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CONSUMER PRODUCT SAFETY

The Consumer Product Safety Improvement Act (CPSIA) was passed in 2008. In general, it added new regulations for children's products, the most notable being limits on the lead content of such products. It also requires third party testing of many children's products for safety. In addition, it created a new public consumer product safety complaint database, the implementation of which is likely to have consequences that have not yet been felt by any business that "touches" a consumer product. Ever since the CPSIA was passed, those industries most directly affected by the law have been seeking relief from its more unrealistic provisions. The Consumer Product Safety Commission (CPSC) has principal responsibility for implementation and on occasion, it has conceded it has been hamstrung by the unrealistic regulatory regime imposed by the CPSIA.

Yesterday, Congress had one of those blink of the eye moments that represent "there is a recess coming" frenzy.

While the House had been plodding along considering a relief bill for

months, suddenly a new bipartisan compromise bill emerged over the week-end. It did not provide all the relief sought by the business community. The consumer advocate community had been against any relief but relented to a degree.

The bill was put on the suspension calendar for Monday morning by leadership even before the bill had a number. Under the suspension calendar, a two thirds vote is required to waive the rules and pass the bill. Typically the procedure is used for non-controversial bills. In a matter of minutes, the House "debated" the bill (by then H.R. 2715) and passed it.

The Senate had not done anything on relief this entire year. Late last week one of the principal players in consumer product safety introduced a bill that was very narrow in scope. After the House passed their bill, there was a truly classic Senate moment on Monday evening. The Majority Leader gets up, and says to the Presiding Officer, "I ask unanimous consent to proceed to H.R. 2715 and pass it." The Presiding Officer says, "Does anybody object? Hearing None, it is so ordered." Thirty seconds. Unless you were there and knew

about H.R. 2715, you would have no hint of what happened. Bill passed. In real time, the whole rite of passage of a bill that did not exist until Sunday took less 12 hours. The President is expected to sign it.

The main reason for quick action has been the imminent lowering of the lead content standard for children's products to 100 parts per million (ppm) on August 14, 2011. The CPSIA has been bringing the lead content down since its enactment. Originally set at 600 ppm, it had already dropped to 300 ppm. One of the oddities of the CPSIA was that the lead content standards applied retroactively to existing inventories on the effective dates of the new standards. The bill changes it so that the 100 ppm lead limit will apply to children's products that are manufactured after the effective date of August 14, 2011.

The bill provides the opportunity for manufacturers to seek a "functional" exception from the lead limit, if it is not practicable or technologically feasible to manufacture the product without lead (however, to meet the criteria for the exception, the product would have to be one that also is not likely be put in the mouth or ingested by a

child or risk public's safety). There are some additional conditions to obtain such an exception.

There are exceptions to the lead limit rules for bicycles (also some testing exclusions), ATVs, snowmobiles, dirt bikes.

There is an exclusion from the lead limit for the sale or donation of some "used" children's products but not children's metal jewelry.

There is a process for some third party testing relief. It requires the CPSC to hold hearings to determine the conditions for providing relief. The commission can then issue regulations to provide for such relief if it determines the relief is justified. The bill sets forth some of the possibilities the Commission could use as a basis for such relief:

- The extent to which the use of materials subject to regulations of another government agency that requires third party testing of those materials may provide sufficient assurance of conformity with an applicable consumer product safety rule, ban, standard, or regulation without further third party testing.
- The extent to which modification of the certification requirements may have the effect of reducing redundant third party testing by or on behalf of 2 or more importers of a product that is substantially similar or identical in all material respects.
- The extent to which products with a substantial number of different components subject to third party testing may be evaluated to show compliance with an applicable rule, ban, standard, or regulation by third party testing of a subset of such components selected by a third party conformity assessment body.
- The extent to which manufacturers with a substantial number of substantially similar products subject to third party testing may reasonably make use of sampling procedures that reduce the overall test burden without compromising the benefits of third party testing.
- The extent to which evidence of conformity with other national or international governmental standards may provide assurance of conformity to

consumer product safety rules, bans, standards, or regulations applicable under this Act.

- The extent to which technology, other than the technology already approved by the Commission, exists for third party conformity assessment bodies to test or to screen for testing consumer products subject to a third party testing requirement.
- Other techniques for lowering the cost of third party testing consistent with assuring compliance with the applicable consumer product safety rules, bans, standards, and regulations.

The bill allows the Commission to provide some third party testing relief for "small batch manufacturers." The small batch manufacturer definition has two prongs. The relief is limited to consumer products (but not lead paint, children's metal jewelry, cribs, baby bouncers, walkers jumpers or small parts) manufactured by a small batch manufacturer where no more than 10,000 units of the same product were manufactured in the previous calendar year and when the manufacturer had no more than \$1,000,000 in total gross revenue from sales of all consumer products in the previous calendar year. The Commission has to determine that no alternative testing requirement is available or economically practicable. There are other conditions and the small batch manufacturer would have to register with the CPSC.

The third party testing requirements established under CPSIA will not apply to ordinary books or ordinary paper-based printed materials. The term 'ordinary book' means a book printed on paper or cardboard, printed with inks or toners, and bound and finished using a conventional method, and that is intended to be read or has educational value. Such term does not include books with inherent play value, and does not include any

toy or other article that is not a book that is sold or packaged with an ordinary book. The term 'ordinary paper-based printed materials' means materials printed on paper or cardboard, such as magazines, posters, greeting cards, and similar products, that are printed with inks or toners and bound and finished using a conventional method. The book and printed material exceptions does not include books or printed materials that contain components that are printed on material other than paper or cardboard or contain nonpaper based components such as metal or plastic parts or accessories that are not part of the binding and finishing materials used in a conventional method.

There are some changes to the phthalates coverage regarding inaccessible component parts.

The Commission may, by regulation, exclude a specific product or class of products from the tracking label requirements, if the Commission determines that it is not practicable for such product or class of products to bear the marks required by the CPISA. The Commission may establish alternative requirements for any product or class of products so excluded from the requirement.

There are some changes that apply to standards for cribs etc.

The bill makes a couple of minor changes to the product safety database structure including a requirement that CPSC hold publication of a complaint for five days when there is a claim of material inaccuracy and that CPSC attempt to obtain model/serial numbers or photos of the product.