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The Consumer Product Safety Improvement Act of 2008 Compliance Strategies for Manufacturers, Importers and Retailers in an Uncertain Regulatory Environment

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Today's panel features:

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Thursday, May 21, 2009

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CPSIA Compliance Strategies for Manufacturers, Importers and Retailers in an Uncertain Regulatory Environment

Strafford Publications Teleconference
May 21, 2009

Best Practices for Implementation and Compliance

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I. IDENTIFY CHILDREN'S PRODUCTS and TOYS

All children's products affected by new rules on lead, tracking labels and third party testing requirements. Toys & childcare products have additional requirements re phthalates, ASTM F963 toy standard, advertising and catalog listings, etc.

A. Primary CPSIA Factors for Children's Products (lead, tracking labels and third party testing requirements, etc.)

"Children's products" are defined in section 3(a)(16) of the Consumer Product Safety Act, as amended by the CPSIA, to include any "consumer product designed or intended *primarily* for children 12 years of age or younger." Factors to consider when determining whether a product is a children's product are:

1. labels and other statements of the manufacturer regarding the use of the product, "if such statement is reasonable,"
2. whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger,
3. whether the product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger, and
4. age determination guidelines for children's products issued by the CPSC in 2002 (these guidelines relate primarily to toys for small children).

B. Distinguish General Use Products from Children’s Products

The word “primarily” is emphasized in the children’s product definition, because mere fact that an article might be used by a child 12 or younger, due to its size for example, does not mean that the product is a children’s product. Items with a broad general appeal and function that includes both adults and children are not children’s products under the CPSIA. Thus, a 12 year-old girl might be able to wear a small women’s garment, but if the item is realistically marketed to both adults and children, and not specifically to children, it should not be considered a “children’s product.”

1. Include articles that use terms such as “junior,” “boys” or “girls” in labels, marketing or use designation
2. Include articles that utilize “junior” or children’s sizing systems or that are sold only in sizes that fit primarily children
3. Exclude items with broader general appeal to adults and children; factors to consider (non-exclusive):
 - a. marketing strategy
 - b. distribution channels
 - c. inclusion in larger product line with general appeal
 - d. merchandising at retail level
 - e. price
 - f. functions or sizing systems that include both adults and children
 - g. do not have designs, colors or graphics (such as cartoon characters) that clearly are for children

C. Toys, Toy Counterparts and Childcare Products (phthalates, ASTM F963 toy standard, advertising, small parts, etc.)

1. Include items in traditional toy categories, such as those in the ASTM Toy Safety Standard F963
2. Include childcare products
3. Exclude sporting goods, apparel and footwear
4. Be careful with “toy counterparts” of items exempt from ASTM F963, such as sporting goods, bicycles and musical instruments

II. IDENTIFY OTHER REGULATED PRODUCTS

A. General Conformity Certification

1. Legal Basis: CPSIA § 102(a)(1) (CPSA § 14(a) as amended: “Except as provided in paragraphs (2) and (3), every manufacturer of a product which is subject to a consumer product safety rule under this Act or similar rule, ban, standard, or regulation under any other Act enforced by the Commission and which is imported for consumption or warehousing or distributed in commerce (and the private labeler of such product if such product bears a private label) shall issue a certificate which – (A) shall certify, based on a test of each product or upon a reasonable testing program, that such product complies with all rules, bans, standards, or regulations applicable to the product under this Act or any other Act enforced by the Commission; and (B) shall specify each such rule, ban, standard, or regulation applicable to the product.
2. What Other Regulated Products? Bicycles, bicycle helmets, children’s bunk beds, apparel fabric, refrigerators, matchbooks, garage door openers, architectural glass, cigarette lighters, lawn mowers, refuse bins, adhesives, paint, insulation materials, CB radio antennas, refrigerators, carpets, mattresses, children’s sleepwear, cribs, chainsaws, gas-fired room heaters, swimming pool parts, and much more, including materials banned or regulated by the Federal Hazardous Substance Act.

B. Compliance Verification

1. Third party testing for children’s products only
2. In-house testing?
3. Verification from suppliers?
4. What do your customers demand?
5. Certificates of compliance (16 CFR Part 1110)

C. Stay on certificate of compliance requirements until February 10, 2010, but stay is *not* applicable to:

1. Lead paint ban for products made after December 21, 2008;
2. Standards for full-size and non full-size cribs and pacifiers effective for products made after January 20, 2009;
3. Ban on small parts effective for products made after February 15, 2009;

4. Limits on lead content of metal components of children's jewelry effective for products made after March 23, 2009;
5. Certification requirements applicable to ATV's manufactured after April 13, 2009;
6. Pre-CPSIA testing and certification requirements, including those for automatic residential garage door openers, bike helmets, candles with metal core wicks, lawnmowers, lighters, mattresses, and swimming pool slides; and
7. Pool drain cover requirements of the Virginia Graeme Baker Pool & Spa Safety Act.

III. **IMPLEMENT TESTING PROGRAMS**

A. **Test Labs:**

1. Immediately identify and engage a CPSC accredited test lab. To date the CPSC has only accredited labs to test for lead paint and for lead content in metal jewelry. Accreditation for phthalates and for lead substrate in items other than jewelry is not expected until later in 2009, but the CPSC has published SOPs for lead substrate and phthalate test procedures, as discussed below.
2. A current list of CPSC accredited labs is on the CPSC website at <http://www.cpsc.gov/cgi-bin/labapplist.aspx>
3. Use caution when selecting test labs and test procedures, as it has been reported that some test labs recommend costly testing that is not required by U.S. law.

B. **Test Records:**

1. Keep records of testing be for at least three years. 16 CFR § 1010.11(d) The CPSIA does not require that records be provided to retailers or distributors, but they may be audited by the CPSC. Special rules exist for bicycle helmet test records. 16 CFR §§ 1203.34 and 1203.41
2. When contract manufacturers are used, obtain test records *directly* from the independent test lab, *not* from the contract manufacturer, particularly in Asia and developing countries, where counterfeit test records are common.

C. **Lead Paint Testing – *compliance and third-party testing are now mandatory.***

1. **Applicability:** All children's products with one or more painted surfaces must pass the CPSC lead paint requirements. "Paint" means a fluid, semi-

fluid, or other material, with or without a suspension of finely divided coloring matter, which changes to a solid film when a thin layer is applied to a metal, wood, stone, paper, leather, cloth, plastic, or other surface. “Paint” does not include printing inks or materials that become a part of the substrate, such as the pigment in a plastic article, or materials that are actually bonded to the substrate, such as by electroplating or ceramic glazing. 16 CFR § 1303.2(b)(1); CPSIA § 101(f)

2. Limit: 90 parts per million (“ppm”). Note: the current limit permitted by 16 CFR § 1303.1 is 600 ppm, but it will decrease to 90 ppm, irrespective of the date of production, on August 14, 2009. CPSIA § 101(f)
3. Test Body: In-house testing was permitted until December 21, 2008; thereafter tests must be done by an independent CPSC accredited laboratory.
4. Test Method: CPSC-CH-E1003-09 Standard Operating Procedure for Determining Lead (Pb) in Paint and Other Similar Surface Coatings (April 26, 2009).
5. Exceptions to Test Method: XRF testing may be permitted for “small painted surfaces” where the total weight of coating is no greater than 10mg, the surface area is no more than 1 cm², and no more than 2µg of lead
6. Certificates of Conformity: required for all children’s products with paint that were manufactured on or after November 12, 2008

D. Lead Substrate Testing – *compliance with lead substrate (content) levels is now mandatory, but in-house testing is currently acceptable; third-party testing will not be required until February 10, 2010.*

1. Applicability: All children’s products must pass CPSC lead substrate requirements. Each part of a children’s product must be tested *separately*, and a high lead level in one part may not be offset by a low level in another. CPSIA § 101(a)
2. Limit: 300 ppm for all parts of all products, irrespective of the date of production (the current limit is actually 600 ppm, but it decreases to 300 ppm on August 14, 2009 and should not be used for new product; the limit will decrease to 100 ppm on August 14, 2011 unless the Commission determines that a limit of 100 parts per million is not technologically feasible for a product or product category). CPSIA § 101(f)
3. Test Body: Testing by CPSC accredited labs will not be required (except as to children’s metal jewelry) until February 10, 2010. In-house testing may be used to confirm compliance until that time.

4. Test Methods *before* February 10, 2010:
 - a. Any reasonable testing, either in-house or by outside labs, is acceptable; XRF devices are acceptable, but require careful training and may not produce accurate results for all materials
 - b. We recommend that the company have an XRF gun to perform spot checks on existing inventory, and that that lab testing be done on any products that test positive on XRF, are not readily amenable to XRF testing, or otherwise create suspicion.

5. Test Methods *after* February 10, 2010:
 - a. Metal Products: CPSC-CH-E1001-08 Standard Operating Procedure for Determining Total Lead (Pb) in Children’s Metal Products (Including Children’s Metal Jewelry) (December 4, 2008)
 - b. Non-Metal Products: Test Method: CPSC-CH-E1002-08 Standard Operating Procedure for Determining Total Lead (Pb) in Non-Metal Children’s Products (February 1, 2009)

6. Certificates of Conformity: Not required until February 10, 2010.

7. Exceptions to Lead Substrate Requirements: Inaccessible parts and certain other items may be exempt from lead substrate requirements.
 - a. Inaccessible Parts: exemption determined by tests prescribed in 16 CFR § 1500.87 (published January 15, 2009) Note, painted or electroplated parts are *not* considered “inaccessible.” CPSIA § 101(b)(3)
 - b. Electrical Parts: exemptions prescribed in 16 CFR § 1500.88 (published February 12, 2009; similar to EU RoHS Directive 2002/95/EC)
 - c. Categorical Exemptions from Testing: 16 CFR § 1500.89 states procedures for obtaining a CPSC determination that a commodity, a class of materials or a specific product does not exceed the CPSIA’s lead content limits. The effect of such a determination would be to relieve that material or product from the testing requirements of the CPSIA purposes of supporting the required certification. The CPSC has published the following list of items that are exempt from lead content testing requirements, provided they have not been treated or altered or undergone any processing that could result in the addition of lead:
 - i. Wood

- ii. Other natural materials including coral, amber, feathers, fur, and untreated leather
 - iii. Yarn, dyed or undyed
 - iv. Dyed or undyed textiles (cotton, wool, hemp, nylon, etc.), including children's fabric products, such as baby blankets, and non-metallic thread and trim. This does not include products that have rhinestones or other ornaments that may contain lead or that have fasteners with possible lead content (such as buttons, metal snaps, zippers or grommets).
 - v. Children's books printed after 1985 that are conventionally printed and intended to be read, as opposed to used for play
 - vi. Certain educational materials, such as chemistry sets
 - vii. Precious gemstones: diamond, ruby, sapphire or emeralds
 - viii. Semiprecious stones provided that the mineral or material is not based on lead and is not associated with any mineral based on lead
 - ix. Natural or cultured pearls
 - x. Surgical steel
 - xi. Gold, of at least 10 karats
 - xii. Silver, at least 925/1000 pure
 - xiii. Platinum, palladium, rhodium, osmium, iridium, and ruthenium
- d. Lead Content Exclusions: For products that exceed CPSIA lead limits, one may seek an exclusion ruling from the CPSC under 16 CFR § 1500.90, which provides that a commodity, a class of materials or a specific product will not result in the absorption of any lead into the human body, taking into account normal and reasonable foreseeable use and abuse by a child, or have any other adverse impact on public health or safety. A petition for an exclusion must be based upon "best-available, objective, peer reviewed, scientific evidence." To date, the CPSC has not granted any exclusion petitions, although a number are pending. No exclusion requests have been granted, and CPSC states it will be extremely difficult to prevail under this standard.

E. CPSIA Phthalate Requirements for Toys and Childcare Products

CPSIA phthalate rules only apply to children's toys and childcare products. Sporting goods, clothing and footwear for children have been ruled exempt from CPSIA phthalate rules, but all children's products sold in California should comply with California phthalate rules as discussed below.

1. Applicability: toys, toy counterparts or childcare products.
 - a. "Children's toys" are products "designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays." Toys include those on the list of toys subject to ASTM Toy Safety Standard F963.
 - b. "Child care articles" are products product "designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger, or to help such children with sucking or teething." Guidance on making determinations published at 74 Fed.Reg. 8058 (February 23, 2009)
 - c. Any articles that are toys must meet lead paint, lead substrate and phthalate rules, as discussed herein, as well as other requirements, including but limited to ASTM F963, sharp points, small parts, and special requirements for labeling, catalog listings and advertising.
2. CPSIA phthalate limits for toys and childcare products:
 - a. No more than 0.1 percent of "3P phthalates" in all toys and childcare products: di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP).
 - b. No more than 0.1 percent of "6P phthalates" in toys and childcare products that can be put in the mouth (i.e., parts smaller than 5cm): diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP).
 - c. Note: protocols for naming organic chemicals permit multiple names for the same compound. For example, di-(2-ethylhexyl) phthalate (DEHP) is sometimes referred to as bis-(2-ethylhexyl) phthalate. Check CAS numbers to confirm.
3. Test Methods: CPSC-CH-C1001-09.1 Standard Operating Procedure for Determination of Phthalates (March 3, 2009); required only for toys and childcare products.
4. Certificates of Conformity: Not required unless the product is a toy or childcare product. It is not necessary to issue a certificate of conformity stating that the product is not a toy or childcare product.

F. California Phthalate Requirements

1. California AB 1108 (California Health & Safety Code §§ 108935, *et seq.*) applies essentially the same rules as CPSIA for toys and childcare products, effective January 1, 2009. No additional testing or action is anticipated unless this law is expanded, but age cutoff is not stated
2. California Proposition 65 requires special warnings on products containing “known carcinogens and reproductive toxicants” that are on a list of chemicals maintained by the California Office of Environmental Health Hazard Assessment. Four of the six phthalates on the CPSIA list are identified as “reproductive toxicants” on the California Proposition 65 list (BBP, DBP, DEHP and DIDP), while the other two phthalates (DINP and DNOP) are not. The California Proposition 65 list also includes Di-n-hexyl phthalate (DnHP), which is not on either of the CPSC lists.
3. Recommendations for Proposition 65 Compliance:
 - a. test all children’s products to CPSIA limits (0.1 percent) for BBP, DBP, DEHP, DIDP and DnHP
 - b. third party testing recommended not required
 - c. certificates of compliance not legally required, but some retailers will demand proof or certification
 - d. any items that exceed test limits for regulated phthalates may require specific warnings

IV. CERTIFICATES OF COMPLIANCE

A. **Legal Requirements:** Stated in CPSC regulations at 16 CFR Part 1110 (Note – “certificate of conformity” and “certificate of compliance” used interchangeably)

B. **Timing**

1. Certificates of Compliance presently required only for children’s products produced after December 21, 2008 that are subject to lead paint testing, and for children’s metal jewelry produced after March 23, 2009.
2. Certificates of Compliance are not required for lead substrate in children’s products, phthalates in toys & childcare products, and most other CPSIA requirements until February 10, 2010. This stay affects only certificates and third party testing – products still must comply with applicable limits of the lead substrate and phthalate rules as applicable.

C. Certificate Procedures

1. Imports: Certificates for goods made outside of USA must be issued by the *importer* and made available to U.S. Customs at the time of importation.
2. Domestic Products: Certificates for goods made in the USA must be issued by the *manufacturer* and made available when the goods are introduced into domestic commerce.
3. All products that require certification must be tested for compliance, based upon a test of *each* product or a “reasonable testing program.”
4. Only children’s products require *third party testing* by a CPSC accredited laboratory to support the certificate (as of the dates stated above), but even if third party testing is required, it is still the importer or manufacturer – *not the test lab* – that must issue the certificate.
5. Manufacturers and importers may furnish certificates electronically if they can be accessed with a unique URL identifier over the Internet. 16 CFR § 1010.13
6. Products not subject to CPSC rules or regulations do not require a certificate to that effect. For example, sporting goods that are not subject to the phthalate limits because they are neither toys nor childcare products do not require a certificate stating that they are exempt.
7. Certificates must be provided to retailers, but need not be provided to consumers.
8. Certificates do not need to be signed, but companies issuing them should consider some form of tracking or validation system to discourage counterfeiting or improper use.
9. Certificates and supporting test records should be kept for at least three years from the date of manufacture. 16 CFR § 1010.11(d)

D. Certificate Form and Content

1. Certificates must be in English (they may also be in another language)
2. Certificates must state the following (16 CFR § 1010.11):
 - a. Identify the products covered by the certificate
 - b. State each CPSC rule, regulation or ban that applies to the product and is covered by the certificate

- c. Identify the manufacturer or importer issuing the certificate (including name, mailing address and telephone number)
- d. Identify the person maintaining records of test results (including name, mailing address, telephone number and email address)
- e. Date (month and year) and place (city and state, country or administrative region) of manufacture; if the same manufacturer operates more than one location in the same city, the street address of the factory in question should be provided
- f. Date (month and year) and place (city and state, country or administrative region) where the product was tested for compliance
- g. If the goods are subject to third party testing requirements, identify the CPSC accredited test lab on whose testing the certificate depends, (including name, mailing address and telephone number of test lab).

V. LABELING FOR CHILDREN’S PRODUCTS

- A. CPSIA section 103 creates strict new labeling requirements for all children’s products produced after August 14, 2009. These labels will require “tracking” information that permits the source of the product to be traced to specific manufacturing sources by batch, run number, or other identifying characteristics.
- B. Planning for implementation should already have begun, but regulations on these requirements have not yet been issued, and more guidance is needed.

VI. RISK AND RESPONSIBILITY TRANSFERS AMONG MANUFACTURERS, IMPORTERS, DISTRIBUTORS AND RETAILERS

- A. Allocate primary responsibility for:
 - 1. Product design
 - 2. Manufacturing and overall integrity
 - 3. Materials & parts sourcing
 - 4. Labels, instructions & packaging
- B. Warranties & representations
 - 1. General compliance with laws of US and other countries of distribution
 - 2. Compliance with identified standards and specifications
 - 3. Compliance with specified provisions of CPSIA (lead, phthalates, etc.)

4. No deviation from samples and/or stated specs re raw materials, component parts, vendors or subcontractors without written consent
- C. Responsibility for CPSIA Testing and Certificates of Compliance
1. Who issues?
 2. How furnished and maintained
 3. Specific test labs?
 4. Chain of custody of test records
- D. Contractual indemnity
1. Product liability claims
 2. Recall expenses and other regulatory issues
 3. Not limited to insurance proceeds
- E. Insurance
1. Separate from and in addition to contractual obligations
 2. Provided by recognized carrier with substantial U.S. presence
 3. Limits – amount and independent of defense and administrative costs
 4. Claims made or occurrence
 5. How many other customers on same policy
 6. Maintain for how long
 7. Consider additional insurance from subcontractors providing critical parts or materials
- F. Disputes
1. ADR, including forum, rules, location and language
 2. Choice of law
 3. Service of notices and legal papers
 4. Attorney's fees and costs for prevailing party?

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15 May 2009

UPDATE ON THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT OF 2008

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On August 14, 2008, President Bush signed the “Consumer Product Safety Improvement Act of 2008” (“CPSIA” or the “Act”) into law. This legislation is most comprehensive overhaul of American consumer product safety laws since the U.S. Consumer Product Safety Commission (“CPSC”) was created by passage of the Consumer Product Safety Act (“CPSA”) in 1972. The CPSIA was triggered by well-publicized recalls of imported toys with lead paint and other hazards, but it goes far beyond toys, and it touches virtually all manufacturers, importers, distributors and retailers of consumer products produced for the American market.

