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## CONSUMER PRODUCT SAFETY LAW

NEWSLETTER OF THE ADVERTISING, MARKETING & MEDIA PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

### Consumer Product Safety Commission Reauthorization on the Move

The U.S. Congress is expected to reach agreement on legislation that would reform the Consumer Product Safety Commission (CPSC) soon. The U.S. House of Representatives and Senate have each passed reauthorization bills that substantially increase funding for the agency, ban lead in children's products, and increase penalties. Congressional leadership considers the legislation to be a top legislative priority and hopes the House and Senate will finish negotiating a final version of the bill soon.

The CPSC has not been significantly reformed in over 15 years. However, when a huge number of children's toys – in large part produced in China – were recalled during the last holiday season because of lead and other hazards, Congress was spurred into action. On December 19, 2007, the House passed its version of the reform bill, HR 4040, by a vote of 407-0. On March 6, 2008, the Senate rejected the House version, by a vote of 57-39, and, instead, passed its own version of the bill (an amended version of S. 2663) by a vote of 79-13. Although the two versions have many similarities, there are also many important differences that will need to be ironed out. The Senate appointed conferees on April 29, 2008, and the House appointed conferees on May 14, 2008. Congressional leadership had hoped to finish negotiations and pass a conference report before Memorial Day, and send the conference report to the President's desk for his signature by July 4. Although the Memorial Day deadline was not met, there is still a strong interest in quick passage. In any case, Speaker of the House Nancy Pelosi wants a final bill enacted before the holiday toy-buying season.

The following is a brief overview of some of the key similarities and differences between the two versions of the bill.

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### **(1) Ban on Lead in Children's Products**

The House and Senate bills would ban children's products containing more than trace levels of lead, lower the allowable level of lead in paint, require that children's products to be tested by a third party, and mandate tracking labels. However, one of the key differences between the two bills is the definition of a children's product. Under the House bill, a children's product is defined as a product for children under 12 years old. In the Senate bill, it is a product for children under 7 years old. Consumer groups are advocating for the Senate definition. Another important difference is the schedule for implementing the lead ban. The House bill would start implementing more restrictive limits in 180 days, while the Senate version would wait a year. The Retail Industry Leaders Association and National Retail Federation argue that the schedule in the House bill would not give smaller shops enough time to turn over inventory.

### **(2) Notification of Safety Hazards**

Both versions include provisions intended to improve notification of product hazards by requiring stricter labeling and registration procedures, permitting anonymous reporting, mandating reports to Congress, and ensuring that consumers, public officials, and other businesses in the distribution chain are notified of substantial product hazards. However, the set of provisions in each bill is very different. One of the more controversial Senate provisions would allow whistle-blowers who suffer retribution to sue for \$250,000 in costs, fees, and damages. The Senate bill also would provide for a publicly available, searchable database of reported injuries or risks of injury.

### **(3) Strengthened Enforcement Provisions**

Both bills increase civil penalties and allow state attorneys general to bring enforcement actions. Current law caps civil penalties at \$1.825 million. The House version would cap it at \$10 million while the Senate version would cap it at \$20 million. The House version would allow state attorneys general to act once the CPSC issues a decision, such as a recall. The Senate would allow state attorneys general to act before the CPSC has acted, allowing them to make their own interpretative decisions.

### **(4) Limits on Selling Hazardous Products**

Both versions of the bill would:

- ban the domestic sale of (and allow CPSC to prohibit the export of) products that do not conform to consumer product safety standards, and
- condition the importation of products produced outside the U.S. on records and inspection compliance.

One of the sticking points in the negotiations is that the Senate version also includes a number of product-specific safety mandates that are for the most part, not included in the House bill. Negotiators must decide which of these mandates (including provisions relating to all-terrain vehicles, portable gas containers, garage doors, charcoal briquettes, cigarette lighters, nanotechnology, equestrian helmets, and portable generators) will be included in the final conference report.

### **(5) Increased Funding**

The number of CPSC employees is at an all-time low. Both versions of the bill significantly increase authorization levels in order to ramp up the number of employees and ensure that the agency has the financial resources to do its job. Both bills also include substantial funding for improving the agency's testing facility.

The conferees that have been appointed are:

<b>House of Representatives</b>	<b>Senate</b>
Dingell (D-MI)	Inouye (D-HI)
Waxman (D-CA)	Pryor (D-AR)
Rush (D-IL)	Boxer (D-CA)
DeGette (D-CO)	Klobuchar (D-MN)
Schakowsky (D-IL)	Stevens (R-AK)
Barton (R-TX)	Hutchinson (R-TX)
Whitfield (R-KY)	Sununu (R-NH)
Stearns (R-FL)	

Manatt will continue to track the legislation as it moves through the legislative process.

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