature of the associated hazard, and any available remedies. The provision further details the type of information required to be contained in a recall notice of a substantial product hazard. This information includes the model or stock keeping unit (SKU) number, common product names, photograph, description of action being taken, the number of product units for which such action is being taken, description of the substantial product hazard, identification of the manufacturers and distributors of the product, the dates the product was manufactured and sold, details of any deaths or injuries associated with the product, remedies available to the consumer, and any other information the CPSC deems necessary.

### **Identification of Supply Chain (§215(b))**

Section 215(b) of the CPSIA amends CPSA §16 (codified at 15 U.S.C. §2065), regarding inspection and recordkeeping, by adding a new subsection (c) to require importers, retailers or distributors of a consumer product or other product or substance regulated by the CPSC to identify the manufacturer upon the request of a CPSC officer or employee. Conversely, a manufacturer is similarly required to identify each retailer or distributor whom the manufacturer directly supplied with a consumer product and each subcontractor involved in the manufacture of such product or from whom the manufacturer obtained a component of such product.

### **Financial Responsibility (§224)**

Section 224 of the CPSIA adds a new section 41 to the CPSA (15 U.S.C. §2088), requiring the CPSC, in consultation with U.S. Customs and Border Protection (CBP) and other relevant federal agencies, to identify any consumer product, or other product or substance regulated by any statute enforced by the CPSC, for which the cost of destruction would normally exceed the bond amounts under the customs laws and to recommend a bond sufficient to cover the costs of destroying the product.

The new section further provides for a GAO study to determine the feasibility of mandating an escrow, proof of insurance, or other security to cover the costs of destruction of a domestically produced product or substance regulated under any act enforced by the CPSC or the costs of an effective recall of a domestic or imported product or substance regulated by the CPSC. The GAO must submit a report on the results of this study to the appropriate congressional committees within 180 days of enactment of the CPSIA, including an assessment of whether such requirements could be implemented and recommendations for implementation.

### **Annual Reporting Requirement (§209)**

Section 209 of the CPSIA amends the annual reporting requirement under CPSA §27(j) (codified at 15 U.S.C. §2076(j)) to include information on the number and summary of recall orders issued under CPSA §§12 and 15; a summary of voluntary actions taken by manufacturers in consultation with the CPSC and with public notice by the CPSC; and an assessment of such orders and actions. Additionally, within one year of the date of enactment of the CPSIA, the annual report shall include progress reports and incident updates with respect to corrective action plans ordered under CPSA §15(d); injury and death statistics for substantial product hazards under CPSA §15(c); and the number and type of communications from consumers to the CPSC for each product for which the CPSC orders corrective action.

### **Inspection of Certified Proprietary Laboratories (§215(a))**

Section 215(a) of the CPSIA amends CPSA §2065(a) (codified at 15 U.S.C. §2065(a)) to authorize CPSC officers and employees to enter and inspect certified proprietary laboratories.

## **Safety of Imported and Exported Products**

### **Export of Recalled and Nonconforming Products (§221)**

Section 221 of the CPSIA amends CPSA §18 (codified at 15 U.S.C. §2067) to authorize the CPSC to ban the exportation from the United States of any consumer product that does not comply with U.S. consumer product safety rules, unless the importing country permits importation of such product into that country. The CPSC must notify the importing country of the impending shipment. If the importing country has not notified the CPSC of its import permission within thirty days of the CPSC notice, the CPSC may take appropriate action to dispose of the product. These restrictions do not apply to the exportation of a product refused admission into the United States and permitted by U.S. customs authorities to be exported in lieu of destruction. Related conforming amendments are also made to the FFA.

Prior to amendment, CPSA §18 permitted the export of products that do not comply with U.S. consumer safety rules to other countries, requiring only that the CPSC had to notify the appropriate agencies in the foreign countries that such products were being exported to those countries.

### **Development of Methodology to Identify Unsafe Imports (§222)**

Section 222(a and b) of the CPSIA (15 U.S.C. §2066 note) requires the CPSC, within two years of enactment of the act, to develop a risk assessment methodology to identify consumer product shipments that are intended for import into the United States and are likely to include products that violate CPSA §17(a) (15 U.S.C. §2066(a)) and other import laws enforced by the CPSC. In developing this methodology, the CPSC is required to

- use, as far as practicable, the International Trade Data System (ITDS) established under the Tariff Act of 1930 to evaluate and assess information about shipments of consumer products intended for import into the United States;
- incorporate this methodology into its information methodology modernization plan; and
- examine how to share information maintained by the CPSC, including the public database and substantial product hazard list, for the purpose of identifying shipments of noncompliant products.