The CPSIA is now nine months old. It has been the subject of praise from consumer groups, criticism from industry, and conflicting statements from Congress and the agency who is supposed to implement it. The authors of the Act were well intentioned, but in its final form, the Act imposed burdens upon the CPSC and upon industry that simply could not be met within the time frames imposed by Congress, and the implementation schedule mandated by the Act reflects a fundamental misunderstanding of how products are developed, produced and brought to market in today’s economy. Most consumer products on store shelves today were in the production pipeline long before anyone anticipated the Act’s rules for phthalates, lead, labeling, testing and other issues, and many products have been rendered unsellable as a result of the Act. Manufacturers have been mustering their resources to comply with the Act and to seek exemptions or deferrals when compliance is impossible. CPSC officials have been scrambling to implement regulations required by the Act and to respond to industry’s compliance efforts.

Some of the most significant features of the Act involve toys and children’s products, including bans of lead and phthalates, new safety standards and test procedures, third-party testing and certification requirements, product tracking labels and registration, and new warnings in advertising and websites for toys and games.

New rules that go far beyond children’s products include mandatory testing and certification for all regulated products, increased civil penalties (up to USD \$15 million) and imprisonment for

Consumer Product Safety Improvement Act of 2008
15 May 2009
Page 2

violations, lower burdens of proof for criminal prosecution, authorizing state attorneys general to enforce federal product safety laws, giving the CPSC greater authority to regulate product recalls and enforce product safety laws, whistleblower protection for employees who report safety violations or cooperate in investigations, public disclosure of product safety data, and stepped up enforcement efforts involving other federal agencies, foreign product safety regulators and state health agencies.

The full impact of the law will not be known for another year or more because many of the new regulations and procedures called for by the Act still have not been implemented by the CPSC, which lacks the resources to do what Congress ordered it to do within the timeframes called for by the Act. Increased funding for the next fiscal year, plus the Obama administration's appointment of two consumer advocates to open positions on the Commission, are expected to have a significant impact in coming years.

Most companies are attempting to implement the Act's requirements ahead of schedule in order to reduce the risk of holding non-conforming inventory upon the effective dates of new regulations, but in many cases there was simply not adequate notice, and as a result, the Act has rendered worthless billions of dollars of products. In some cases, such as the tracking labels that will be required on all children's products as of August 14, 2009, there are still no regulations. Petitions for exemption, exclusion or deferral of enforcement have been submitted by several stakeholders, and they have been met with mixed results from the CPSC.

All stakeholders, including manufacturers, importers, brand owners, retailers, and others who work with them, are in need of guidance on how to comply with the new Act. In some cases, the CPSC has issued final regulations under the new Act, but the CPSC states it does not have adequate resources to provide detailed guidance or official approvals regarding specific products or procedures. The CPSC has issued general guidance in letters and on its website, and a recently published [guide](#) for small business is particularly useful, but all CPSC guidance is highly qualified by statements that it has not been reviewed or approved by the full Commission and it may be superseded at any time by the General Counsel, by the Commission, by the Chairman of the Commission, or by operation of law (i.e., by a court ruling). At least one lawsuit has successfully challenged an interpretive statement of the CPSC's General Counsel.

At least ten bills have been introduced in Congress that would delay or modify implementation of some of the CPSIA's requirements, but the likelihood of any passing is not known.

Essentials Elements of CPSIA Compliance

Awareness and preparation are essential to any CPSC compliance program. Every company involved in producing, importing, distributing or selling consumer products for the U.S. market must ask themselves the following questions:

1. Do you know which CPSC statutes, regulations or bans apply to each of your products?
2. Have you identified all products that might be regulated as children's products, toys, children's metal jewelry or childcare products and taken proper compliance steps?
3. Do you have a verifiable system in place for identifying "children's products" and do you have any products that might avoid being regulated as toys or children's products with proper packaging, marketing and instructions?
4. Have you verified that your entire existing inventory of children's products, toys and childcare products meets the new lead and phthalate requirements?
5. Do you have a testing lab that is able to meet your needs?
6. Are you monitoring developments at the CPSC regarding testing and certification?
7. Have you begun testing completed products and controlling your incoming materials?
8. Have you confirmed that you have the appropriate labels on each of your products, including the new tracking labels for children's products that will be required later this year?
9. Are you communicating with your manufacturing facilities / material suppliers / test labs / shippers / customs brokers / distributors / retailers and others regarding risk transfers and your respective requirements and obligations for CPSIA compliance?
10. If you are a manufacturer or importer, have you prepared your certificates of compliance and do you have the means to furnish electronic certificates of compliance to shippers, customs, CPSC, distributors and retailers?
11. If you are a retailer or distributor, are you requesting and receiving proper certificates of compliance from your vendors and do you have a system for tracking them?
12. If your products are sold in California, are you Proposition 65 compliant? Do any of your products contain chemicals on the OEHHA list of carcinogens and reproductive toxicants? Do you know which consent Prop 65 decrees apply to your products?

If you answered "no" to any of these questions, you risk significant compliance issues and immediate action is needed. Even if you have answered "yes" to all, your continued vigilance is necessary in order to keep up with the constant stream of new developments that will affect your products and your company's operations.

Testing and Certificates of Compliance

With certain exceptions, all consumer products produced on or after November 12, 2008 that are the subject of any rule, ban, standard or regulation enforced by the CPSC must have a “Certificate of Compliance” (“Certificate”, also referred to as a certificate of conformity or general conformity certificate) that identifies the product and the rules applicable to the product, and attests that the product complies with those rules.

The CPSC issued final regulations for Certificates of Compliance (16 C.F.R. Part 1110) on November 10, 2008. Every person affected by the CPSIA should possess and understand these regulations, which include the following requirements:

- Certificates for imported goods must be issued by the *importer* and made available at the time of importation;
- Certificates for domestic goods must be issued by the *manufacturer* and made available when the goods are introduced into domestic commerce.
- All products that require certification must be tested for compliance, based upon a test of *each* product or a “reasonable testing program.” The law does not, however, define what constitutes a “reasonable testing program.”
- Only children’s products require *third party testing* to support the Certificate, but even if third party testing is required, it is still the importer or manufacturer – not the test lab – that must issue the Certificate.
- Certificates must be in English (they may also be in another language) and must identify the manufacturer or importer issuing the certificate, state the date and place of manufacture, the date and place of certification testing, state the issuing party’s name, mailing address and telephone number, and identify the individual responsible for maintaining records of test results. If the goods are subject to third party testing requirements, the Certificate must identify the test lab.
- Manufacturers and importers may furnish certificates electronically if they can be accessed with a unique URL identifier over the Internet.
- Products not subject to CPSC rules or regulations do not require a Certificate to that effect. For example, items that are not subject to the phthalate limits because they are neither toys nor childcare products do not require a Certificate stating that they are exempt.

- Certificates must be provided to retailers, but need not be provided to consumers.
- Certificates do not need to be signed.
- In some cases CPSC regulations specify a different form of Certificate. For example, the Certificate for bicycle helmets is the label in the helmet required by the CPSC bicycle helmet regulations issued in 1998. (16 CFR § 1203.34)
- There is no exemption or special set of rules for small businesses, charities, home businesses or others who are disproportionately impacted by the CPSIA.

The Act's requirements for lead and phthalate testing and certification have created considerable confusion and controversy. The short implementation schedule caught many manufacturers and retailers off guard because the new limits have been deemed applicable to existing inventory, and the schedule imposed by Congress did not allow sufficient time to incorporate the new limits and test procedures into production and distribution cycles. The lead and phthalate requirements threaten to render billions of dollars of new products worthless, to mandate costly testing of products that are inherently lead free, and to outlaw the sale of lead-bearing products that do not pose a safety threat, such as electrical and technical components that are not readily accessible or where exposure will not result in the absorption of lead into the human body.

Temporary Stay of Certain Testing and Certification Requirements

In response to an outpouring of complaints, and in acknowledgement of its own inability to meet the deadlines imposed by Congress in the CPSIA, the CPSC announced on January 30, 2009 that it was issuing a one-year stay of enforcement for testing and certification requirements for manufacturers and importers of regulated products pertaining to lead content, phthalates, the ASTM Toy Safety standard and several other pending requirements.

This limited stay of enforcement is intended primarily to give CPSC staff adequate time to finalize proposed rules for testing and certification, issue exemptions for certain materials and products from lead and phthalate testing, and for industry to develop a better understanding of which rules apply to their products and how to implement them. The stay will remain in effect until February 10, 2010, but it leaves significant uncertainties because it is only a stay of **testing and certification requirements** – **it does not stay requirements that lead and phthalates be reduced to the levels ordered by the CPSIA, nor does it stay implementation of the ASTM toy safety standard. The sale of non-compliant products exposes manufacturers, importers and retailers to CPSC enforcement penalties, state enforcement, and civil liabilities to consumers.**

Any changes to the effective date of the new requirements or to rules on retroactivity of the lead and phthalate requirements will require a new act of Congress. Bills have been proposed in Congress that would defer some of these requirements, but none has passed.

For many products that are inherently lead free, such as textiles, the stay and proposed regulations may offer real relief from the potentially burdensome and expensive testing requirements. However, for manufacturers, importers, distributors and retailers of children’s products that may exceed the lead limits, the stay may encourage a “don’t test, don’t tell” policy, compelling them to put blind faith in the CPSC that it ultimately will agree with the manufacturers’ exemption requests or to simply hope for the best until the smoke clears. Alternatively, they may attempt compliance with uncertain testing techniques.

The recent stay ruling also does not stay enforcement of regulations already implemented. The current implementation schedule of the new safety regulations and for third party testing and certification of children’s products is below. In some cases, products produced before the third-party test date may require a Certificate of Compliance, but the certificate may be based upon in-house testing.

Some major U.S. retailers and distributors have implemented compliance programs that are stricter than those of the CPSC or which require certificates of compliance for products and circumstances in which the law does not require them. Manufacturers and importers need to know what is required by law and what is not so they can intelligently negotiate these requirements.

The following chart was provided by the CPSC to inform businesses of their testing and certification compliance deadlines and the effect of the temporary stay on those deadlines – it does not include other requirements or deadlines established by the CPSIA.

Always check for updates on testing and certification requirements and deadlines, as these requirements are subject to change at any time due to possible court decisions, decisions by the Commission or actions by Congress.

Regulated Product	When do products need to comply?	When is testing and certification enforced/required?
<i>Lead in Paint for children’s products:</i> Limit of 600 parts per million (ppm) Limit drops to 90 ppm	Now August 14, 2009	Now August 14, 2009
<i>Children’s Metal Jewelry:</i> Lead content limit of 600 ppm	Now	March 20,2009*

Regulated Product	When do products need to comply?	When is testing and certification enforced/required?
<i>Total Lead Content for children's products:</i> Limit of 600 ppm Limit drops to 300 ppm Limit drops to 100 ppm (if technologically feasible)	February 10, 2009 August 14, 2009 August 14, 2011	February 10, 2010* February 10, 2010* August 14, 2011*
<i>Certain Phthalates in toys and childcare products:</i> Limit of 0.1% (of total weight) in toys and child care articles	February 10, 2009	February 10, 2010*
<i>Mandatory Toy Standard (ASTM F963)</i> , which relates to safety requirements, labeling, and testing for: hazards caused by magnets; certain toxic substances; toys with spherical ends; hemispheric-shaped objects; cords, straps, and elastics; battery-operated toys; and more.	Now (for items produced after February 10, 2009)	February 10, 2010*
<i>Cribs and Pacifiers</i>	Now	Now
<i>Small Parts</i> (products for children under 3)	Now	Now
<i>Baby Bouncers, Walkers and Jumpers</i>	Now	February 10, 2010
* Testing and certification are not required for products already in inventory that are covered by the new lead and phthalate limits and toy standards.		
Note: The enforcement of the requirement for a general certificate of conformity for non-children's products will resume on February 10, 2010. The Commission promises to issue additional information on this topic soon.		

- Additionally, ***the temporary stay of certification and testing does not apply to:***
 - Pre-CPSIA testing and certification requirements, including those for automatic residential garage door openers, bike helmets, candles with metal core wicks, lawnmowers, lighters, mattresses and swimming pool slides;
 - Swimming pool drain cover requirements of the Virginia Graeme Baker Pool & Spa Safety Act; and
 - Voluntary guarantees under the Flammable Fabrics Act.
- Care must be taken when selecting test labs. When third party testing is required, tests must be performed by a CPSC accredited lab. It has been reported that some labs hold themselves out as CPSC accredited or certified to test lead content and phthalates, but such claims would be false. Many labs possess technical competence to test for lead

substrate and phthalate levels, but no labs as of this date are officially accredited by the CPSC to perform these tests; third party testing for phthalates and lead substrate will not be required until accreditation procedures are established.

- The CPSC has stated that resellers of used children's products (such as thrift or consignment stores) are not required to test for compliance with CPSC standards or issue Certificates of Compliance because they are neither distributors nor manufacturers, but their merchandise nevertheless must comply with applicable rules and regulations, including those regarding lead paint, lead content and phthalate content.
- Providing a false Certificate can trigger civil and/or criminal penalties.

Ban on Lead in All Children's Products

New rules regulating *lead paint* and *lead content* (also referred to as substrate) apply to *all* children's products (i.e., products intended primarily for children age 12 and under). CPSC states that the new limits on lead content and lead paint apply to *all inventory existing as of the effective dates*, no matter when it was manufactured, and that non-compliant products will have to be destroyed or remediated.

- Lead Paint:
 - Rules in effect since 1977 (16 CFR Part 1303) impose a 600 ppm limit on lead paint for toys and certain other articles intended for use by children, as well as household furniture. This limit remains in effect until August 14, 2009, when it will be reduced to 90 ppm.
 - Conformity Certificates are required for all children's products with paint that were manufactured on or after November 12, 2008, but they could be based on in-house testing until December 21, 2008, after which time third-party testing from a CPSC accredited laboratory is required.
 - Recently announced stays of enforcement for lead content and phthalates do not affect the lead paint limits, testing or certification requirements in any way. Testing and certification are required for all paint on all children's products.
- Lead Content (substrate):
 - New lead *content* (substrate) limits for children's products (600 ppm) went into effect February 10, 2009 and will be lowered to 300 ppm on August 14, 2009. They may be further lowered to 100 ppm, but only if the CPSC makes certain feasibility findings.

- Conformity Certificates from the importer or manufacturer would have been required after February 10, 2009, but the CPSC has stayed certification and third party testing requirements for lead content until February 10, 2010 pending the issuance of final regulations on lead testing and laboratory accreditation. This stay of enforcement of testing and certification does not, however, defer requirements that lead content actually be reduced to the 600/300 levels ordered by the CPSIA, thus requiring companies to have effective testing programs already in place.
- The lead content limits apply to each individual component of a product, such that high lead content in one part cannot be offset by low lead content in another.
- Lead in a substrate is not rendered “inaccessible” merely because it is covered by paint or electroplating.

Lead Content Exemptions

The CPSC has issued regulations and regulatory notices potentially affecting the procedures or requirements for seeking relief from the CPSIA, e.g., 16 CFR §§1500.89 – 1500.91, and a number of industry groups have submitted petitions for exemptions, exclusions, special determinations or stays of enforcement of CPSIA requirements that apply to their products. These petitions have met with mixed results. For the most part, the CPSC’s response has been to deny outright exemptions, but to grant stays of enforcement in some cases to permit manufacturers to develop compliant products, as has been done for children’s bicycles and all-terrain vehicles. Details on certain exemptions and CPSC determinations are below.

Electronics: The CPSIA expressly permits the CPSC to exempt certain electronic components from lead content requirements, and on February 6, 2009, the CPSC issued an interim final rule regarding lead limits in certain electronic components for which lead content compliance is not technologically feasible. The rule, based in part upon a European rule (EU RoHS Directive 2002/95/EC), provides exemptions for children’s electronics for which it is not feasible to remove all lead and based upon accessibility.

Other Children’s Products: The CPSC regulations permit relief from CPSC lead limits and test requirements in two different ways. First, one may seek a CPSC *determination* that a commodity, a class of materials or a specific product does not exceed the CPSIA’s lead content limits. The effect of such a determination would be to relieve that material or product from the test requirements for certification.

Alternatively, for products that exceed CPSIA lead limits, one may seek an *exclusion* ruling, which if granted would provide that a commodity, a class of materials or a specific product will not result in the absorption of any lead into the human body, taking into account normal

and reasonable foreseeable use and abuse by a child, or have any other adverse impact on public health or safety. A petition for an exclusion must be based upon “best-available, objective, peer reviewed, scientific evidence.” To date, the CPSC has not granted any exclusion petitions, although a number are pending. The CPSC acknowledges that it may be extremely difficult, if not possible, to prevail under this standard, and that the CPSIA does not give CPSC any discretion to waive lead limits in other circumstances.

Other Testing Exemptions: The CPSC has received many comments about the Act’s requirement that testing must be performed on each model of the finished product rather than on component parts, because in most cases it would be more efficient to test components that are common to multiple products and not to test components that are inherently lead free. The CPSC presently is accepting comments on this issue in anticipation of new regulations that may permit component part testing in some circumstances. The National Association of Manufacturers, the American Apparel and Footwear Association and other industry groups have submitted persuasive comments on this issue.

On January 15, 2009, the CPSC issued several important proposed regulations regarding exemptions from the lead ban. These regulations have not yet been finalized, but they address the following issues and could provide significant relief for some manufacturers and importers:

- Certain “natural” materials that are inherently lead free, including precious and semi-precious gemstones, pearls, wood, feathers, natural fibers, coral, amber, feathers and fur, may be exempt from lead content testing, but only if they are untreated (e.g., “natural” cotton would be exempt but dyed cotton would not).
- Certain metals and alloys that are inherently lead free, including gold (at least 10 karat), sterling silver (at least 925/1000), platinum, palladium, rhodium, osmium, iridium and ruthenium may be exempt from lead content testing.
- Certain electronic devices and inaccessible component parts and materials from which lead exposure is minimal may be exempt from the lead content limits and test requirements.

Ban on Phthalates in Toys and Child Care Articles

Phthalates (pronounced “THA lātes”) are a family of compounds derived from oil, often referred to as plasticizers, that are used to make vinyl, PVC and other “plastic” items soft, smooth or pliable. They also are found in cosmetics, inks, sealants and other products. Some researchers and safety advocates have alleged phthalates are harmful to children, but in 2003 European Union safety regulators and the CPSC concluded otherwise and rejected petitions

to limit their use in children's products. The EU nevertheless followed the "precautionary principle" when it enacted a phthalate ban for toys and child care products in 2005, and several American states began developing phthalate bans thereafter. The CPSIA limits are similar to what was proposed in California in 2007, and it has many similarities to the European rule. The CPSIA as enacted limits phthalates in children's toys and child care articles as of February 10, 2009, as follows:

- Prohibits the sale of *children's toys* and *child care articles* with concentrations of more than 0.1 percent of three compounds known as "3P phthalates": di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP).
- Establishes an interim ban on the sale of children's toys that can be placed in a child's mouth and all child care articles that contain more than 0.1 percent of the following three "6P phthalates": diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP). Toys that can be put in the mouth are defined to include toys or parts smaller than 5 centimeters in dimension, and exclude toys that can only be licked.
- Phthalates and alternative plasticizers that are not banned by the CPSIA *may*, therefore, be used in children's toys or child care articles, but manufacturers are still responsible for ensuring that toys and other children's products are not considered "hazardous" under the general requirements of the Federal Hazardous Substances Act ("FHSA") and that they comply with state disclosure laws, such as California Proposition 65.
- Conformity Certificates from the importer or manufacturer would have been required after February 10, 2009, but as discussed above, the certification and third party testing requirements for lead and phthalate content have been stayed until February 10, 2010 pending the issuance of final regulations on testing and laboratory accreditation. This stay of enforcement of testing and certification does *not*, however, defer requirements that phthalates actually be reduced to the 0.1% (1,000 ppm) levels ordered by the CPSIA.

Application to Existing Inventory: The phthalate rules have generated controversy in regard to whether they govern existing inventory and the scope of products to which they apply. As of this writing, the following events have occurred:

- As it now stands, the phthalate limits apply irrespective of the production date. The CPSC's general counsel had taken the position that the phthalates ban does not apply to inventory produced before the February 10, 2009 effective date, but on February 2, 2009, the U.S. District Court in New York issued a ruling against the CPSC and ordered that the new phthalate rules apply retroactively to all children's toys and childcare products, irrespective of when they were produced, imported or distributed. The CPSC has stated that it will not appeal this ruling.

- On January 30, 2009, the CPSC voted to defer enforcement of testing and certification requirements for phthalates (and for lead, as discussed above), but the CPSC was powerless to defer implementation of the actual limits, because they are prescribed in the Act as written by Congress. As a result, compliance with the phthalate limits is required for all toys and childcare products produced, imported or sold on or after February 10, 2009, but third party testing and certificates of conformity will not be required until February 10, 2010.

Application to Apparel and Footwear: On November 25, 2008, the general counsel for the CPSC issued an advisory opinion that the phthalate ban is generally not applicable to children's shoes and wearing apparel. The CPSC also described several exceptions to this exemption, including sleepwear for children age three and under, bibs and children's dress-up or play costumes.

Application to Sporting Goods, Bicycles and Musical Instruments: The definition of "children's toys" in the CPSIA is broad and vague. However, the ASTM toy safety standard that was adopted as part of the CPSIA provides more definitive terms, and it specifically exempts sporting goods, camping goods, bicycles, athletic equipment, musical instruments and furniture (but not their "toy counterparts"). The CPSC has announced in guidance documents that items exempt from the ASTM toy safety standard also are exempt from the phthalates ban. We caution, however, that guidance from the CPSC, even when in writing, is subject to being reversed by the Commission or by court decision.

State Enforcement and Preemption

A controversy has arisen in regard to how the CPSIA interacts with state laws that potentially regulate phthalates and related compounds. Several state regulators, including the Attorney General of California, have taken aggressive stances on these issues.

- The CPSIA authorizes *state attorneys general* to enforce the CPSA and related laws by seeking injunctive relief, but requires states to give the CPSC advance notice of any intent to initiate a state action (state enforcement previously was prohibited, and the CPSC did not support this provision of the new act). CPSIA § 218.
- More stringent state laws on toy safety may be adopted by states that follow specific notice and procedural requirements prescribed in CPSIA section 106(h). Arizona, California, Illinois and New York have already filed applications under this procedure.
- The CPSIA expressly *preempts conflicting state laws* regarding the six regulated phthalates, but it allows states to regulate other compounds and phthalate alternatives. CPSIA § 108(d).

California Proposition 65

- The CPSIA expressly *does not preempt* certain state warning laws regarding phthalates and other chemicals, including California Proposition 65. CPSIA § 231(b)
- Proposition 65 (California Health & Safety Code §§ 25249.5 *et seq.*) was adopted in California by voter initiative in 1986. It does not expressly ban any particular chemicals, but it prohibits anyone doing business in California from knowingly and intentionally causing exposures to listed carcinogens and reproductive toxicants without a “clear and reasonable warning.” Proposition 65 warning requirements (and liability for failure to comply) apply to anyone in the chain of distribution, including manufacturers, distributors, and retailers.
- Most alleged violations of Proposition 65 are enforced by private lawsuits which seek injunctive relief, civil penalties of up to USD\$2,500 per violation per day, and attorneys’ fees and costs. The private plaintiffs who bring these suits are environmental bounty hunters who receive 25 percent of all civil penalties assessed. Burdens of proof in Proposition enforcement suits heavily favor the plaintiffs, and once a plaintiff meets its minimal burden of proof, a defendant must prove a costly affirmative defense to avoid liability, such as proving that the exposures at issue will not exceed health risk thresholds.
- Recent activities involving Proposition 65 in California may result in effective bans of some phthalates and other chemicals that are *not* banned by the CPSIA. Recent Proposition 65 enforcement suits have successfully been brought regarding phthalates in bicycles, sporting goods and other items that are not subject to CPSIA phthalate limits.
- California also has adopted its own phthalate ban, AB 1108. On December 3, 2008, the California Attorney General issued a public letter to the CPSC asserting that California AB 1108 and Proposition 65 are in no way affected by the CPSIA, and that California will begin enforcing AB 1108 on January 1, 2009. Four of the six phthalates banned by the CPSIA are identified as “reproductive toxicants” on the California Proposition 65 list (BBP, DBP, DEHP and DIDP), while the other two phthalates (DINP and DNOP) are not; the California Proposition 65 list also includes Di-n-hexyl phthalate (DnHP), which is not on either of the CPSC lists. The definitions of toys and child care products under AB 1108 are arguably broader than those in the CPSIA.
- The state of Washington also has passed a law regulating phthalates (Chapter 288), and a number of other states, including New York, Oregon and Vermont, have passed statutes that relate to child product safety, and more states are reported to be contemplating them.

Import-Export Issues

- U.S. Customs will refuse entry to products that lack proper Certificates of Compliance; non-compliant products may be *seized and destroyed*.
- Children's products that lack the requisite permanent *tracking labels* will be refused entry after August 14, 2009 and may be *seized and destroyed*.
- Recalled, banned, hazardous or non-conforming products already in the U.S. *may not be exported* to other countries (i.e., they must be *remediated or destroyed*).
- The Act mandates more joint efforts involving the CPSC and U.S. Customs and Border Protection to prevent import and export of unsafe products, including inspections that will prevent non-compliant products from being shipped from their countries of origin. On October 29, 2008, U.S. Customs and Border Patrol ("CPB") announced a new pilot program on product safety that will become part of its existing Importer Self-Assessment (ISA) program. The new "Importer Self-Assessment-Product Safety (ISA-PS)" pilot is described as a partnership among CBP, the CPSC and importers. Interested importers must apply to CBP to participate in this program.
- CPSC has agreements in place with counterpart agencies in Canada, Chile, China, Costa Rica, the European Commission, Egypt, India, Israel, Japan, Korea, Mexico, Peru, Taiwan and Vietnam to share product safety data, engage in joint enforcement efforts and pursue common goals. Recalls or safety investigations in one country often trigger enforcement actions in other countries' product safety agencies, thus requiring careful coordination of recalls and compliance for companies with international distribution.
- CPSC is specifically targeting Asian countries for enforcement and educational efforts. Some CPSC publications are available in Chinese, and CPSC officials have toured Asia to publicize and share information about the new law.
- The CPSC may publish a "substantial product hazard list" of products or product classes that triggers reporting requirements and allows products to be refused entry into the U.S.
- The CPSC may condition the import and distribution of a product on a company's compliance with certain recordkeeping and inspection requirements.

New Definitions for Toys and Children's Products

Many of the new Act's provisions are tied to highly technical definitions in the existing Consumer Product Safety Act and product safety rules. The new Act adds more definitions,

primarily relating to children's products. These definitions have significant impacts upon which rules apply to a given product, when compliance must be achieved and how compliance must be verified.

- “*Children’s products*” is a new definition used throughout the Act. It includes any “consumer product designed or intended primarily for children 12 years of age or younger.” The Act lists several factors to consider when determining whether a product is a children’s product, including labels and other statements of the manufacturer regarding the use of the product, “if such statement is reasonable,” whether the product is represented in its packaging, display, promotion, or advertising 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 a child 12 years of age or younger, and age determination guidelines for children’s products issued by the CPSC in 2002.
- Two other new definitions pertain *only* to the phthalate regulations: “*Children’s toys*” includes products “designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays.” “*Child care articles*” are defined as “a consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger, or to help such children with sucking or teething.” See the discussion in the phthalates section above as to how this “toy” definition may arguably apply to items such as sporting goods, camping goods, bicycles, athletic equipment, musical instruments and furniture.

New Advertising and Labeling Requirements

- All consumer products are the subject of a new rule providing that advertisements, labels and packaging may not reference a consumer product safety rule or a voluntary standard (such as an ASTM standard) unless the product conforms with all requirements of the rule or standard. Any violation of this requirement, even in the case of voluntary standards, could result in a recall, as well as possible penalties for misrepresentation.
- Tracking labels will be required for all children’s products, including shoes and apparel, by August 14, 2009. These labels are intended to facilitate recalls in the event a product is found to be dangerous or non-compliant with safety regulations.
- The new children’s product tracking labels must bear “*permanent and distinguishable marks*” that allow the manufacturer and importer to identify source, production date and batch information so as to improve tracking and identification of recalled products. Tracking labels must be on each individual unit “to the extent practicable,” recognizing that it may not be practical for labels to be printed on small toys and other small products that are manufactured and shipped without individual packaging.

- Interpretive regulations regarding tracking labels are expected but have not been issued.
- The Act permits the CPSC to issue regulations extending this children's product tracking label rule to all consumer products.

Additional Rules Affecting Toys and Children's Products

- Adopts *ASTM Standard F963* as a mandatory consumer product safety rule applicable to products manufactured after February 10, 2009, and directs studies that may result in additional rules. ASTM F963 is a comprehensive safety specification applying to most toys and many child care articles, and it is a "living standard" in that it is subject to periodic updates. The standard does not, however, cover sporting goods, camping goods, bicycles, athletic equipment, musical instruments, furniture or a variety of other specified items, but it does apply to "toy counterparts" of such items.
- Creates new rules for *durable infant and toddler products*, including cribs, high chairs, strollers, infant carriers, bath seats, gates, swings and other items, that will facilitate owner registration by requiring manufacturers to provide postpaid registration cards, maintain a registry of owners, and to take other steps that will enable more efficient distribution of recall and safety notices.
- Requires *choking hazard warnings on Internet and catalog listings* for children's toys and games. The Federal Hazardous Substances Act has for many years required warnings on *packaging* and *accompanying descriptive materials* for toys and games containing small balls, balloons, small parts and marbles that they present choking hazards and are not for children under age 3. The CPSIA requires that these choking warnings be included in all Internet advertisements by December 12, 2008 and in all catalogs and other printed materials by February 10, 2009, if they provide a "direct means for the purchase or order of the product." The CPSC issued final regulations (16 C.F.R. Part 1500) on this topic on November 14, 2008.

Stronger Enforcement Procedures and Penalties

The Act gives the CPSC substantially more enforcement muscle, both in the form of procedures and increased penalties, as follows:

- Increases *civil penalties* for violations of the CPSA and other statutes enforced by the CPSC to USD\$100,000 for each violation, up to a maximum of USD\$15,000,000 for a related series of violations (current limits are \$8,000 / \$1,825,000). Civil penalties can be imposed for late reporting of potential safety hazards and other violations.

- Increases *criminal penalties* by permitting larger fines, up to 5 years imprisonment, and forfeiture of assets associated with a violation, and removes a requirement that directors, officers and agents be aware of violations before being criminally charged.
- Eliminates any obligation to perform a *cost-benefit analysis* when establishing standards for packaging household substances under the Poison Prevention Packaging Act of 1970.
- Prohibits CPSC regulatory activities from *preempting* damage claims arising under common law and state statutes, or from preempting California Proposition 65.

More Stringent Recall and Reporting Procedures

- Requires manufacturers, importers, distributors and retailers to report to the CPSC immediately if they learn that one of their products fails to comply with an applicable consumer product safety rule or “any other rule, regulation, standard, or ban” under the CPSCA or any other Act enforced by the Commission.
- Eliminates the right of a party recalling a product to *elect* whether they will offer a refund, repair *or* replacement for recalled products and permits the CPSC to require a refund, repair *and/or* replacement as the CPSC determines to be in the public interest.
- Creates new requirements for the content and dissemination of recall notices and permits the CPSC to require *recall notices in languages other than English*.
- Calls for a study to determine the feasibility of requiring that manufacturers, importers and retailers establish escrow funds, purchase insurance or otherwise provide financial security to pay for recalls and/or destruction of recalled products.
- Provides stronger prohibitions against stockpiling and selling banned or recalled products, or any products that violate product safety regulations.

New Liabilities for Employers

- Establishes *whistleblower protection* for employees who report violations, testify or otherwise provide assistance in consumer product safety enforcement proceedings, or who refuse to participate in an employer’s illegal conduct. Aggrieved employees may seek injunctive relief, reinstatement, back pay (with interest), damages, litigation costs, expert witness fees, and attorneys’ fees.

New Rules Affecting Other Products and Substances

- **All-Terrain Vehicles (ATVs):** The CPSIA imposes an immediate ban on 3-wheel ATVs, adopts American National Standard ANSI/SVIA-1-2007 as a mandatory safety standard for all other ATVs (effective April 13, 2009) and mandates additional studies, standards and safety programs targeted at ATVs intended for use by youth. In April of 2009, the CPSC voted, however, to stay enforcement of CPSIA lead content requirements for youth-sized ATVs in response to a petition by manufacturers, which argued that to enforce the lead ban would prohibit the sale of all youth-size ATVs and force young people to use more dangerous adult-size vehicles.
- **Other New Safety Rules:** Directs or requests the CPSC to investigate or promulgate new safety rules for a variety of other products, including formaldehydes in textiles and apparel, garage door openers, cigarette lighters, equestrian helmets, lead in ceramics, carbon monoxide poisoning, smoke alarms, pet toys that could become children's playthings, and tipping hazards involving furniture and appliances.

Manufacturers Lose Privacy of Product Information

- Mandates that the CPSC develop a *searchable database*, accessible to the public through the Internet, that will include reports from consumers and other sources on deaths and injuries reportedly caused by consumer products.
- The new database will include product names and manufacturers' names, but the law bars disclosure of a complaining consumer's identity unless the consumer consents, which may prevent manufacturers from investigating alleged incidents involving their products.
- Permits the CPSC to demand that any manufacturer, importer, retailer or distributor provide *supply chain information* for any consumer product, including the name, address and other information for manufacturers, subcontractors and component suppliers, as well as retailers and distributors, even if no complaint or investigation is pending.
- Permits the CPSC to share manufacturers' confidential commercial information with state and local public health agencies, as well as *foreign* product safety regulators.
- Shortens the time that companies have to object to public disclosure of *confidential* commercial information from 30 to 15 days.

Administrative Changes at the CPSC

- Mandates significant budget increases for the CPSC to fund new hiring, safety, research and enforcement initiatives.
- Provides for *expedited rulemaking* and judicial review of CPSC rules and standards.
- Increases the Commission to a full five members (it had been operating with only three commissioners and now has two), and it permits a quorum of only *two* commissioners for a period of one year in order to facilitate implementation of the act's many mandates for new regulations.
- Bans *industry-sponsored travel* by CPSC commissioners and staff, and authorizes a travel budget to address the increasingly global market for consumer products.

Background of the Consumer Product Safety Commission

Congress created the U.S. Consumer Product Safety Commission in 1972 through passage of the Consumer Product Safety Act, 16 U.S.C. §§ 2051-5084. The CPSC has broad regulatory powers over manufacturers, importers, distributors and retailers of consumer products, which include almost any product that consumers may encounter, including those used in schools, residences and recreation, with the exception of items regulated by other federal agencies, such as food, drugs, medical devices, cosmetics, motor vehicles, aircraft, boats, firearms and tobacco.

The CPSC's mandate is to reduce the incidence of death and injuries caused by defective products, and it carries out that mandate through various means, including market surveillance, analyzing accident data, investigating accidents and consumer complaints, developing safety standards and regulations, and controlling all aspects of product recalls. Voluntary reporting of potentially hazardous products by manufacturers, importers, distributors and retailers is a cornerstone of the Commission's regulatory scheme, and multimillion-dollar penalties have been imposed upon companies that have failed to file accurate and timely reports with the CPSC.

The CPSC has maintained a pro-consumer stance, even through successive Republican administrations. Recent announcements by the Obama administration of appointments to two open commissioner positions, if confirmed by the Senate, are expected to move the agency's focus further to the left. Inez Moore Tenenbaum, a former public interest lawyer, South Carolina's State Superintendent of Education and a major Obama fundraiser, has been nominated to serve as chair of the CPSC; Robert S. Adler, a long-time board member of Consumers Union and a law professor at the University of North Carolina, has been nominated as a commissioner

Every company involved in making, selling, importing or distributing consumer products for the US market must have a working knowledge of the CPSC and its regulations regarding product safety, recalls and reporting. Importers and private labelers have substantially the same legal obligations as manufacturers in regard to reporting potential hazards and recalling defective products, and product safety issues often have global implications. The majority of recalled products in recent years have been imports, and the CPSC has entered into agreements with its counterpart agencies in most of America's major trading partner countries to share data, engage in joint enforcement efforts and pursue common goals regarding consumer product safety.

Companies risk extra expense, financial losses and litigation exposure from the manufacture, importation or sale of non-compliant products. Recall and product liability risks can be minimized with procedures that reduce occurrences, identify potential problems early, allow for rapid mobilization and correction, and transfer risk to appropriate parties.

About the Author and Duane Morris LLP

Paul Rosenlund is a partner in the San Francisco office of Duane Morris LLP. His practice emphasizes advising and representing clients in product liability, product safety and risk management, unfair competition, class action, false advertising, intellectual property, antitrust and commercial matters. He serves as national or regional counsel for many product manufacturers and distributors, and he is chair of the firm's Product Safety, Compliance, and Recalls practice group. This group is composed of lawyers from diverse offices and practices to form an integrated product safety, compliance and recall practice with a global reach.

Duane Morris lawyers advise and represent foreign and domestic manufacturers, brand owners, importers, distributors and retailers of consumer products, food, drugs, motor vehicles and medical devices. They assist clients in developing and implementing product recalls and product safety initiatives and risk management programs, as well as handling product liability litigation, on a local, national and worldwide basis; they regularly advise and represent clients involving reporting, recall and penalty proceedings before the U.S. Consumer Product Safety Commission, the U.S. Food and Drug Administration and other state and federal agencies.

The Duane Morris Product Safety, Compliance, and Recalls Practice Group is actively advising clients regarding the Consumer Product Safety Improvement Act of 2008 and its impact upon their operations, and is working with them to develop compliance tools and programs. Our compliance advice can cover a wide range of topics, and is unique to each client's circumstances and products, but may cover any or all of the following topics:

- Identifying CPSC regulations that apply to the company's products, and determining when and how each regulation must be implemented;

Consumer Product Safety Improvement Act of 2008
15 May 2009
Page 21

- Developing systems of documenting compliance with CPSC regulations, including testing and inspections (internal and third party) and conformity certificates;
- Import, export and customs issues;
- Communicating with customers, as well as with subcontractors and suppliers, regarding the parties' mutual expectations on product safety and CPSC compliance, and negotiating terms for warranties, indemnities, insurance and other risk management matters;
- Training employees and industry groups regarding product safety and risk management issues;
- Communicating with CPSC management and compliance staff regarding proposed regulations and to obtain rulings and interpretations on a variety of compliance issues, including exemptions from CPSIA testing requirements and exclusions from CPSIA lead limits;
- Advising companies regarding possible reporting obligations to the CPSC under Sections 15 and 37 of the Consumer Product Safety Act and preparing and presenting product hazard reports as appropriate; and
- Advising companies regarding possible obligations to recall products, negotiating the terms of recalls with CPSC compliance staff, advising clients regarding logistics, public relations and other issues that arise in product recalls, and assisting clients with international compliance issues when their products are distributed in multiple countries.

Duane Morris attorneys also have strong experience defending class action and individual lawsuits related to consumer protection laws, and should the need arise, our White-Collar Criminal Defense, Corporate Investigations and Regulatory Compliance team is composed of criminal defense lawyers (including former federal prosecutors) highly skilled in representing individuals and corporations facing state and/or federal allegations of criminal and professional misconduct, as well as managing high profile internal investigations, corporate compliance, whistleblower and *qui tam* issues.

Duane Morris LLP, among the 100 largest law firms in the world, is a full-service firm of more than 700 attorneys in 27 offices across the United States and in England, Singapore and Vietnam. In addition to legal services, Duane Morris has independent affiliates employing approximately 100 professionals engaged in other disciplines. With offices in major markets, and as part of an international network of independent law firms, Duane Morris represents clients across the United States and around the world.