Section 222(d) of the CPSIA requires the CPSC, not later than 180 days of completion of the risk assessment methodology, to submit a report to the appropriate congressional committees including

- a plan for implementing the methodology;
- an assessment of whether the CPSC requires additional statutory authority to implement the methodology;
- the level of appropriations necessary to implement the methodology;
- changes made or to be made to the CPSC memorandum of understanding with the CBP;

- the status of CPSC access to the Automated Targeting System and the development of the Automated Targeting system rule; and
- the status of the effectiveness of the International Trade Data System in enhancing cooperation between the CPSC and CBP to identify non-compliant shipments.

### **Cooperation with U.S. Customs and Border Protection (§222(c))**

Section 222(c) of the CPSIA (15 U.S.C. §2066 note) requires the CPSC, within one year of enactment of this act, to develop a plan for sharing information and coordinating with CBP to improve enforcement and consumer protection. This plan must consider

- the number of CPSC personnel that should be stationed at U.S. ports of entry to identify shipments of consumer products that violate import safety laws enforced by the CPSC;
- the nature and extent of cooperation between CPSC and CBP personnel in identifying such noncompliant shipments;
- the number of CPSC personnel that should be stationed at the National Targeting Center of CBP, including the nature and extent of cooperation with the CBP, the responsibilities of the CPSC personnel, and usefulness of information at the Center in identifying noncompliant shipments;
- the development of rules for the Automated Targeting System and expedited access of the CPSC to the System; and
- the information and resources necessary for the development, updating, and effective implementation of the risk assessment methodology.

### **Substantial Product Hazard List and Destruction of Unsafe Imports (§223)**

Section 223 of the CPSIA adds a new subsection (j) to CPSA §15 (codified at 15 U.S.C. §2064(j)) requiring the CPSC to specify by rule, for any consumer product or class of products, characteristics that constitute a substantial product hazard, if such characteristics are readily observable and covered by voluntary standards that have been effective in reducing the risk of injury and experience substantial compliance. A person adversely affected by such a rule may petition for judicial review under the CPSA not later than 60 days after promulgation of the rule.

CPSIA §223 amends a couple provisions to *require* rather than *permit* certain actions with regard to imports. CPSA §17(e) (codified at 15 U.S.C. §2066(e)), formerly permitting CBP to destroy products refused importation into the United States in lieu of exportation, is amended to require the destruction of such products unless the CBP permits export in lieu of destruction and such products are exported within ninety days of export approval. CPSA §17(g) (codified at 15 U.S.C. §2066(g)), formerly permitting the CPSC, at its discretion, to condition importation on a manufacturer's compliance with inspection and recordkeeping requirements, is amended to require manufacturers of imports to comply with all inspection and recordkeeping requirements or the products will be refused admission. The CPSC must advise the customs authorities of who is not in compliance. A related new subsection (d) of CPSA §16 (codified at 15 U.S.C. §2065(d)) requires the CPSC, by rule, to condition manufacturing, selling, distributing, or importing any



consumer product or other product on the manufacturer's compliance with the inspection and recordkeeping requirements of the CPSA and the related rules.

### **Study of CPSC Authority Related to Imported Products (§225)**

Section 225 of the CPSIA requires GAO, within one year of the enactment of this act, to conduct a study of the authorities of the CPSA to assess their effectiveness in preventing the importation of unsafe consumer products and to submit a report of its findings to the appropriate congressional committees. This report must include recommendations with respect to plans to prevent such importation; inspection of foreign manufacturing plants by the CPSC; and a requirement that foreign manufacturers consent to the jurisdiction of U.S. courts for enforcement actions by the CPSC.

## **Miscellaneous Provisions**

### **Adoption of a Mandatory All-Terrain Vehicles (ATVs) Safety Standard (§232)**

CPSIA §232 adds a new CPSA §42 (15 U.S.C. §2089), requiring the CPSC to publish in the Federal Register, as a mandatory consumer product safety standard, the American National Standard for Four Wheel All-Terrain Vehicles Equipment Configuration and Performance Requirements developed by the Specialty Vehicle Institute of America (American National Standard ANSI/SVIA-1-2007). It is unlawful for a manufacturer or distributor to import or distribute a non-compliant ATV in commerce in the United States or, until a three-wheel ATV standard is issued, a new three-wheeled ATV. Upon revision of these standards by the standard-setting organizations, the CPSC must incorporate by a rule revisions that are related to safe performance and any additional changes necessary to reduce an unreasonable risk of injury. The CPSC must also consider strengthening additional ATV safety standards.

### **Formaldehyde Study (§234)**

GAO is required to conduct a study on the use of formaldehyde in the manufacturing of textiles and apparel not later than two years after the enactment of the CPSIA.