Consumer Product Safety Improvement Act of 2008
15 May 2009
Page 22

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**The Consumer Product Safety Improvement
Act of 2008:
Compliance Strategies for Manufacturers,
Importers and Retailers in an Uncertain
Regulatory Environment**

Peter L. Winik

Global Co-Chair, Product Liability and Mass Torts Practice
Latham & Watkins LLP

LATHAM & WATKINS

Introduction

- The CPSIA was enacted on August 14, 2008, with various provisions going into effect on a rolling basis
- Its provision cover a wide range of products, with many key provisions focused on children's products, children's toys, and childcare articles
- Key provisions include new lead in surface coating and substrate lead limits, phthalate limits, testing and certification requirements, and greatly increased civil and criminal penalties

What Products Does the CPSIA Cover?

Key definitions include:

- The CPSIA covers a wide range of products
- Provisions of the CPSIA in many instances apply to statutorily defined categories of products, such as children's products, children's toys, etc.

Children's Product	A "consumer product designed or intended primarily for children 12 years or younger "
Children's Toy	Products "designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays "
Child Care Article	"Designed or intended by the manufacturer to facilitate sleep or the feeding of children 3 and younger or to help such children with sucking and teething "

What Products Does the CPSIA Cover? (*cont'd*)

- The products covered vary depending on provision, with regulations applying to categories of products such as children's products, children's toys, etc.

CPSIA Provision	Applies to
More stringent lead in surface coating limit	Toys and other articles intended for use by children
New limits on phthalates	Children's toys and child care articles
New limits on substrate lead	Children's products
Tracking Labels	Children's products
Third Party Testing and Certification	Children's products
General Conformity Certification	Every product subject to a CPSC-enforced regulation
Durable Nursery Product Standards	Cribs, high chairs, play yards, bath seats, baby gates, strollers, walkers, swings and toddler beds

What Products Does the CPSIA Cover? (*cont'd*)

- Other provisions, such as enhanced penalties, state attorneys general enforcement, and whistleblower protections apply more generally to all products subject to CPSC regulation

Testing and Certification

- The CPSIA imposes two types of testing and certification requirements
 - General Conformity Certification based on internal testing
 - Third Party Certification based on third party testing
- The CPSC has issued a stay of enforcement for most of the testing and certification requirements contained in the CPSIA
 - The stay will remain in effect until at least February 10, 2010
 - Applies to both general conformity and third party certification

Testing and Certification (*cont'd*)

- Stay applies to testing and certification requirements only, not the underlying substantive requirements
- The stay does not apply to some standards, such as lead content in paint for children's products, lead content of metal components of children's metal jewelry, crib and pacifier requirements, etc.

General Conformity Certification

- “Every manufacturer of *a product* which is subject to a consumer product safety rule under this Act or similar rule, ban, standard, or regulation under any other Act enforced by the Commission and which is imported for consumption or warehousing or distributed in commerce...
 - shall issue a certificate which shall certify, based on a *test of each product* or upon *a reasonable testing program*, that such product complies with all rules, bans, standards, or regulations applicable to the product . . .”
- Required for *all products* subject to CPSC-enforced regulations

General Conformity Certification (*cont'd*)

- Standards currently or eventually requiring general certification testing include:
 - FHSA regulations not subject to third-party testing requirements (e.g. bicycle standards)
 - Poison prevention packaging
 - Fabric Flammability

Third Party Testing

- “*Before importing* for consumption or warehousing or *distributing in commerce* any *children’s product* that is subject to a children’s product safety rule, every *manufacturer* of such children’s product . . . shall
 - Submit *sufficient samples* of the children’s product, or samples that are *identical in all material respects* to the product, to a *third party conformity assessment body* accredited under paragraph (3) to be tested for compliance with such children’s product safety rule; and
 - Based on such testing, *issue a certificate* that certifies that such children’s product complies with the children’s product safety rule based on the assessment of a third party conformity assessment body accredited to conduct such tests.”

Third Party Testing (*cont'd*)

- Required only for *children's products* subject to children's product safety rule
- Standards currently or eventually requiring third party testing include
 - Lead in paint
 - Total lead content
 - Small parts
 - Cribs and pacifiers
 - Phthalates
 - ASTM F963

Greater Transparency and Public Disclosure

- The CPSIA contains a number of provisions that will increase public access to information and disclosure of product safety issues to the public
- The CPSC will establish a searchable online public database of non-confidential information by August 2010, including at a minimum reports of harm from consumer products and notices of recalls and corrective actions

Greater Transparency and Public Disclosure (*cont'd*)

- Streamlines the FOIA process for consumer product safety information and allows for expedited consideration of requests where the public health and safety so require
- New whistleblower protections will protect employees of manufacturers, private labelers, distributors, and retailers of consumer products from firing or other retaliation for reporting, testifying about, or failing to participate in activity that they reasonably believe violates a consumer product safety rule

Greater Transparency and Public Disclosure (*cont'd*)

- Manufacturers of durable nursery products must provide for registration of such products and maintain contact information of registrants, as well as permanently place the manufacturer name and contract information, model name and number, and the date of manufacture on each product
- Manufacturers of children's products must place permanent, distinguishing marks on product and packaging to enable the manufacturer and the consumer to determine manufacturer, location, and date of production

Changes in Enforcement and Penalties

- The CPSIA significantly alters the enforcement and penalty framework for violations of CPSC-enforced regulations
 - Increased civil and criminal penalties
 - Enforcement by state Attorneys General



Increased Civil Penalties

- Increased penalties for violations of the Consumer Products Safety Act (CPSA), Federal Hazardous Substances Act (FHSA), Flammable Fabrics Act (FFA)
- Additional factors to be considered:
 - “nature, extent, and gravity of the violation”
 - “including how to mitigate undue adverse economic impacts on small businesses” and
 - “other factors as appropriate”
- Effective August 14, 2009 *or* upon publication of the Commission’s interpretation of the penalty factors – whichever date is earliest

Old Penalty \$5,000	New Penalty \$100,000
Old Cap \$1,825,000	New Cap \$15,000,000

Increased Criminal Penalties

- Increases Criminal Penalties for violations of §19 of the Consumer Products Safety Act (CPSA), §5(a) of the Federal Hazardous Substances Act (FHSA) & §3 or §8(b) of the Flammable Fabrics Act (FFA)
- Penalties include imprisonment of no more than 5 years for a *knowing* and *willful* violation, a monetary fine or both
- The CPSIA removes the requirement that the CPSC give notice of violations as a prerequisite to criminal liability
- Asset forfeiture “associated with the violation” also now possible, in addition to other penalties

Old Penalty	New Penalty
Up to \$50,000	Up to \$250,000 (individual), \$500,000 (company) or 2x “gross pecuniary gain”
1 year imprisonment	5 years imprisonment

State Attorneys General Enforcement Powers

- State Attorneys General now have authority to enforce certain federal product safety laws
- Able to sue in federal court to enforce various provisions of the Act
 - Stop the sale of products that violate safety standards, have been recalled or banned, lack proper certifications or tracking labels, etc.
 - Do NOT have power to sue regarding notification requirements or other provisions relating to notification and other interactions with CPSC

State Attorneys General Enforcement Powers (*cont'd*)

- Injunctive relief only; no monetary damages
- Must provide notice to CPSC (unless addressing a “substantial product hazard”)
- Cannot sue if action is already pending by the United States, unless addressing sale of banned products or products that do not meet relevant standards (concurrent suits thus possible)
- No specific attorney’s fees provision

Enhanced Recall Authority

- The CPSIA grants the CPSC greater authority over product recalls
- The CPSC will formulate uniform guidelines outlining required content for recall notices
- Broadens CPSC's ability to order a recall

Enhanced Recall Authority (*cont'd*)

- Increases CPSC options when it determines recall enforcement is necessary
 - Under the CPSIA, the CPSC, rather than the manufacturer, may determine whether the manufacturer must repair, refund, or replace the affected product
- Grants the CPSC the authority to request names and contact information for entities in the supply chain of affected consumer products

Increased Resources for the CPSC

- The CPSIA provides for increased funding to the CPSC for fiscal years 2010 to 2014
- Promulgating regulations pursuant to the CPSIA continues to consume significant CPSC time and resources
- The CPSC continues to find itself under funded and must prioritize its enforcement goals

The CPSIA and Products Litigation

- New standards set by government=new standards for litigation
- Stepped up enforcement could lead to more follow-on class action and products liability litigation
- Increased public access to product safety information could lead to an increase in product liability litigation

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Client Alert

Latham & Watkins Litigation Department
Products Liability & Mass Torts Group

Consumer Product Safety Commission Issues Stay of Product Testing and Certification Requirements

Introduction

The US Consumer Product Safety Commission (the Commission) has issued a stay of enforcement of some of the testing and certification requirements of the Consumer Product Safety Improvement Act of 2008 (CPSIA). Knowing about this stay is important for manufacturers and importers of CPSC-regulated products, particularly manufacturers and importers of products that may be considered children's products.

A One-Year Stay of Third-Party Testing and Certification Requirements

On January 30, 2008, the Commission voted unanimously (2-0) to issue a one-year stay of enforcement that will become effective beginning February 10, 2009, the date on which third-party testing and certification requirements for total lead content and phthalate limits were scheduled to go into effect. It will remain in effect until at least February 10, 2010, when the Commission will take a vote to decide whether to terminate the stay.

Though narrow in scope, the stay will provide relief from some testing and certification requirements and

related costs to manufacturers. The most considerable impact of this stay relates to the third-party testing and certification regulations for total (substrate) lead content limits and phthalate limits that were scheduled to take effect on a rolling basis, beginning on February 10 when general conformity certificate requirements for these limits were to go into effect. As a result of the stay, manufacturers will not be required to issue any certificates of compliance—third-party testing-based or otherwise—with either the total (substrate) lead and phthalate limits during the duration of the stay. Nor will children's products be subject to the third-party testing requirements for the new total (substrate) lead limits, and children's toys will not have to undergo third-party testing for the new phthalate limits as was originally to be required later this year.¹

It is important to note that, while the Commission has stayed these testing and certification requirements, it has not stayed the underlying requirements themselves. Thus, although a product may be sold without testing and certification regarding total lead content or phthalates, the product still must still comply with those limits beginning February 10. For example, a children's product may still be sold

"Though the US Consumer Product Safety Commission's stay provides temporary relief from costs associated with certain testing and certification requirements, manufacturers and retailers must still comply with the underlying requirements going into effect February 10, 2009."

after February 10 without a certificate of compliance for the total lead limit; however, that product would still be a banned substance if it exceeds the 600ppm lead content limit. As explained by Chairwoman Nord in a written statement, the stay is meant to give temporary relief to manufacturers who would otherwise have to incur substantial testing costs to comply with the law, although, it does not provide relief from having to comply with the underlying lead content and phthalate requirements that will soon go into effect.

The stay also does not halt or delay implementation of the testing and certification requirements relating to lead content in paint for children's products manufactured after December 21, 2008, lead content of metal components of children's metal jewelry manufactured after March 23, 2009, small parts of children's products manufactured after February 15, 2009, and any requirements applicable to cribs and pacifiers manufactured after January 20, 2009.

Nor does the stay change the way in which the rules will be applied to existing inventory; although the CPSC General Counsel has issued guidance that the phthalates limits do not apply to products manufactured before February 10, the total (substrate) lead limit does. In line with this guidance, any children's product sold beginning February 10, 2009 must comply with the new lead limit, regardless of when the product was manufactured. The extent to which retailers will take the cue from the CPSC's action and relax their compliance testing requirements remains to be seen. Similarly, state attorneys general—who have enforcement authority under the new statute—have not indicated whether they will adhere to the CPSC's newly issued testing stay.

Conclusion

Though the US Consumer Product Safety Commission's stay provides temporary relief from costs associated with certain testing and certification requirements, manufacturers and retailers must still comply with the underlying requirements going into effect February 10, 2009. Uncertainties remain concerning the full impact of this recent action. Manufacturers, importers and retailers should continue to monitor Commission and Congressional action closely on these issues.

Endnote

¹ It also does not apply to: testing and certification requirements that were in place prior to August 14, 2008, including requirements for automatic residential garage door openers, bicycle helmets, lawnmowers, mattresses, etc; certain certifications of compliance required for All-Terrain Vehicles; any voluntary guarantees provided for in the Flammable Fabrics Act; or any certifications required based on the requirements of the Virginia Graeme Baker Pool & Spa Safety Act

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US Congress Passes Landmark Product Safety Legislation

Introduction

The United States Congress took a major step towards stricter consumer products regulation and enforcement in late July, with the passage of the Consumer Product Safety Improvement Act of 2008 (the Act). The legislation follows the recall of more than 45 million products (primarily children's products) in 2007, a year some have termed "the year of the recall." As described more fully in this *Client Alert*, the Act creates stricter safety standards for consumer products (particularly children's products), substantially enhances enforcement mechanisms for consumer product safety rules, increases potential criminal and civil penalties associated with violations, empowers state Attorneys General to enforce the statute, provides whistleblower protection for reporters of alleged consumer product safety violations, and gives additional funding and authority to the Consumer Product Safety Commission (CPSC).

Changes to the Substantive Standards

The Act tightens federal regulation of lead and phthalates in consumer products—features of the legislation that have drawn significant media attention—and otherwise tightens product safety standards. The Act imposes tremendous burdens on the

CPSC to promulgate implementing regulations on an ambitious time schedule.

Children's Products

Lead

In recent years a number of states have enacted restrictions on lead in children's products that are far tougher than existing federal standards. The Act responds to these developments by providing tougher limits on lead in paint and for surface and substrate lead in children's products. The Act decreases the amount of lead allowed in paint from the current .06 percent to the new limit of .0009 percent. The Act also limits the amount of lead in any children's product to 600 ppm at 180 days after enactment of the new law, 300 ppm at one year after enactment and 100 ppm three years after the enactment date. The Act anticipates that the CPSC will review this standard and revise it downward if technologically feasible.

In an important departure from certain state statutes, inaccessible component parts are not subject to the restriction, and the CPSC is given one year under the Act to engage in rulemaking regarding how this exception is applied. The CPSC can also exclude certain materials or products if it determines that they do not result in lead absorption and do not cause other adverse effects to human health.

"Manufacturers, importers, distributors and retailers of consumer products would be well advised to pay close attention to the legislation and assess its impact on their business."

These new regulations will likely preempt the numerous conflicting state lead laws under the existing preemption framework for consumer product safety standards, but it is impossible to determine in advance how state governments and the courts will apply preemption in this context.

Phthalates

The Act also regulates phthalates, chemicals frequently used to soften plastics and make them more durable. The Act bans three specific phthalates¹ in concentrations greater than 0.1 percent, beginning 180 days after enactment. An additional three phthalates² are also prohibited pending further study into their potential harmful effects. Notably, although this portion of the Act likely preempts dissimilar state regulations regulating these six phthalates in children's products, the Act specifically disavows preemption as to any other phthalates.

New Safety Standards

Durable infant and toddler products will also be subjected to new substantive safety standards. The Act would require the CPSC either to adopt current voluntary standards as mandatory or promulgate new, more stringent standards within one year of the date of enactment. Cribs are specifically targeted; and liability for nonconforming cribs is extended to vendors of cribs in addition to manufacturers. The Act also makes ASTM Voluntary Standard F963-07, a previously voluntary standard for toys, mandatory, and directs the CPSC to conduct periodic reviews and implement a more stringent standard if such is required.

Third Party Testing

The Act mandates independent third-party testing of all products subject to children's product safety rules. Manufacturers must submit samples to accredited testing entities and receive certification of compliance with the applicable product safety rules before

they can import, warehouse or distribute any children's product. Because there is currently no system of accreditation, the CPSC is to promulgate accreditation procedures for testing entities. This rulemaking is to take place, at the latest, within 10 months following enactment (with earlier deadlines for accreditation to test for certain products and standards, such as three months for the lead standard). All accredited assessment bodies are to be independent and remain uninfluenced by the manufacturer.

Labeling and Registration

In order to aid in the event of recall, the Act requires manufacturers of children's products to affix tracking labels to their goods. In addition to the new tracking labels, the CPSC is directed to issue a new registration rule for durable infant and toddler products that requires manufacturers to provide customers with postage-paid registration forms, maintain a registry of all consumers who have registered, and to affix manufacturer contact and product information permanently to such products.

Advertising

The Act also imposes new requirements for advertisements of children's products that are subject to safety rules. For example, all advertisements that provide a direct means for purchase³ of certain children's toys and games would need to include prominently displayed cautionary statements regarding the potential hazards that they may pose. This duty also extends to retailers, though they need only request the relevant cautionary statement from a manufacturer in order to satisfy it.

Import/Export Provisions

In addition to the new regulations regarding children's products, the Act imposes new substantive restrictions on the import and export of non-conforming products. Companies may be prevented

from exporting products that are not in compliance with the applicable product safety rules unless the receiving countries have given their consent to accepting the products. As for non-compliant products that are imported into this country, the Act establishes the procedures by which products refused admission will be destroyed unless the owner has applied instead for their export. Additionally, manufacturers of imported products are subjected to new recordkeeping and inspection provisions. The rights to manufacture for sale, offer for sale, distribute and import these goods are conditioned upon compliance with these new provisions.

New Enforcement Provisions

The Act also makes several important changes with regard to consumer product safety enforcement.

State Attorney General Enforcement Ability

One of the most significant provisions of the Act authorizes state Attorneys General to bring actions in federal court on behalf of citizens for substantive safety-related violations, including the manufacture, sale, distribution or importation of any product that violates a safety standard or is a banned hazardous product, failure to comply with the CPSC's requirements regarding a mandatory recall, and failure to comply with product certification and labeling requirements. Notably, the provisions do not allow state enforcement of provisions regarding CPSC reporting requirements.

The Attorney General must provide the CPSC with 30-days notice before filing suit, and the CPSC has a right to intervene at any stage in such cases. An exception to the notice requirement exists when the state Attorney General believes the action is necessary to protect consumers from a substantial product hazard.

An Increase in Civil and Criminal Penalties

Another major provision of the Act is the increase in maximum civil penalties from US \$1.25 million to US \$15 million, to take effect within a year of the date of enactment. The Act also codifies additional factors to be considered by the CPSC or a court in assessing a penalty, including: the nature, extent and gravity of the violation; how to mitigate undue economic impacts on small businesses; and a catch-all ("other factors as appropriate").

Criminal penalties are also increased. First, the maximum term of imprisonment for willful violation is increased from one year to five years. The maximum fine is increased from US \$50,000 to a maximum of either (a) US \$250,000 (individual) or US \$500,000 (company), or (b) twice the pecuniary gain from the violation. Criminal liability for directors, officers and agents is no longer contingent on the issuance of a notice from the CPSC. Lastly, criminal violations now may entail asset forfeiture in addition to any fine or prison sentence.

Whistleblower Protection

The Act also institutes whistleblower protection for any employee who reports or refuses to engage in what he or she reasonably believes to be a violation of the consumer product safety laws. There is no bounty provision, and the employee's remedies include reinstatement of the employee with back pay, compensatory damages and legal fees. This provision applies to employees at all stages of manufacture and sale, including those working for retailers, and will be administered by the Secretary of Labor. A provision that awards companies \$1,000 in attorney's fees for complaints deemed frivolous is also included.

Additional CPSC Authority and Administrative Changes

In addition to attempting to strengthen the CPSC generally through a significantly increased budget and other administrative changes, the Act gives the CPSC additional substantive authority. Most notable are the CPSC's increased authority over how a mandatory recall is performed and authority to share information with other governmental agencies and with the public.

CPSC's Authority Over Recalls

The Act grants the CPSC greater authority with regard to product recalls by broadening the language authorizing CPSC to order a recall, and increasing the options available to the CPSC when it determines that recall enforcement is necessary. When it is determined that a hazard exists and the CPSC requires a mandatory recall, the Act will entrust the CPSC with the decision of whether the manufacturer repairs, refunds or replaces the product. In the past this decision was left to manufacturers. The CPSC is also directed to formulate uniform guidelines for the substantive content of recall notices. Although the exact details are left to the CPSC, the Act mandates that the guidelines require that the notice include the number of affected units, the dates during which they were manufactured, the primary retailers of the products and a description of the products. Manufacturers must also disclose the identified hazard, the remedies available to consumers and an account of the injuries and deaths that have occurred as a result of the hazard.

The Act would also give the CPSC the authority to request the names and contact information of all entities involved in the supply chain for consumer products. This covers all parties involved in importation, distribution and sale of a product.

Sharing of Information

Another provision allows the CPSC to share confidential information it receives from manufacturers and others with state, local and foreign governments and other federal agencies, under a memorandum of understanding or other safeguards that ensure that the other entity will keep that information confidential. Additional information sharing requirements extend to voluntary recalls, as well, as the CPSC is required to provide notice to state health authorities. The CPSC is also required to create a publicly accessible database of non-confidential information that would allow anyone to view, for example, consumer complaints via the Internet.

Conclusion

The Consumer Product Safety Improvement Act of 2008 effects a broad and sweeping overhaul of our consumer product safety laws. Manufacturers, importers, distributors and retailers of consumer products would be well advised to pay close attention to the legislation and assess its impact on their business.

Currently, the Act has been passed by both houses of Congress and is awaiting the President's signature. Despite initial reports that there could be a veto, the President now appears ready to sign the Act into law.

* * *

Latham & Watkins LLP has one of the world's leading international product safety practices with attorneys in the United States, Asia and Europe. An international team of Latham & Watkins attorneys has managed worldwide recalls that have been implemented in more than 50 countries and that have involved numerous regulatory authorities around the world. Latham & Watkins attorneys counsel clients and handle regulatory and investigative actions, litigation, worldwide recalls, product liability lawsuits and class actions.

Peter Winik, Global Chair of the Product Liability and Mass Torts Practice Group and a lawyer with decades of experience in CPSC-related matters, will host an upcoming webcast to outline the new legal obligations and describe the types of compliance programs that manufacturers, retailers and importers should have in place in order to ensure that the new safety standards are being met. For more information on the program, please contact Jennifer Sugiyama (jennifer.sugiyama@lw.com).

Endnotes

- ¹ The three are di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP) and benzyl butyl phthalate (BBP).
- ² These include diisononyl phthalate (DINP), diisodecyl phthalate (DIDP) and di-n-octyl phthalate (DnOP).
- ³ Most notably, this would include both Internet Web sites that allow for direct purchase and paper catalogues. Internet sites would need to comply within 120 days of the date of enactment, while catalogues and other printed materials must comply within 180 days.

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One Hundred Tenth Congress
of the
United States of America

AT THE SECOND SESSION

*Begun and held at the City of Washington on Thursday,
the third day of January, two thousand and eight*

An Act

To establish consumer product safety standards and other safety requirements for children's products and to reauthorize and modernize the Consumer Product Safety Commission.

*Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Consumer Product Safety Improvement Act of 2008”.

(b) **TABLE OF CONTENTS.**—The table of contents for this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. References.
- Sec. 3. Authority to issue implementing regulations.

TITLE I—CHILDREN'S PRODUCT SAFETY

- Sec. 101. Children's products containing lead; lead paint rule.
- Sec. 102. Mandatory third party testing for certain children's products.
- Sec. 103. Tracking labels for children's products.
- Sec. 104. Standards and consumer registration of durable nursery products.
- Sec. 105. Labeling requirement for advertising toys and games.
- Sec. 106. Mandatory toy safety standards.
- Sec. 107. Study of preventable injuries and deaths in minority children related to consumer products.
- Sec. 108. Prohibition on sale of certain products containing specified phthalates.

TITLE II—CONSUMER PRODUCT SAFETY COMMISSION REFORM

Subtitle A—Administrative Improvements

- Sec. 201. Reauthorization of the Commission.
- Sec. 202. Full Commission requirement; interim quorum; personnel.
- Sec. 203. Submission of copy of certain documents to Congress.
- Sec. 204. Expedited rulemaking.
- Sec. 205. Inspector general audits and reports.
- Sec. 206. Industry-sponsored travel ban.
- Sec. 207. Sharing of information with Federal, State, local, and foreign government agencies.
- Sec. 208. Employee training exchanges.
- Sec. 209. Annual reporting requirement.

Subtitle B—Enhanced Enforcement Authority

- Sec. 211. Public disclosure of information.
- Sec. 212. Establishment of a public consumer product safety database.
- Sec. 213. Prohibition on stockpiling under other Commission-enforced statutes.
- Sec. 214. Enhanced recall authority and corrective action plans.
- Sec. 215. Inspection of firewalled conformity assessment bodies; identification of supply chain.
- Sec. 216. Prohibited acts.
- Sec. 217. Penalties.
- Sec. 218. Enforcement by State attorneys general.
- Sec. 219. Whistleblower protections.

H. R. 4040—2

Subtitle C—Specific Import-Export Provisions

- Sec. 221. Export of recalled and non-conforming products.
- Sec. 222. Import safety management and interagency cooperation.
- Sec. 223. Substantial product hazard list and destruction of noncompliant imported products.
- Sec. 224. Financial responsibility.
- Sec. 225. Study and report on effectiveness of authorities relating to safety of imported consumer products.

Subtitle D—Miscellaneous Provisions and Conforming Amendments

- Sec. 231. Preemption.
- Sec. 232. All-terrain vehicle standard.
- Sec. 233. Cost-benefit analysis under the Poison Prevention Packaging Act of 1970.
- Sec. 234. Study on use of formaldehyde in manufacturing of textile and apparel articles.
- Sec. 235. Technical and conforming changes.
- Sec. 236. Expedited judicial review.
- Sec. 237. Repeal.
- Sec. 238. Pool and Spa Safety Act technical amendments.
- Sec. 239. Effective dates and Severability.

SEC. 2. REFERENCES.

(a) DEFINED TERMS.—As used in this Act—

(1) the term “appropriate Congressional committees” means the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate; and

(2) the term “Commission” means the Consumer Product Safety Commission.

(b) CONSUMER PRODUCT SAFETY ACT.—Except as otherwise expressly provided, whenever in this Act an amendment is expressed as an amendment to a section or other provision, the reference shall be considered to be made to a section or other provision of the Consumer Product Safety Act (15 U.S.C. 2051 et seq.).

SEC. 3. AUTHORITY TO ISSUE IMPLEMENTING REGULATIONS.

The Commission may issue regulations, as necessary, to implement this Act and the amendments made by this Act.

TITLE I—CHILDREN’S PRODUCT SAFETY

SEC. 101. CHILDREN’S PRODUCTS CONTAINING LEAD; LEAD PAINT RULE.

(a) GENERAL LEAD BAN.—

(1) TREATMENT AS A BANNED HAZARDOUS SUBSTANCE.—Except as expressly provided in subsection (b) beginning on the dates provided in paragraph (2), any children’s product (as defined in section 3(a)(16) of the Consumer Product Safety Act (15 U.S.C. 2052(a)(16))) that contains more lead than the limit established by paragraph (2) shall be treated as a banned hazardous substance under the Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.).

(2) LEAD LIMIT.—

(A) 600 PARTS PER MILLION.—Except as provided in subparagraphs (B), (C), (D), and (E), beginning 180 days after the date of enactment of this Act, the lead limit referred to in paragraph (1) is 600 parts per million total lead content by weight for any part of the product.

(B) 300 PARTS PER MILLION.—Except as provided by subparagraphs (C), (D), and (E), beginning on the date

that is 1 year after the date of enactment of this Act, the lead limit referred to in paragraph (1) is 300 parts per million total lead content by weight for any part of the product.

(C) 100 PARTS PER MILLION.—Except as provided in subparagraphs (D) and (E), beginning on the date that is 3 years after the date of enactment of this Act, subparagraph (B) shall be applied by substituting “100 parts per million” for “300 parts per million” unless the Commission determines that a limit of 100 parts per million is not technologically feasible for a product or product category. The Commission may make such a determination only after notice and a hearing and after analyzing the public health protections associated with substantially reducing lead in children’s products.

(D) ALTERNATE REDUCTION OF LIMIT.—If the Commission determines under subparagraph (C) that the 100 parts per million limit is not technologically feasible for a product or product category, the Commission shall, by regulation, establish an amount that is the lowest amount of lead, lower than 300 parts per million, the Commission determines to be technologically feasible to achieve for that product or product category. The amount of lead established by the Commission under the preceding sentence shall be substituted for the 300 parts per million limit under subparagraph (B) beginning on the date that is 3 years after the date of enactment of this Act.

(E) PERIODIC REVIEW AND FURTHER REDUCTIONS.—The Commission shall, based on the best available scientific and technical information, periodically review and revise downward the limit set forth in this subsection, no less frequently than every 5 years after promulgation of the limit under subparagraph (C) or (D) to require the lowest amount of lead that the Commission determines is technologically feasible to achieve. The amount of lead established by the Commission under the preceding sentence shall be substituted for the lead limit in effect immediately before such revision.

(b) EXCLUSION OF CERTAIN MATERIALS OR PRODUCTS AND INACCESSIBLE COMPONENT PARTS.—

(1) CERTAIN PRODUCTS OR MATERIALS.—The Commission may, by regulation, exclude a specific product or material from the prohibition in subsection (a) if the Commission, after notice and a hearing, determines on the basis of the best-available, objective, peer-reviewed, scientific evidence that lead in such product or material will neither—

(A) result in the absorption of any lead into the human body, taking into account normal and reasonably foreseeable use and abuse of such product by a child, including swallowing, mouthing, breaking, or other children’s activities, and the aging of the product; nor

(B) have any other adverse impact on public health or safety.

(2) EXCEPTION FOR INACCESSIBLE COMPONENT PARTS.—

(A) IN GENERAL.—The limits established under subsection (a) shall not apply to any component part of a children’s product that is not accessible to a child through

normal and reasonably foreseeable use and abuse of such product, as determined by the Commission. A component part is not accessible under this subparagraph if such component part is not physically exposed by reason of a sealed covering or casing and does not become physically exposed through reasonably foreseeable use and abuse of the product. Reasonably foreseeable use and abuse shall include to, swallowing, mouthing, breaking, or other children's activities, and the aging of the product.

(B) INACCESSIBILITY PROCEEDING.—Within 1 year after the date of enactment of this Act, the Commission shall promulgate a rule providing guidance with respect to what product components, or classes of components, will be considered to be inaccessible for purposes of subparagraph (A).

(C) APPLICATION PENDING CPSC GUIDANCE.—Until the Commission promulgates a rule pursuant to subparagraph (B), the determination of whether a product component is inaccessible to a child shall be made in accordance with the requirements laid out in subparagraph (A) for considering a component to be inaccessible to a child.

(3) CERTAIN BARRIERS DISQUALIFIED.—For purposes of this subsection, paint, coatings, or electroplating may not be considered to be a barrier that would render lead in the substrate inaccessible to a child, or to prevent absorption of any lead into the human body, through normal and reasonably foreseeable use and abuse of the product.

(4) CERTAIN ELECTRONIC DEVICES.—If the Commission determines that it is not technologically feasible for certain electronic devices, including devices containing batteries, to comply with subsection (a), the Commission, by regulation, shall—

(A) issue requirements to eliminate or minimize the potential for exposure to and accessibility of lead in such electronic devices, which may include requirements that such electronic devices be equipped with a child-resistant cover or casing that prevents exposure to and accessibility of the parts of the product containing lead; and

(B) establish a schedule by which such electronic devices shall be in full compliance with the limits in subsection (a), unless the Commission determines that full compliance will not be technologically feasible for such devices within a schedule set by the Commission.

(5) PERIODIC REVIEW.—The Commission shall, based on the best available scientific and technical information, periodically review and revise the regulations promulgated pursuant to this subsection no less frequently than every 5 years after the first promulgation of a regulation under this subsection to make them more stringent and to require the lowest amount of lead the Commission determines is technologically feasible to achieve.

(c) APPLICATION WITH ASTM F963.—To the extent that any regulation promulgated by the Commission under this section (or any section of the Consumer Product Safety Act or any other Act enforced by the Commission, as such Acts are affected by this section) is inconsistent with the ASTM F963 standard, such

promulgated regulation shall supersede the ASTM F963 standard to the extent of the inconsistency.

(d) **TECHNOLOGICAL FEASIBILITY DEFINED.**—For purposes of this section, a limit shall be deemed technologically feasible with regard to a product or product category if—

(1) a product that complies with the limit is commercially available in the product category;

(2) technology to comply with the limit is commercially available to manufacturers or is otherwise available within the common meaning of the term;

(3) industrial strategies or devices have been developed that are capable or will be capable of achieving such a limit by the effective date of the limit and that companies, acting in good faith, are generally capable of adopting; or

(4) alternative practices, best practices, or other operational changes would allow the manufacturer to comply with the limit.

(e) **PENDING RULEMAKING PROCEEDINGS TO HAVE NO EFFECT.**—The pendency of a rulemaking proceeding to consider—

(1) a delay in the effective date of a limit or an alternate limit under this section related to technological feasibility,

(2) an exception for certain products or materials or inaccessibility guidance under subsection (b) of this section, or

(3) any other request for modification of or exemption from any regulation, rule, standard, or ban under this Act or any other Act enforced by the Commission,

shall not delay the effect of any provision or limit under this section nor shall it stay general enforcement of the requirements of this section.

(f) **MORE STRINGENT LEAD PAINT BAN.**—

(1) **IN GENERAL.**—Effective on the date that is 1 year after the date of enactment of this Act, the Commission shall modify section 1303.1 of its regulations (16 C.F.R. 1301.1) by substituting “0.009 percent” for “0.06 percent” in subsection (a) of that section.

(2) **PERIODIC REVIEW AND REDUCTION.**—The Commission shall, no less frequently than every 5 years after the date on which the Commission modifies the regulations pursuant to paragraph (1), review the limit for lead in paint set forth in section 1303.1 of title 16, Code of Federal Regulations (as revised by paragraph (1)), and shall by regulation revise downward the limit to require the lowest amount of lead that the Commission determines is technologically feasible to achieve.

(3) **METHODS FOR SCREENING LEAD IN SMALL PAINTED AREAS.**—In order to provide for effective and efficient enforcement of the limit set forth in section 1303.1 of title 16, Code of Federal Regulations, the Commission may rely on x-ray fluorescence technology or other alternative methods for measuring lead in paint or other surface coatings on products subject to such section where the total weight of such paint or surface coating is no greater than 10 milligrams or where such paint or surface coating covers no more than 1 square centimeter of the surface area of such products. Such alternative methods for measurement shall not permit more than 2 micrograms of lead in a total weight of 10 milligrams or less of paint or other surface coating or in a surface area of 1 square centimeter or less.

(4) ALTERNATIVE METHODS OF MEASURING LEAD IN PAINT GENERALLY.—

(A) STUDY.—Not later than 1 year after the date of enactment of this Act, the Commission shall complete a study to evaluate the effectiveness, precision, and reliability of x-ray fluorescence technology and other alternative methods for measuring lead in paint or other surface coatings when used on a children's product or furniture article in order to determine compliance with part 1303 of title 16, Code of Federal Regulations, as modified pursuant to this subsection.

(B) RULEMAKING.—If the Commission determines, based on the study in subparagraph (A), that x-ray fluorescence technology or other alternative methods for measuring lead in paint are as effective, precise, and reliable as the methodology used by the Commission for compliance determinations prior to the date of enactment of this Act, the Commission may promulgate regulations governing the use of such methods in determining the compliance of products with part 1303 of title 16, Code of Federal Regulations, as modified pursuant to this subsection. Any regulations promulgated by the Commission shall ensure that such alternative methods are no less effective, precise, and reliable than the methodology used by the Commission prior to the date of enactment of this Act.

(5) PERIODIC REVIEW.—The Commission shall, no less frequently than every 5 years after the Commission completes the study required by paragraph (4)(A), review and revise any methods for measurement utilized by the Commission pursuant to paragraph (3) or pursuant to any regulations promulgated under paragraph (4) to ensure that such methods are the most effective methods available to protect children's health. The Commission shall conduct an ongoing effort to study and encourage the further development of alternative methods for measuring lead in paint and other surface coating that can effectively, precisely, and reliably detect lead levels at or below the level set forth in part 1303 of title 16, Code of Federal Regulations, or any lower level established by regulation.

(6) NO EFFECT ON LEGAL LIMIT.—Nothing in paragraph (3), nor reliance by the Commission on any alternative method of measurement pursuant to such paragraph, nor any rule prescribed pursuant to paragraph (4), nor any method established pursuant to paragraph (5) shall be construed to alter the limit set forth in section 1303 of title 16, Code of Federal Regulations, as modified pursuant to this subsection, or provide any exemption from such limit.

(7) CONSTRUCTION.—Nothing in this subsection shall be construed to affect the authority of the Commission or any other person to use alternative methods for detecting lead as a screening method to determine whether further testing or action is needed.

(g) TREATMENT AS A REGULATION UNDER THE FHSA.—Any ban imposed by subsection (a) or rule promulgated under subsection (a) or (b) of this section, and section 1303.1 of title 16, Code of Federal Regulations (as modified pursuant to subsection (f)(1) or (2)), or any successor regulation, shall be considered a regulation of the Commission promulgated under or for the enforcement of

section 2(q) of the Federal Hazardous Substances Act (15 U.S.C. 1261(q)).

SEC. 102. MANDATORY THIRD PARTY TESTING FOR CERTAIN CHILDREN'S PRODUCTS.

(a) MANDATORY AND THIRD PARTY TESTING.—

(1) GENERAL CONFORMITY CERTIFICATION.—

(A) AMENDMENT.—Paragraph (1) of section 14(a) (15 U.S.C. 2063(a)) is amended to read as follows:

“(1) GENERAL CONFORMITY CERTIFICATION.—Except as provided in paragraphs (2) and (3), every manufacturer of a product which is subject to a consumer product safety rule under this Act or similar rule, ban, standard, or regulation under any other Act enforced by the Commission and which is imported for consumption or warehousing or distributed in commerce (and the private labeler of such product if such product bears a private label) shall issue a certificate which—

“(A) shall certify, based on a test of each product or upon a reasonable testing program, that such product complies with all rules, bans, standards, or regulations applicable to the product under this Act or any other Act enforced by the Commission; and

“(B) shall specify each such rule, ban, standard, or regulation applicable to the product.”.

(B) EFFECTIVE DATE.—The amendment made by subparagraph (A) shall take effect 90 days after the date of enactment of this Act.

(2) THIRD PARTY TESTING REQUIREMENT.—Section 14(2) (15 U.S.C. 2063(2)) is further amended by redesignating paragraph (2) as paragraph (4) and inserting after paragraph (1) the following:

“(2) THIRD PARTY TESTING REQUIREMENT.—Effective on the dates provided in paragraph (3), before importing for consumption or warehousing or distributing in commerce any children's product that is subject to a children's product safety rule, every manufacturer of such children's product (and the private labeler of such children's product if such children's product bears a private label) shall—

“(A) submit sufficient samples of the children's product, or samples that are identical in all material respects to the product, to a third party conformity assessment body accredited under paragraph (3) to be tested for compliance with such children's product safety rule; and

“(B) based on such testing, issue a certificate that certifies that such children's product complies with the children's product safety rule based on the assessment of a third party conformity assessment body accredited to conduct such tests.

A manufacturer or private labeler shall issue either a separate certificate for each children's product safety rule applicable to a product or a combined certificate that certifies compliance with all applicable children's product safety rules, in which case each such rule shall be specified.

(3) SCHEDULE FOR IMPLEMENTATION OF THIRD PARTY TESTING.—

“(A) GENERAL APPLICATION.—Except as provided under subparagraph (F), the requirements of paragraph (2) shall

apply to any children's product manufactured more than 90 days after the Commission has established and published notice of the requirements for accreditation of third party conformity assessment bodies to assess conformity with a children's product safety rule to which such children's product is subject.

“(B) TIME LINE FOR ACCREDITATION.—

“(i) LEAD PAINT.—Not later than 30 days after the date of enactment of the Consumer Product Safety Improvement Act of 2008, the Commission shall publish notice of the requirements for accreditation of third party conformity assessment bodies to assess conformity with part 1303 of title 16, Code of Federal Regulations.