### **Expedited Judicial Review**

CPSIA §236 provides for expedited judicial review of a consumer product safety rule relating to the identification of substantial hazards under CPSA §15(j); all-terrain vehicles under CPSA §42; durable infant and toddler products under CPSIA §104; and mandatory toy safety standards under CPSIA §104. A person adversely affected by such a rule may petition in the U.S. Court of Appeals for the District of Columbia Circuit for expedited judicial review of the rule within 60 days of its promulgation. The judgment of the court affirming or setting aside the rule is final, subject to review by the U.S. Supreme Court. A rule to which expedited judicial review applies is not subject to judicial review in proceedings relating to imported products under CPSA §17 or in civil or criminal proceedings for enforcement.



## Definitions

Among other technical and conforming changes, CPSIA §235 adds definitions for “appropriate congressional committees,” “children’s product,” and “third-party-logistics provider.”

“Appropriate congressional committees” are defined as the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate.

“Children’s product” is defined as a consumer product designed or intended primarily for children 12 years of age or younger. Several factors are to be considered in determining whether a product is primarily intended for a child 12 years of age or younger, including a manufacturer statement or label about the intended use of the product; whether the packaging, display, promotion or advertising of the product represents it as appropriate for use by children 12 years of age or younger; whether the product is commonly recognized by consumers as being intended for use by children 12 years of age or younger; and the Age Determination Guidelines issued by the CPSC in 2002.<sup>75</sup>

“Third-party logistics provider” is defined as a person who solely receives, holds or otherwise transports a consumer product in the ordinary course of business but who does not take title to the product. CPSIA §235 also adds third-party logistics providers to the list of carriers that are not deemed to be manufacturers, distributors, or retailers of a consumer product under the CPSA solely by reason of receiving or transporting a consumer product in the ordinary course of their business and thus are exempt from the requirements of the CPSA.

## Pool and Spa Safety Act Technical Corrections

CPSIA §238 amends the Virginia Graeme Baker Pool and Spa Safety Act<sup>76</sup> by adding a definition of “state” to the act and by providing for the adoption by the CPSC of revisions made to the pool and spa safety standard by the American Society of Mechanical Engineers, an independent standard-setting organization (the earlier act had mandated adoption of the voluntary standard).

## Provisions Deleted in the Conference Agreement

The Senate Text contained several provisions concerning consumer safety product standards or studies concerning specific consumer products that did not have counterparts in the House Text and ultimately were not included in the final text of the conference agreement,<sup>77</sup> including (section numbers from Senate Text)

- garage door openers (§31);
- carbon monoxide poisoning from portable gas generators and charcoal briquettes (§32);

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<sup>75</sup> Timothy P. Smith, ed., CPSC, *Age Determination Guidelines: Relating Children’s Ages To Toy Characteristics and Play Behavior* (2002).

<sup>76</sup> P.L. 110-140, title XIV, 121 Stat. 1492, 1794 (2007).

<sup>77</sup> P.L. 110-278, the Children’s Gasoline Burn Prevention Act, 122 Stat. 2602 (2008), adopted safety standards for child-resistant closures on portable gasoline containers similar to Senate Text §28.

- cigarette lighters (§33); and
- equestrian helmets (§41).

Although the House Text did not include such provisions because its sole focus was reform of the CPSC and its authority and enforcement powers, language in H.Rept. 110-501 (2007) directed the CPSC to take action concerning single-product issues, including

- the promulgation by the CPSC of a final rule on cigarette lighters;
- a public awareness campaign concerning smoke alarms and smoke detection systems;
- a consideration of a safety standard concerning the warning labels for the lead content of ceramic food containers or serving ware;
- a consideration of CPSC authority to regulate pet toys that could be used by children and possible rules concerning the lead content and use of lead paint in such pet toys;
- a consideration of the tipping hazards of home appliances and furniture and possible safety standards; and
- a study of injuries and deaths related to toy guns and possible rules for marking of toy guns distinguishing them from actual firearms.<sup>78</sup>

The House Committee on Energy and Commerce noted in its report that it became aware of the potential dangers posed by asbestos in toys late in the legislative process and would take up these issues in subsequent hearings and legislation.

The Conference Report echoed all the concerns noted above, directing the CPSC to consider these issues and take action regarding safety standards for such products and hazards.<sup>79</sup>

Additionally, the Conference Report recognized nanotechnology as a new, emerging technology used in the manufacture of consumer products and expressed its expectation that the CPSC would review the technology and the safety of its application in consumer products.<sup>80</sup>

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<sup>78</sup> H.R. 5471, to require the Consumer Product Safety Commission to prescribe rules requiring distinctive markings on toy and look-alike firearms (cosponsored by Towns and Blackburn).

<sup>79</sup> H.Rept. 110-787 at 67, 75-77 (2008).

<sup>80</sup> *Id.* at 68.

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