“(ii) FULL-SIZE CRIBS; NON FULL-SIZE CRIBS; PACIFIERS.—Not later than 60 days after the date of enactment of the Consumer Product Safety Improvement Act of 2008, the Commission shall publish notice of the requirements for accreditation of third party conformity assessment bodies to assess conformity with parts 1508, 1509, and 1511 of such title.

“(iii) SMALL PARTS.—Not later than 90 days after the date of enactment of the Consumer Product Safety Improvement Act of 2008, the Commission shall publish notice of the requirements for accreditation of third party conformity assessment bodies to assess conformity with part 1501 of such title.

“(iv) CHILDREN'S METAL JEWELRY.—Not later than 120 days after the date of enactment of the Consumer Product Safety Improvement Act of 2008, the Commission shall publish notice of the requirements for accreditation of third party conformity assessment bodies to assess conformity with the requirements of section 101(a)(2) of such Act with respect to children's metal jewelry.

“(v) BABY BOUNCERS, WALKERS, AND JUMPERS.—Not later than 210 days after the date of enactment of the Consumer Product Safety Improvement Act of 2008, the Commission shall publish notice of the requirements for accreditation of third party conformity assessment bodies to assess conformity with parts 1500.18(a)(6) and 1500.86(a) of such title.

“(vi) ALL OTHER CHILDREN'S PRODUCT SAFETY RULES.—The Commission shall publish notice of the requirements for accreditation of third party conformity assessment bodies to assess conformity with other children's product safety rules at the earliest practicable date, but in no case later than 10 months after the date of enactment of the Consumer Product Safety Improvement Act of 2008, or, in the case of children's product safety rules established or revised 1 year or more after such date of enactment, not later than 90 days before such rules or revisions take effect.

“(C) ACCREDITATION.—Accreditation of third party conformity assessment bodies pursuant to the requirements established under subparagraph (B) may be conducted

either by the Commission or by an independent accreditation organization designated by the Commission.

“(D) PERIODIC REVIEW.—The Commission shall periodically review and revise the accreditation requirements established under subparagraph (B) to ensure that the requirements assure the highest conformity assessment body quality that is feasible.

“(E) PUBLICATION OF ACCREDITED ENTITIES.—The Commission shall maintain on its Internet website an up-to-date list of entities that have been accredited to assess conformity with children’s product safety rules in accordance with the requirements published by the Commission under this paragraph.

“(F) EXTENSION.—If the Commission determines that an insufficient number of third party conformity assessment bodies have been accredited to permit certification for a children’s product safety rule under the accelerated schedule required by this paragraph, the Commission may extend the deadline for certification to such rule by not more than 60 days.

“(G) RULEMAKING.—Until the date that is 3 years after the Consumer Product Safety Improvement Act of 2008, Commission proceedings under this paragraph shall be exempt from the requirements of sections 553 and 601 through 612 of title 5, United States Code.”.

(3) CONFORMING AMENDMENTS.—Section 14(a)(4) (15 U.S.C. 2063(a)(4)), as redesignated by paragraph (2) of this subsection, is amended—

(A) by striking “required by paragraph (1) of this subsection” and inserting “required under paragraph (1), (2), or (3)”; and

(B) by striking “requirement under paragraph (1)” and inserting “requirement under paragraph (1), (2), or (3)”.

(b) ADDITIONAL REQUIREMENTS; DEFINITIONS.—Section 14 (15 U.S.C. 2063) is further amended by adding at the end the following:

“(d) ADDITIONAL REGULATIONS FOR THIRD PARTY TESTING.—

“(1) AUDIT.—Not later than 10 months after the date of enactment of the Consumer Product Safety Improvement Act of 2008, the Commission shall by regulation establish requirements for the periodic audit of third party conformity assessment bodies as a condition for the continuing accreditation of such conformity assessment bodies under subsection (a)(3)(C).

“(2) COMPLIANCE; CONTINUING TESTING.—Not later than 15 months after the date of enactment of the Consumer Product Safety Improvement Act of 2008, the Commission shall by regulation—

“(A) initiate a program by which a manufacturer or private labeler may label a consumer product as complying with the certification requirements of subsection (a); and

“(B) establish protocols and standards—

“(i) for ensuring that a children’s product tested for compliance with an applicable children’s product safety rule is subject to testing periodically and when there has been a material change in the product’s design or manufacturing process, including the sourcing of component parts;

“(ii) for the testing of random samples to ensure continued compliance;

“(iii) for verifying that a children’s product tested by a conformity assessment body complies with applicable children’s product safety rules; and

“(iv) for safeguarding against the exercise of undue influence on a third party conformity assessment body by a manufacturer or private labeler.

“(e) WITHDRAWAL OF ACCREDITATION.—

“(1) IN GENERAL.—The Commission may withdraw its accreditation or its acceptance of the accreditation of a third party conformity assessment body accredited under this section if the Commission finds, after notice and investigation, that—

“(A) a manufacturer, private labeler, or governmental entity has exerted undue influence on such conformity assessment body or otherwise interfered with or compromised the integrity of the testing process with respect to the certification of a children’s product under this section; or

“(B) such conformity assessment body failed to comply with an applicable protocol, standard, or requirement established by the Commission under subsection (d).

“(2) PROCEDURE.—In any proceeding to withdraw the accreditation of a conformity assessment body, the Commission—

“(A) shall consider the gravity of the conformity assessment body’s action or failure to act, including—

“(i) whether the action or failure to act resulted in injury, death, or the risk of injury or death;

“(ii) whether the action or failure to act constitutes an isolated incident or represents a pattern or practice; and

“(iii) whether and when the conformity assessment body initiated remedial action; and

“(B) may—

“(i) withdraw its acceptance of the accreditation of the conformity assessment body on a permanent or temporary basis; and

“(ii) establish requirements for reaccreditation of the conformity assessment body.

“(3) FAILURE TO COOPERATE.—The Commission may suspend the accreditation of a conformity assessment body if it fails to cooperate with the Commission in an investigation under this section.

“(f) DEFINITIONS.—In this section:

“(1) CHILDREN’S PRODUCT SAFETY RULE.—The term ‘children’s product safety rule’ means a consumer product safety rule under this Act or similar rule, regulation, standard, or ban under any other Act enforced by the Commission, including a rule declaring a consumer product to be a banned hazardous product or substance.

“(2) THIRD PARTY CONFORMITY ASSESSMENT BODY.—

“(A) IN GENERAL.—The term ‘third party conformity assessment body’ means a conformity assessment body that, except as provided in subparagraph (D), is not owned, managed, or controlled by the manufacturer or private

labeler of a product assessed by such conformity assessment body.

“(B) GOVERNMENTAL PARTICIPATION.—Such term may include an entity that is owned or controlled in whole or in part by a government if—

“(i) to the extent practicable, manufacturers or private labelers located in any nation are permitted to choose conformity assessment bodies that are not owned or controlled by the government of that nation;

“(ii) the entity’s testing results are not subject to undue influence by any other person, including another governmental entity;

“(iii) the entity is not accorded more favorable treatment than other third party conformity assessment bodies in the same nation who have been accredited under this section;

“(iv) the entity’s testing results are accorded no greater weight by other governmental authorities than those of other third party conformity assessment bodies accredited under this section; and

“(v) the entity does not exercise undue influence over other governmental authorities on matters affecting its operations or on decisions by other governmental authorities controlling distribution of products based on outcomes of the entity’s conformity assessments.

“(C) TESTING AND CERTIFICATION OF ART MATERIALS AND PRODUCTS.—A certifying organization (as defined in appendix A to section 1500.14(b)(8) of title 16, Code of Federal Regulations (or any successor regulation or ruling)) meets the requirements of subparagraph (A) with respect to the certification of art material and art products required under this section or by regulations prescribed under the Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.).

“(D) FIREWALLED CONFORMITY ASSESSMENT BODIES.—Upon request, the Commission may accredit a conformity assessment body that is owned, managed, or controlled by a manufacturer or private labeler as a third party conformity assessment body if the Commission by order finds that—

“(i) accreditation of the conformity assessment body would provide equal or greater consumer safety protection than the manufacturer’s or private labeler’s use of an independent third party conformity assessment body; and

“(ii) the conformity assessment body has established procedures to ensure that—

“(I) its test results are protected from undue influence by the manufacturer, private labeler or other interested party;

“(II) the Commission is notified immediately of any attempt by the manufacturer, private labeler or other interested party to hide or exert undue influence over test results; and

“(III) allegations of undue influence may be reported confidentially to the Commission.

“(g) REQUIREMENTS FOR CERTIFICATES.—

“(1) IDENTIFICATION OF ISSUER AND CONFORMITY ASSESSMENT BODY.—Every certificate required under this section shall identify the manufacturer or private labeler issuing the certificate and any third party conformity assessment body on whose testing the certificate depends. The certificate shall include, at a minimum, the date and place of manufacture, the date and place where the product was tested, each party’s name, full mailing address, telephone number, and contact information for the individual responsible for maintaining records of test results.

“(2) ENGLISH LANGUAGE.—Every certificate required under this section shall be legible and all content required by this section shall be in the English language. A certificate may also contain the same content in any other language.

“(3) AVAILABILITY OF CERTIFICATES.—Every certificate required under this section shall accompany the applicable product or shipment of products covered by the same certificate and a copy of the certificate shall be furnished to each distributor or retailer of the product. Upon request, the manufacturer or private labeler issuing the certificate shall furnish a copy of the certificate to the Commission.

“(4) ELECTRONIC FILING OF CERTIFICATES FOR IMPORTED PRODUCTS.—In consultation with the Commissioner of Customs, the Commission may, by rule, provide for the electronic filing of certificates under this section up to 24 hours before arrival of an imported product. Upon request, the manufacturer or private labeler issuing the certificate shall furnish a copy to the Commission and to the Commissioner of Customs.

“(h) RULE OF CONSTRUCTION.—Compliance of any children’s product with third party testing and certification or general conformity certification requirements under this section shall not be construed to exempt such children’s product from any requirement that such product actually be in conformity with all applicable rules, regulation, standards, or ban under any Act enforced by the Commission.”

(c) CPSC CONSIDERATION OF EXISTING REQUIREMENTS.—In establishing standards for accreditation of a third party conformity assessment body under section 14(a)(3) of the Consumer Product Safety Act, as added by subsection (a), the Commission may consider standards and protocols for accreditation of such conformity assessment bodies by independent accreditation organizations that are in effect on the date of enactment of this Act, but shall ensure that the protocols, standards, and requirements prescribed under such section 14(a)(3) incorporate, as the standard for accreditation, the most current scientific and technological standards and techniques available.

(d) CONFORMING AMENDMENTS.—Section 14(b) (15 U.S.C. 2063(b)) is amended—

(1) by striking “consumer products which are subject to consumer product safety standards under this Act” and inserting “any product which is subject to a consumer product safety rule under this Act, or a similar rule, regulation, standard, or ban under any other Act enforced by the Commission,”; and

(2) by striking “or testing programs.” and inserting “, unless the Commission, by rule, requires testing by an independent

third party for a particular rule, regulation, standard, or ban, or for a particular class of products.”.

SEC. 103. TRACKING LABELS FOR CHILDREN’S PRODUCTS.

(a) **IN GENERAL.**—Section 14(a) (15 U.S.C. 2063(a)), as amended by section 102 of this Act, is further amended by adding at the end the following:

“(5) Effective 1 year after the date of enactment of the Consumer Product Safety Improvement Act of 2008, the manufacturer of a children’s product shall place permanent, distinguishing marks on the product and its packaging, to the extent practicable, that will enable—

“(A) the manufacturer to ascertain the location and date of production of the product, cohort information (including the batch, run number, or other identifying characteristic), and any other information determined by the manufacturer to facilitate ascertaining the specific source of the product by reference to those marks; and

“(B) the ultimate purchaser to ascertain the manufacturer or private labeler, location and date of production of the product, and cohort information (including the batch, run number, or other identifying characteristic).”.

(b) **LABEL INFORMATION.**—Section 14(c) (15 U.S.C. 2063(c)) is amended by redesignating paragraphs (2) and (3) as paragraphs (3) and (4) and by inserting after paragraph (1) the following:

“(2) The cohort information (including the batch, run number, or other identifying characteristic) of the product.”.

(c) **ADVERTISING, LABELING, AND PACKAGING REPRESENTATION.**—Section 14 (15 U.S.C. 2063) is further amended by adding at the end the following:

“(d) **REQUIREMENT FOR ADVERTISEMENTS.**—No advertisement for a consumer product or label or packaging of such product may contain a reference to a consumer product safety rule or a voluntary consumer product safety standard unless such product conforms with the applicable safety requirements of such rule or standard.”.

SEC. 104. STANDARDS AND CONSUMER REGISTRATION OF DURABLE NURSERY PRODUCTS.

(a) **SHORT TITLE.**—This section may be cited as the “Danny Keysar Child Product Safety Notification Act”.

(b) **SAFETY STANDARDS.**—

(1) **IN GENERAL.**—The Commission shall—

(A) in consultation with representatives of consumer groups, juvenile product manufacturers, and independent child product engineers and experts, examine and assess the effectiveness of any voluntary consumer product safety standards for durable infant or toddler products; and

(B) in accordance with section 553 of title 5, United States Code, promulgate consumer product safety standards that—

(i) are substantially the same as such voluntary standards; or

(ii) are more stringent than such voluntary standards, if the Commission determines that more stringent standards would further reduce the risk of injury associated with such products.

(2) **TIMETABLE FOR RULEMAKING.**—Not later than 1 year after the date of enactment of this Act, the Commission shall

commence the rulemaking required under paragraph (1) and shall promulgate standards for no fewer than 2 categories of durable infant or toddler products every 6 months thereafter, beginning with the product categories that the Commission determines to be of highest priority, until the Commission has promulgated standards for all such product categories. Thereafter, the Commission shall periodically review and revise the standards set forth under this subsection to ensure that such standards provide the highest level of safety for such products that is feasible.

(3) JUDICIAL REVIEW.—Any person adversely affected by such standards may file a petition for review under the procedures set forth in section 11(g) of the Consumer Product Safety Act (15 U.S.C. 2060(g)), as added by section 236 of this Act.

(c) CRIBS.—

(1) IN GENERAL.—It shall be a violation of section 19(a)(1) of the Consumer Product Safety Act (15 U.S.C. 2068(a)(1)) for any person to which this subsection applies to manufacture, sell, contract to sell or resell, lease, sublet, offer, provide for use, or otherwise place in the stream of commerce a crib that is not in compliance with a standard promulgated under subsection (b).

(2) PERSONS TO WHICH SUBSECTION APPLIES.—This subsection applies to any person that—

(A) manufactures, distributes in commerce, or contracts to sell cribs;

(B) based on the person's occupation, holds itself out as having knowledge or skill peculiar to cribs, including child care facilities and family child care homes;

(C) is in the business of contracting to sell or resell, lease, sublet, or otherwise place cribs in the stream of commerce; or

(D) owns or operates a place of public accommodation affecting commerce (as defined in section 4 of the Federal Fire Prevention and Control Act of 1974 (15 U.S.C. 2203) applied without regard to the phrase “not owned by the Federal Government”).

(3) CRIB DEFINED.—In this subsection, the term “crib” includes—

(A) new and used cribs;

(B) full-sized or nonfull-sized cribs; and

(C) portable cribs and crib-pens.

(d) CONSUMER REGISTRATION REQUIREMENT.—

(1) RULEMAKING.—Notwithstanding any provision of chapter 6 of title 5, United States Code, or the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.), not later than 1 year after the date of enactment of this Act, the Commission shall, pursuant to its authority under section 16(b) of the Consumer Product Safety Act (15 U.S.C. 2065(b)), promulgate a final consumer product safety rule to require each manufacturer of a durable infant or toddler product—

(A) to provide consumers with a postage-paid consumer registration form with each such product;

(B) to maintain a record of the names, addresses, e-mail addresses, and other contact information of consumers who register their ownership of such products with the

manufacturer in order to improve the effectiveness of manufacturer campaigns to recall such products; and

(C) to permanently place the manufacturer name and contact information, model name and number, and the date of manufacture on each durable infant or toddler product.

(2) REQUIREMENTS FOR REGISTRATION FORM.—The registration form required to be provided to consumers under paragraph (1) shall—

(A) include spaces for a consumer to provide the consumer's name, address, telephone number, and e-mail address;

(B) include space sufficiently large to permit easy, legible recording of all desired information;

(C) be attached to the surface of each durable infant or toddler product so that, as a practical matter, the consumer must notice and handle the form after purchasing the product;

(D) include the manufacturer's name, model name and number for the product, and the date of manufacture;

(E) include a message explaining the purpose of the registration and designed to encourage consumers to complete the registration;

(F) include an option for consumers to register through the Internet; and

(G) include a statement that information provided by the consumer shall not be used for any purpose other than to facilitate a recall of or safety alert regarding that product.

In issuing regulations under this section, the Commission may prescribe the exact text and format of the required registration form.

(3) RECORD KEEPING AND NOTIFICATION REQUIREMENTS.—The rules required under this section shall require each manufacturer of a durable infant or toddler product to maintain a record of registrants for each product manufactured that includes all of the information provided by each consumer registered, and to use such information to notify such consumers in the event of a voluntary or involuntary recall of or safety alert regarding such product. Each manufacturer shall maintain such a record for a period of not less than 6 years after the date of manufacture of the product. Consumer information collected by a manufacturer under this Act may not be used by the manufacturer, nor disseminated by such manufacturer to any other party, for any purpose other than notification to such consumer in the event of a product recall or safety alert.

(4) STUDY.—The Commission shall conduct a study at such time as it considers appropriate on the effectiveness of the consumer registration forms required by this section in facilitating product recalls and whether such registration forms should be required for other children's products. Not later than 4 years after the date of enactment of this Act, the Commission shall report its findings to the appropriate Congressional committees.

(e) USE OF ALTERNATIVE RECALL NOTIFICATION TECHNOLOGY.—

(1) TECHNOLOGY ASSESSMENT AND REPORT.—The Commission shall—

(A) beginning 2 years after a rule is promulgated under subsection (d), regularly review recall notification technology and assess the effectiveness of such technology in facilitating recalls of durable infant or toddler products; and

(B) not later than 3 years after the date of enactment of this Act and periodically thereafter as the Commission considers appropriate, transmit a report on such assessments to the appropriate Congressional committees.

(2) DETERMINATION.—If, based on the assessment required by paragraph (1), the Commission determines by rule that a recall notification technology is likely to be as effective or more effective in facilitating recalls of durable infant or toddler products as the registration forms required by subsection (d), the Commission—

(A) shall submit to the appropriate Congressional committees a report on such determination; and

(B) shall permit a manufacturer of durable infant or toddler products to use such technology in lieu of such registration forms to facilitate recalls of durable infant or toddler products.

(f) DEFINITION OF DURABLE INFANT OR TODDLER PRODUCT.—As used in this section, the term “durable infant or toddler product”—

(1) means a durable product intended for use, or that may be reasonably expected to be used, by children under the age of 5 years; and

(2) includes—

(A) full-size cribs and nonfull-size cribs;

(B) toddler beds;

(C) high chairs, booster chairs, and hook-on chairs;

(D) bath seats;

(E) gates and other enclosures for confining a child;

(F) play yards;

(G) stationary activity centers;

(H) infant carriers;

(I) strollers;

(J) walkers;

(K) swings; and

(L) bassinets and cradles.

SEC. 105. LABELING REQUIREMENT FOR ADVERTISING TOYS AND GAMES.

Section 24 of the Federal Hazardous Substances Act (15 U.S.C. 1278) is amended—

(1) by redesignating subsections (c) and (d) as subsections (d) and (e), respectively; and

(2) by inserting after subsection (b) the following:

“(c) ADVERTISING.—

“(1) REQUIREMENT.—

“(A) CAUTIONARY STATEMENT.—Any advertisement by a retailer, manufacturer, importer, distributor, or private labeler (including advertisements on Internet websites or in catalogues or other printed materials) that provides a direct means for the purchase or order of a product

for which a cautionary statement is required under subsection (a) or (b) shall include the appropriate cautionary statement displayed on or immediately adjacent to that advertisement, as modified by regulations issued under paragraph (3).

“(B) APPLICATION TO RETAILERS.—

“(i) REQUIREMENT TO INFORM.—A manufacturer, importer, distributor, or private labeler that provides such a product to a retailer shall inform the retailer of any cautionary statement requirement applicable to the product.

“(ii) RETAILER’S REQUIREMENT TO INQUIRE.—A retailer is not in violation of subparagraph (A) if the retailer requested information from the manufacturer, importer, distributor, or private labeler as to whether the cautionary statement required by subparagraph (A) applies to the product that is the subject of the advertisement and the manufacturer, importer, distributor, or private labeler provided false information or did not provide such information.

“(C) DISPLAY.—The cautionary statement required by subparagraph (A) shall be prominently displayed—

“(i) in the primary language used in the advertisement;

“(ii) in conspicuous and legible type in contrast by typography, layout, or color with other material printed or displayed in such advertisement; and

“(iii) in a manner consistent with part 1500 of title 16, Code of Federal Regulations.

“(D) DEFINITIONS.—In this subsection:

“(i) The terms ‘manufacturer’, ‘distributor’, and ‘private labeler’ have the meaning given those terms in section 3 of the Consumer Product Safety Act (15 U.S.C. 2052).

“(ii) The term ‘retailer’ has the meaning given that term in section 3 of the Consumer Product Safety Act (15 U.S.C. 2052), but does not include an individual whose selling activity is intermittent and does not constitute a trade or business.

“(2) EFFECTIVE DATE.—The requirement in paragraph (1) shall take effect—

“(A) with respect to advertisements on Internet websites, 120 days after the date of enactment of the Consumer Product Safety Improvement Act of 2008; and

“(B) with respect to catalogues and other printed materials, 180 days after such date of enactment.

“(3) RULEMAKING.—Notwithstanding any provision of chapter 6 of title 5, United States Code, or the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.), the Commission shall, not later than 90 days after the date of enactment of the Consumer Product Safety Improvement Act of 2008, promulgate regulations to effectuate this section with respect to catalogues and other printed material. The Commission may, under such regulations, provide a grace period of no more than 180 days for catalogues and other printed material printed prior to the effective date of paragraph (1) during which time distribution of such catalogues and other printed material shall

not be considered a violation of such paragraph. The Commission may promulgate regulations concerning the size and placement of the cautionary statement required by paragraph (1) of this subsection as appropriate relative to the size and placement of the advertisements in such catalogues and other printed material. The Commission shall promulgate regulations that clarify the applicability of these requirements to catalogues and other printed material distributed solely between businesses and not to individual consumers.

“(4) ENFORCEMENT.—The requirements in paragraph (1) shall be treated as a consumer product safety standard promulgated under section 9 of the Consumer Product Safety Act (15 U.S.C. 2056). The publication or distribution of any advertisement that is not in compliance with paragraph (1) shall be treated as a prohibited act under section 19(a)(1) of such Act (15 U.S.C. 2068).”.

SEC. 106. MANDATORY TOY SAFETY STANDARDS.

(a) IN GENERAL.—Beginning 180 days after the date of enactment of this Act, the provisions of ASTM International Standard F963–07 Consumer Safety Specifications for Toy Safety (ASTM F963), as it exists on the date of enactment of this Act (except for section 4.2 and Annex 4 or any provision that restates or incorporates an existing mandatory standard or ban promulgated by the Commission or by statute) shall be considered to be consumer product safety standards issued by the Commission under section 9 of the Consumer Product Safety Act (15 U.S.C. 2058).

(b) RULEMAKING FOR SPECIFIC TOYS, COMPONENTS AND RISKS.—

(1) EVALUATION.—Not later than 1 year after the date of enactment of this Act, the Commission, in consultation with representatives of consumer groups, juvenile product manufacturers, and independent child product engineers and experts, shall examine and assess the effectiveness of ASTM F963 or its successor standard (except for section 4.2 and Annex 4), as it relates to safety requirements, safety labeling requirements, and test methods related to—

- (A) internal harm or injury hazards caused by the ingestion or inhalation of magnets in children’s products;
- (B) toxic substances;
- (C) toys with spherical ends;
- (D) hemispheric-shaped objects;
- (E) cords, straps, and elastics; and
- (F) battery-operated toys.

(2) RULEMAKING.—Within 1 year after the completion of the assessment required by paragraph (1), the Commission shall promulgate rules in accordance with section 553 of title 5, United States Code, that—

- (A) take into account other children’s product safety rules; and
- (B) are more stringent than such standards, if the Commission determines that more stringent standards would further reduce the risk of injury of such toys.

(c) PERIODIC REVIEW.—The Commission shall periodically review and revise the rules set forth under this section to ensure that such rules provide the highest level of safety for such products that is feasible.

(d) CONSIDERATION OF REMAINING ASTM STANDARDS.—After promulgating the rules required by subsection (b), the Commission shall—

(1) in consultation with representatives of consumer groups, juvenile product manufacturers, and independent child product engineers and experts, examine and assess the effectiveness of ASTM F963 (and alternative health protective requirements to prevent or minimize flammability of children's products) or its successor standard, and shall assess the adequacy of such standards in protecting children from safety hazards; and

(2) in accordance with section 553 of title 5, United States Code, promulgate consumer product safety rules that—

(A) take into account other children's product safety rules; and

(B) are more stringent than such standards, if the Commission determines that more stringent standards would further reduce the risk of injury associated with such toys.

(e) PRIORITIZATION.—The Commission shall promulgate rules beginning with the product categories that the Commission determines to be of highest priority, until the Commission has promulgated standards for all such product categories.

(f) TREATMENT AS CONSUMER PRODUCT SAFETY STANDARDS.—Rules issued under this section shall be considered consumer product safety standards issued by the Commission under section 9 of the Consumer Product Safety Act (15 U.S.C. 2058).

(g) REVISIONS.—If ASTM International (or its successor entity) proposes to revise ASTM F963–07, or a successor standard, it shall notify the Commission of the proposed revision. The Commission shall incorporate the revision or a section of the revision into the consumer product safety rule. The revised standard shall be considered to be a consumer product safety standard issued by the Consumer Product Safety Commission under section 9 of the Consumer Product Safety Act (15 U.S.C. 2058), effective 180 days after the date on which ASTM International notifies the Commission of the revision unless, within 90 days after receiving that notice, the Commission notifies ASTM International that it has determined that the proposed revision does not improve the safety of the consumer product covered by the standard. If the Commission so notifies ASTM International with respect to a proposed revision of the standard, the existing standard shall continue to be considered to be a consumer product safety rule without regard to the proposed revision.

(h) RULEMAKING TO CONSIDER EXEMPTION FROM PREEMPTION.—

(1) EXEMPTION OF STATE LAW FROM PREEMPTION.—Upon application of a State or political subdivision of a State, the Commission shall, after notice and opportunity for oral presentation of views, consider a rulemaking to exempt from the provisions of section 26(a) of the Consumer Product Safety Act (under such conditions as it may impose in the rule) any proposed safety standard or regulation which is described in such application and which is designed to protect against a risk of injury associated with a children's product subject to the consumer product safety standards described in subsection (a) or any rule promulgated under this section. The Commission shall grant such an exemption if the State or political subdivision standard or regulation—

(A) provides a significantly higher degree of protection from such risk of injury than the consumer product safety standard or rule under this section; and

(B) does not unduly burden interstate commerce.

In determining the burden, if any, of a State or political subdivision standard or regulation on interstate commerce, the Commission shall consider and make appropriate (as determined by the Commission in its discretion) findings on the technological and economic feasibility of complying with such standard or regulation, the cost of complying with such standard or regulation, the geographic distribution of the consumer product to which the standard or regulation would apply, the probability of other States or political subdivisions applying for an exemption under this subsection for a similar standard or regulation, and the need for a national, uniform standard under this Act for such consumer product.

(2) EFFECT OF STANDARDS ON ESTABLISHED STATE LAWS.—Nothing in this section or in section 26 of the Consumer Product Safety Act (15 U.S.C. 2075) shall prevent a State or political subdivision of a State from continuing in effect a safety requirement applicable to a toy or other children's product that is designed to deal with the same risk of injury as the consumer product safety standards established by this section and that is in effect on the day before the date of enactment of this Act, if such State or political subdivision has filed such requirement with the Commission within 90 days after the date of enactment of this Act, in such form and in such manner as the Commission may require.

(i) JUDICIAL REVIEW.—The issuance of any rule under this section is subject to judicial review as provided in section 11(g) of the Consumer Product Safety Act (15 U.S.C. 2060(g)), as added by section 236 of this Act.

SEC. 107. STUDY OF PREVENTABLE INJURIES AND DEATHS IN MINORITY CHILDREN RELATED TO CONSUMER PRODUCTS.

(a) IN GENERAL.—Not later than 90 days after the date of enactment of this Act, the Comptroller General shall initiate a study, by the Government Accountability Office or by contract through an independent entity, to assess disparities in the risks and incidence of preventable injuries and deaths among children of minority populations, including Black, Hispanic, American Indian, Alaska Native, Native Hawaiian, and Asian/Pacific Islander children in the United States. The Comptroller General shall consult with the Commission as necessary.

(b) REQUIREMENTS.—The study shall examine the racial disparities of the rates of preventable injuries and deaths related to suffocation, poisonings, and drownings, including those associated with the use of cribs, mattresses and bedding materials, swimming pools and spas, and toys and other products intended for use by children.

(c) REPORT.—Not later than 1 year after the date of enactment of this Act, the Comptroller General shall report the findings to the appropriate Congressional committees. The report shall include—

(1) the Comptroller General's findings on the incidence of preventable risks of injuries and deaths among children

of minority populations and recommendations for minimizing such risks;

(2) recommendations for public outreach, awareness, and prevention campaigns specifically aimed at racial minority populations; and

(3) recommendations for education initiatives that may reduce statistical disparities.

SEC. 108. PROHIBITION ON SALE OF CERTAIN PRODUCTS CONTAINING SPECIFIED PHTHALATES.

(a) **PROHIBITION ON THE SALE OF CERTAIN PRODUCTS CONTAINING PHTHALATES.**—Beginning on the date that is 180 days after the date of enactment of this Act, it shall be unlawful for any person to manufacture for sale, offer for sale, distribute in commerce, or import into the United States any children’s toy or child care article that contains concentrations of more than 0.1 percent of di-(2-ethylhexyl) phthalate (DEHP), dibutyl phthalate (DBP), or benzyl butyl phthalate (BBP).

(b) **PROHIBITION ON THE SALE OF ADDITIONAL PRODUCTS CONTAINING CERTAIN PHTHALATES.**—

(1) **INTERIM PROHIBITION.**—Beginning on the date that is 180 days after the date of enactment of this Act and until a final rule is promulgated under paragraph (3), it shall be unlawful for any person to manufacture for sale, offer for sale, distribute in commerce, or import into the United States any children’s toy that can be placed in a child’s mouth or child care article that contains concentrations of more than 0.1 percent of diisononyl phthalate (DINP), diisodecyl phthalate (DIDP), or di-n-octyl phthalate (DnOP).

(2) **CHRONIC HAZARD ADVISORY PANEL.**—

(A) **APPOINTMENT.**—Not earlier than 180 days after the date of enactment of this Act, the Commission shall begin the process of appointing a Chronic Hazard Advisory Panel pursuant to the procedures of section 28 of the Consumer Product Safety Act (15 U.S.C. 2077) to study the effects on children’s health of all phthalates and phthalate alternatives as used in children’s toys and child care articles.

(B) **EXAMINATION.**—The panel shall, within 18 months after its appointment under subparagraph (A), complete an examination of the full range of phthalates that are used in products for children and shall—

(i) examine all of the potential health effects (including endocrine disrupting effects) of the full range of phthalates;

(ii) consider the potential health effects of each of these phthalates both in isolation and in combination with other phthalates;

(iii) examine the likely levels of children’s, pregnant women’s, and others’ exposure to phthalates, based on a reasonable estimation of normal and foreseeable use and abuse of such products;

(iv) consider the cumulative effect of total exposure to phthalates, both from children’s products and from other sources, such as personal care products;

(v) review all relevant data, including the most recent, best-available, peer-reviewed, scientific studies

of these phthalates and phthalate alternatives that employ objective data collection practices or employ other objective methods;

(vi) consider the health effects of phthalates not only from ingestion but also as a result of dermal, hand-to-mouth, or other exposure;

(vii) consider the level at which there is a reasonable certainty of no harm to children, pregnant women, or other susceptible individuals and their offspring, considering the best available science, and using sufficient safety factors to account for uncertainties regarding exposure and susceptibility of children, pregnant women, and other potentially susceptible individuals; and

(viii) consider possible similar health effects of phthalate alternatives used in children's toys and child care articles.

The panel's examinations pursuant to this paragraph shall be conducted *de novo*. The findings and conclusions of any previous Chronic Hazard Advisory Panel on this issue and other studies conducted by the Commission shall be reviewed by the panel but shall not be considered determinative.

(C) REPORT.—Not later than 180 days after completing its examination, the panel appointed under subparagraph (A) shall report to the Commission the results of the examination conducted under this section and shall make recommendations to the Commission regarding any phthalates (or combinations of phthalates) in addition to those identified in subsection (a) or phthalate alternatives that the panel determines should be declared banned hazardous substances.

(3) PERMANENT PROHIBITION BY RULE.—Not later than 180 days after receiving the report of the panel under paragraph (2)(C), the Commission shall, pursuant to section 553 of title 5, United States Code, promulgate a final rule to—

(A) determine, based on such report, whether to continue in effect the prohibition under paragraph (1), in order to ensure a reasonable certainty of no harm to children, pregnant women, or other susceptible individuals with an adequate margin of safety; and

(B) evaluate the findings and recommendations of the Chronic Hazard Advisory Panel and declare any children's product containing any phthalates to be a banned hazardous product under section 8 of the Consumer Product Safety Act (15 U.S.C. 2057), as the Commission determines necessary to protect the health of children.

(c) TREATMENT OF VIOLATION.—A violation of subsection (a) or (b)(1) or any rule promulgated by the Commission under subsection (b)(3) shall be treated as a violation of section 19(a)(1) of the Consumer Product Safety Act (15 U.S.C. 2068(a)(1)).

(d) TREATMENT AS CONSUMER PRODUCT SAFETY STANDARDS; EFFECT ON STATE LAWS.—Subsections (a) and (b)(1) and any rule promulgated under subsection (b)(3) shall be considered consumer product safety standards under the Consumer Product Safety Act. Nothing in this section or the Consumer Product Safety Act (15 U.S.C. 2051 et seq.) shall be construed to preempt or otherwise

affect any State requirement with respect to any phthalate alternative not specifically regulated in a consumer product safety standard under the Consumer Product Safety Act.

(e) DEFINITIONS.—

(1) DEFINED TERMS.—As used in this section:

(A) The term “phthalate alternative” means any common substitute to a phthalate, alternative material to a phthalate, or alternative plasticizer.

(B) The term “children’s toy” means a consumer product designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays.

(C) The term “child care article” means a consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age 3 and younger, or to help such children with sucking or teething.

(D) The term “consumer product” has the meaning given such term in section 3(a)(1) of the Consumer Product Safety Act (15 U.S.C. 2052(a)(1)).

(2) DETERMINATION GUIDELINES.—

(A) AGE.—In determining whether products described in paragraph (1) are designed or intended for use by a child of the ages specified, the following factors shall be considered:

(i) A statement by a manufacturer about the intended use of such product, including a label on such product if such statement is reasonable.

(ii) Whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children of the ages specified.

(iii) Whether the product is commonly recognized by consumers as being intended for use by a child of the ages specified.

(iv) The Age Determination guidelines issued by the Commission staff in September 2002 and any successor to such guidelines.

(B) TOY THAT CAN BE PLACED IN A CHILD’S MOUTH.—For purposes of this section a toy can be placed in a child’s mouth if any part of the toy can actually be brought to the mouth and kept in the mouth by a child so that it can be sucked and chewed. If the children’s product can only be licked, it is not regarded as able to be placed in the mouth. If a toy or part of a toy in one dimension is smaller than 5 centimeters, it can be placed in the mouth.

TITLE II—CONSUMER PRODUCT SAFETY COMMISSION REFORM

Subtitle A—Administrative Improvements

SEC. 201. REAUTHORIZATION OF THE COMMISSION.

(a) AUTHORIZATION OF APPROPRIATIONS.—Subsection (a) of section 32 (15 U.S.C. 2081) is amended to read as follows:

“(a) GENERAL AUTHORIZATION OF APPROPRIATIONS.—

“(1) IN GENERAL.—There are authorized to be appropriated to the Commission for the purpose of carrying out the provisions of this Act and any other provision of law the Commission is authorized or directed to carry out—

“(A) \$118,200,000 for fiscal year 2010;

“(B) \$115,640,000 for fiscal year 2011;

“(C) \$123,994,000 for fiscal year 2012;

“(D) \$131,783,000 for fiscal year 2013; and

“(E) \$136,409,000 for fiscal year 2014.

“(2) TRAVEL ALLOWANCE.—From amounts appropriated pursuant to paragraph (1), there shall be made available \$1,200,000 for fiscal year 2010, \$1,248,000 for fiscal year 2011, \$1,297,000 for fiscal year 2012, \$1,350,000 for fiscal year 2013, and \$1,403,000 for fiscal year 2014, for travel, subsistence, and related expenses incurred in furtherance of the official duties of Commissioners and employees with respect to attendance at meetings or similar functions, which shall be used by the Commission for such purposes in lieu of acceptance of payment or reimbursement for such expenses from any person—

“(A) seeking official action from, doing business with, or conducting activities regulated by, the Commission; or

“(B) whose interests may be substantially affected by the performance or nonperformance of the Commissioner’s or employee’s official duties.”.

(b) REPORT.—Not later than 180 days after the date of enactment of this Act, the Commission shall transmit to the appropriate Congressional committees a report of its plans to allocate the funding authorized by subsection (a). Such report shall include—

(1) the number of full-time investigators and other full-time equivalents the Commission intends to employ;

(2) efforts by the Commission to develop standards for training product safety inspectors and technical staff employed by the Commission;

(3) efforts and policies of the Commission to encourage Commission scientific staff to seek appropriate publishing opportunities in peer-reviewed journals and other media; and

(4) the efforts of the Commission to reach and educate retailers of second-hand products and informal sellers, such as thrift shops and yard sales, concerning consumer product safety rules and product recalls, especially those relating to durable nursery products, in order to prevent the resale of any products that have been recalled, including the development of educational materials for distribution not later than 1 year after the date of enactment of this Act.

(c) CONFORMING AMENDMENTS.—Section 32 (15 U.S.C. 2081) is further amended by striking subsection (b) and redesignating subsection (c) as subsection (b) and inserting after such subsection designation the following: “LIMITATION.—”.

SEC. 202. FULL COMMISSION REQUIREMENT; INTERIM QUORUM; PERSONNEL.

(a) TEMPORARY QUORUM.—Notwithstanding section 4(d) of the Consumer Product Safety Act (15 U.S.C. 2053(d)), 2 members of the Commission, if they are not affiliated with the same political party, shall constitute a quorum for the transaction of business

for the 1 year period beginning on the date of enactment of this Act.

(b) **REPEAL OF QUORUM LIMITATION.**—

(1) **REPEAL.**—Title III of Public Law 102–389 is amended by striking the first proviso in the item captioned “CONSUMER PRODUCT SAFETY COMMISSION, SALARIES AND EXPENSES” (15 U.S.C. 2053 note).

(2) **EFFECTIVE DATE.**—The amendment made by paragraph (1) shall take effect 1 year after the date of enactment of this Act.

(c) **PERSONNEL.**—

(1) **PROFESSIONAL STAFF.**—The Commission shall increase the number of full-time personnel employed by the Commission to at least 500 by October 1, 2013, subject to the availability of appropriations.

(2) **PORTS OF ENTRY; OVERSEAS INSPECTORS.**—As part of the 500 full-time employees required by paragraph (1), the Commission shall hire personnel to be assigned to duty stations at United States ports of entry, or to inspect overseas manufacturing facilities, subject to the availability of appropriations.

SEC. 203. SUBMISSION OF COPY OF CERTAIN DOCUMENTS TO CONGRESS.

(a) **IN GENERAL.**—Notwithstanding any rule, regulation, or order to the contrary, the Commission shall comply with the requirements of section 27(k) of the Consumer Product Safety Act (15 U.S.C. 2076(k)) with respect to budget recommendations, legislative recommendations, testimony, and comments on legislation submitted by the Commission to the President or the Office of Management and Budget after the date of enactment of this Act.

(b) **REINSTATEMENT OF REQUIREMENT.**—Section 3003(d) of Public Law 104–66 (31 U.S.C. 1113 note) is amended—

(1) by striking “or” after the semicolon in paragraph (31);

(2) by redesignating paragraph (32) as (33); and

(3) by inserting after paragraph (31) the following:

“(32) section 27(k) of the Consumer Product Safety Act (15 U.S.C. 2076(k)); or”.

SEC. 204. EXPEDITED RULEMAKING.

(a) **ANPR REQUIREMENT.**—

(1) **IN GENERAL.**—Section 9 (15 U.S.C. 2058) is amended—

(A) by striking “shall be commenced” in subsection (a) and inserting “may be commenced”;

(B) by striking “in the notice” in subsection (b) and inserting “in a notice”;

(C) by striking “unless, not less than 60 days after publication of the notice required in subsection (a), the” in subsection (c) and inserting “unless the”;

(D) by striking “an advance notice of proposed rulemaking under subsection (a) relating to the product involved,” in the third sentence of subsection (c) and inserting “the notice,”; and

(E) by striking “Register.” in the matter following paragraph (4) of subsection (c) and inserting “Register. Nothing in this subsection shall preclude any person from submitting an existing standard or portion of a standard as a proposed consumer product safety standard.”.

(2) CONFORMING AMENDMENT.—Section 5(a)(3) (15 U.S.C. 2054(a)(3)) is amended by striking “an advance notice of proposed rulemaking or”.

(b) RULEMAKING UNDER FEDERAL HAZARDOUS SUBSTANCES ACT.—

(1) IN GENERAL.—Section 3(a) of the Federal Hazardous Substances Act (15 U.S.C. 1262(a)) is amended to read as follows:

“(a) RULEMAKING.—

“(1) IN GENERAL.—Whenever in the judgment of the Commission such action will promote the objectives of this Act by avoiding or resolving uncertainty as to its application, the Commission may by regulation declare to be a hazardous substance, for the purposes of this Act, any substance or mixture of substances, which it finds meets the requirements of section 2(f)(1)(A).

“(2) PROCEDURE.—Proceedings for the issuance, amendment, or repeal of regulations under this subsection and the admissibility of the record of such proceedings in other proceedings, shall be governed by the provisions of subsections (f) through (i) of this section.”.

(2) PROCEDURE.—Section 2(q)(2) of the Federal Hazardous Substances Act (15 U.S.C. 1261(q)(2)) is amended by striking “Proceedings for the issuance, amendment, or repeal of regulations pursuant to clause (B) of subparagraph (1) of this paragraph shall be governed by the provisions of sections 701(e), (f), and (g) of the Federal Food, Drug, and Cosmetic Act: Provided, That if” and inserting “Proceedings for the issuance, amendment, or repeal of regulations pursuant to clause (B) of subparagraph (1) of this paragraph shall be governed by the provisions of subsections (f) through (i) of section 3 of this Act, except that if”.

(3) ANPR REQUIREMENT.—Section 3 of the Federal Hazardous Substances Act (15 U.S.C. 1262) is amended—

(A) by striking “shall be commenced” in subsection (f) and inserting “may be commenced”;

(B) by striking “in the notice” in subsection (g)(1) and inserting “in a notice”;

(C) by striking “unless, not less than 60 days after publication of the notice required in subsection (f), the” in subsection (h) and inserting “unless the”; and

(D) by striking “Committee on Commerce” and all that follows through “Representatives.” in subsection (h), and inserting “appropriate Congressional committees. Nothing in this subsection shall preclude any person from submitting an existing standard or portion of a standard as a proposed regulation.”

(4) OTHER CONFORMING AMENDMENTS.—The Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.) is amended—

(A) by striking paragraphs (c) and (d) of section 2 and inserting the following:

“(c) The term ‘Commission’ means the Consumer Product Safety Commission.”;

(B) by striking “Secretary” each place it appears and inserting “Commission” except—

(i) in section 10(b) (15 U.S.C. 1269(b));

(ii) in section 14 (15 U.S.C. 1273); and

(iii) in section 21(a) (15 U.S.C. 1276(a));

(C) by striking “Department” each place it appears, except in sections 5(c)(6)(D)(i) and 14(b) (15 U.S.C. 1264(c)(6)(D)(i) and 1273(b)), and inserting “Commission”;

(D) by striking “he” and “his” each place they appear in reference to the Secretary and inserting “it” and “its”, respectively;

(E) by striking “Secretary of Health, Education, and Welfare” each place it appears in section 10(b) (15 U.S.C. 1269(b)) and inserting “Commission”;

(F) by striking “Secretary of Health, Education, and Welfare” each place it appears in section 14 (15 U.S.C. 1273) and inserting “Commission”;

(G) by striking “Department of Health, Education, and Welfare” in section 14(b) (15 U.S.C. 1273(b)) and inserting “Commission”;

(H) by striking “Consumer Product Safety Commission” each place it appears and inserting “Commission”;

(I) by striking “(hereinafter in this section referred to as the ‘Commission’)” in section 14(d) (15 U.S.C. 1273(d)) and section 20(a)(1) (15 U.S.C. 1275(a)(1)); and

(J) by striking paragraph (5) of section 18(b) (15 U.S.C. 1261 note).

(c) RULEMAKING UNDER FLAMMABLE FABRICS ACT.—

(1) IN GENERAL.—Section 4 of the Flammable Fabrics Act (15 U.S.C. 1193) is amended—

(A) by striking “shall be commenced” in subsection (g) and inserting “may be commenced by a notice of proposed rulemaking or”;

(B) by striking “unless, not less than 60 days after publication of the notice required in subsection (g), the” in subsection (i) and inserting “unless the”; and

(C) by striking “Committee on Commerce” and all that follows through “Representatives.” in subsection (i), and inserting “appropriate Congressional committees. Nothing in this subsection shall preclude any person from submitting an existing standard or portion of a standard as a proposed regulation.”

(2) OTHER CONFORMING AMENDMENTS.—The Flammable Fabrics Act (15 U.S.C. 1193) is amended—

(A) by striking paragraph (i) of section 2 (15 U.S.C. 1191(i)) and inserting the following:

“(i) The term ‘Commission’ means the Consumer Product Safety Commission.”;

(B) by striking “Secretary of Commerce” each place it appears and inserting “Commission”;

(C) by striking “Secretary” each place it appears and inserting “Commission”, except in sections 9 and 14 (15 U.S.C. 1198 and 1201);

(D) by striking “he” and “his” each place either such word appears in reference to the Secretary and inserting “it” and “its”, respectively;

(E) by striking paragraph (5) of section 4(e) (15 U.S.C. 1193(e)) and redesignating paragraph (6) as paragraph (5);

(F) by striking “Consumer Product Safety Commission (hereinafter in this section referred to as the ‘Commission’) in section 15 (15 U.S.C. 1202)” and inserting “Commission”;

(G) by amending subsection (d) of section 16 (15 U.S.C. 1203) to read as follows:

“(d) In this section, a reference to a flammability standard or other regulation for a fabric, related material, or product in effect under this Act includes a standard of flammability continued in effect by section 11 of the Act of December 14, 1967 (Public Law 90–189).”; and

(H) by striking “Consumer Product Safety Commission” in section 17 (15 U.S.C. 1204) and inserting “Commission”.

SEC. 205. INSPECTOR GENERAL AUDITS AND REPORTS.

(a) **IMPROVEMENTS BY THE COMMISSION.**—The Inspector General of the Commission shall conduct reviews and audits to assess—

(1) the Commission’s capital improvement efforts, including improvements and upgrades of the Commission’s information technology architecture and systems and the development of the database of publicly available information on incidents involving injury or death required under section 6A of the Consumer Product Safety Act, as added by section 212 of this Act; and

(2) the adequacy of procedures for accrediting conformity assessment bodies as authorized by section 14(a)(3) of the Consumer Product Safety Act (15 U.S.C. 2063(a)(3)), as amended by this Act, and overseeing the third party testing required by such section.

(b) **EMPLOYEE COMPLAINTS.**—Within 1 year after the date of enactment of this Act, the Inspector General shall conduct a review of—

(1) complaints received by the Inspector General from employees of the Commission about failures of other employees to enforce the rules or regulations of the Consumer Product Safety Act or any other Act enforced by the Commission or otherwise carry out their responsibilities under such Acts if such alleged failures raise issues of conflicts of interest, ethical violations, or the absence of good faith; and

(2) actions taken by the Commission to address such failures and complaints, including an assessment of the timeliness and effectiveness of such actions.

(c) **PUBLIC INTERNET WEBSITE LINKS.**—Not later than 30 days after the date of enactment of this Act, the Commission shall establish and maintain—

(1) a direct link on the homepage of its Internet website to the Internet webpage of the Commission’s Office of Inspector General; and

(2) a mechanism on the webpage of the Commission’s Office of Inspector General by which individuals may anonymously report cases of waste, fraud, or abuse with respect to the Commission.

(d) **REPORTS.**—

(1) **ACTIVITIES AND NEEDS OF INSPECTOR GENERAL.**—Not later than 60 days after the date of enactment of this Act, the Inspector General of the Commission shall transmit a report to the appropriate Congressional committees on the activities of the Inspector General, any structural barriers which prevent the Inspector General from providing robust oversight of the activities of the Commission, and any additional authority or resources that would facilitate more effective oversight.

(2) **REVIEWS OF IMPROVEMENTS AND EMPLOYEE COMPLAINTS.**—Beginning for fiscal year 2010, the Inspector General of the Commission shall include in an annual report to the appropriate Congressional committees the Inspector General’s findings, conclusions, and recommendations from the reviews and audits under subsections (a) and (b).

SEC. 206. INDUSTRY-SPONSORED TRAVEL BAN.

(a) **IN GENERAL.**—The Act (15 U.S.C. 1251 et seq.) is amended by adding at the end the following new section:

“SEC. 39. PROHIBITION ON INDUSTRY-SPONSORED TRAVEL.

“Notwithstanding section 1353 of title 31, United States Code, and section 27(b)(6) of this Act, no Commissioner or employee of the Commission shall accept travel, subsistence, or related expenses with respect to attendance by a Commissioner or employee at any meeting or similar function relating to official duties of a Commissioner or an employee, from a person—

“(1) seeking official action from, doing business with, or conducting activities regulated by, the Commission; or

“(2) whose interests may be substantially affected by the performance or nonperformance of the Commissioner’s or employee’s official duties.”

(b) **CLERICAL AMENDMENT.**—The table of contents in section 1 (15 U.S.C. 2051 note) is amended by inserting at the end the following:

“Sec. 39. Prohibition on industry-sponsored travel.”

SEC. 207. SHARING OF INFORMATION WITH FEDERAL, STATE, LOCAL, AND FOREIGN GOVERNMENT AGENCIES.

Section 29 (15 U.S.C. 2078) is amended by adding at the end the following:

“(f) **SHARING OF INFORMATION WITH FEDERAL, STATE, LOCAL, AND FOREIGN GOVERNMENT AGENCIES.**—

“(1) **AGREEMENTS AND CONDITIONS.**—Notwithstanding the requirements of subsections (a)(3) and (b) of section 6, relating to public disclosure of information, the Commission may make information obtained by the Commission available to any Federal, State, local, or foreign government agency upon the prior certification of an appropriate official of any such agency, either by a prior agreement or memorandum of understanding with the Commission or by other written certification, that such material will be maintained in confidence and will be used only for official law enforcement or consumer protection purposes, if—

“(A) the agency has set forth a bona fide legal basis for its authority to maintain the material in confidence;

“(B) the materials are to be used for purposes of investigating, or engaging in enforcement proceedings related to, possible violations of—

“(i) laws regulating the manufacture, importation, distribution, or sale of defective or unsafe consumer products, or other practices substantially similar to practices prohibited by any law administered by the Commission;

“(ii) a law administered by the Commission, if disclosure of the material would further a Commission investigation or enforcement proceeding; or

“(iii) with respect to a foreign law enforcement agency, with the approval of the Attorney General, other foreign criminal laws, if such foreign criminal laws are offenses defined in or covered by a criminal mutual legal assistance treaty in force between the government of the United States and the foreign law enforcement agency’s government; and

“(C) in the case of a foreign government agency, such agency is not from a foreign state that the Secretary of State has determined, in accordance with section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), has repeatedly provided support for acts of international terrorism, unless and until such determination is rescinded pursuant to section 6(j)(4) of that Act (50 U.S.C. App. 2405(j)(4)).

“(2) ABROGATION OF AGREEMENTS.—The Commission may abrogate any agreement or memorandum of understanding with another agency if the Commission determines that the other agency has failed to maintain in confidence any information provided under such agreement or memorandum of understanding, or has used any such information for purposes other than those set forth in such agreement or memorandum of understanding.

“(3) ADDITIONAL RULES AGAINST DISCLOSURE.—Except as provided in paragraph (4), the Commission shall not be required to disclose under section 552 of title 5, United States Code, or any other provision of law—

“(A) any material obtained from a foreign government agency, if the foreign government agency has requested confidential treatment, or has precluded such disclosure under other use limitations, as a condition of providing the material;

“(B) any material reflecting a consumer complaint obtained from any other foreign source, if that foreign source supplying the material has requested confidential treatment as a condition of providing the material; or

“(C) any material reflecting a consumer complaint submitted to a Commission reporting mechanism sponsored in part by foreign government agencies.

“(4) LIMITATION.—Nothing in this subsection authorizes the Commission to withhold information from the Congress or prevent the Commission from complying with an order of a court of the United States in an action commenced by the United States or the Commission.

“(5) DEFINITION.—In this subsection, the term ‘foreign government agency’ means—

“(A) any agency or judicial authority of a foreign government, including a foreign state, a political subdivision of a foreign state, or a multinational organization constituted by and comprised of foreign states, that is vested with law enforcement or investigative authority in civil, criminal, or administrative matters; and

“(B) any multinational organization, to the extent that it is acting on behalf of an entity described in subparagraph (A).

“(g) NOTIFICATION TO STATE HEALTH DEPARTMENTS.—Whenever the Commission is notified of any voluntary corrective action taken by a manufacturer (or a retailer in the case of a retailer selling a product under its own label) in consultation with the Commission, or issues an order under section 15(c) or (d) with respect to any product, the Commission shall notify each State’s health department (or other agency designated by the State) of such voluntary corrective action or order.”.

SEC. 208. EMPLOYEE TRAINING EXCHANGES.

(a) IN GENERAL.—The Commission may—

(1) retain or employ officers or employees of foreign government agencies on a temporary basis pursuant to section 4 of the Consumer Product Safety Act (15 U.S.C. 2053) or section 3101 or 3109 of title 5, United States Code; and

(2) detail officers or employees of the Commission to work on a temporary basis for appropriate foreign government agencies for the purpose of providing or receiving training.

(b) RECIPROCITY AND REIMBURSEMENT.—The Commission may execute the authority contained in subsection (a) with or without reimbursement in money or in kind, and with or without reciprocal arrangements by or on behalf of the foreign government agency involved. Any amounts received as reimbursement for expenses incurred by the Commission under this section shall be credited to the appropriations account from which such expenses were paid.

(c) STANDARDS OF CONDUCT.—An individual retained or employed under subsection (a)(1) shall be considered to be a Federal employee while so retained or employed, only for purposes of—

(1) injury compensation as provided in chapter 81 of title 5, United States Code, and tort claims liability under chapter 171 of title 28, United States Code;

(2) the Ethics in Government Act (5 U.S.C. App.) and the provisions of chapter 11 of title 18, United States Code; and

(3) any other statute or regulation governing the conduct of Federal employees.

SEC. 209. ANNUAL REPORTING REQUIREMENT.

(a) IN GENERAL.—Section 27(j) (15 U.S.C. 2076(j)) is amended—

(1) in the matter preceding paragraph (1), by striking “The Commission” and inserting “Notwithstanding section 3003 of the Federal Reports Elimination and Sunset Act of 1995 (31 U.S.C. 1113 note), the Commission”; and

(2) by redesignating paragraphs (5) through (11) as paragraphs (7) through (13), respectively, and inserting after paragraph (4) the following:

“(5) the number and a summary of recall orders issued under section 12 or 15 during such year and a summary of voluntary corrective actions taken by manufacturers in consultation with the Commission of which the Commission has notified the public, and an assessment of such orders and actions;

“(6) beginning not later than 1 year after the date of enactment of the Consumer Product Safety Improvement Act of 2008—

“(A) progress reports and incident updates with respect to action plans implemented under section 15(d);

“(B) statistics with respect to injuries and deaths associated with products that the Commission determines present a substantial product hazard under section 15(c); and

“(C) the number and type of communication from consumers to the Commission with respect to each product with respect to which the Commission takes action under section 15(d);”.

(b) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to reports submitted for fiscal year 2009 and thereafter.

Subtitle B—Enhanced Enforcement Authority

SEC. 211. PUBLIC DISCLOSURE OF INFORMATION.

Section 6 (15 U.S.C. 2055) is amended—

(1) by inserting “A manufacturer or private labeler shall submit any such mark within 15 calendar days after the date on which it receives the Commission’s offer.” after “paragraph (2).” in subsection (a)(3);

(2) by striking “30 days” in subsection (b)(1) and inserting “15 days”;

(3) by striking “finds that the public” in subsection (b)(1) and inserting “publishes a finding that the public”;

(4) by striking “notice and publishes such a finding in the Federal Register,” in subsection (b)(1) and inserting “notice,”;

(5) by striking “10 days” in subsection (b)(2) and inserting “5 days”;

(6) by striking “finds that the public” in subsection (b)(2) and inserting “publishes a finding that the public”;

(7) by striking “notice and publishes such finding in the Federal Register.” in subsection (b)(2) and inserting “notice.”;

(8) in subsection (b)—

(A) by striking “(3)” and inserting “(3)(A)”; and

(B) by adding at the end thereof the following:

“(B) If the Commission determines that the public health and safety requires expedited consideration of an action brought under subparagraph (A), the Commission may file a request with the District Court for such expedited consideration. If the Commission files such a request, the District Court shall—

“(i) assign the matter for hearing at the earliest possible date;

“(ii) give precedence to the matter, to the greatest extent practicable, over all other matters pending on the docket of the court at the time;

“(iii) expedite consideration of the matter to the greatest extent practicable; and

“(iv) grant or deny the requested injunction within 30 days after the date on which the Commission’s request was filed with the court.”;

(9) by striking “section 19 (related to prohibited acts);” in subsection (b)(4) and inserting “any consumer product safety rule or provision of this Act or similar rule or provision of any other Act enforced by the Commission;”;

(10) by striking “or” after the semicolon in subsection (b)(5)(B);

(11) by striking “disclosure.” in subsection (b)(5)(C) and inserting “disclosure; or”;

(12) by inserting in subsection (b)(5) after subparagraph (C) the following:

“(D) the Commission publishes a finding that the public health and safety requires public disclosure with a lesser period of notice than is required under paragraph (1).”; and

(13) in the matter following subparagraph (D) of subsection (b)(5) (as added by paragraph (12) of this section), by striking “section 19(a),” and inserting “any consumer product safety rule or provision under this Act or similar rule or provision of any other Act enforced by the Commission.”.

SEC. 212. ESTABLISHMENT OF A PUBLIC CONSUMER PRODUCT SAFETY DATABASE.

(a) IN GENERAL.—The Act is amended by inserting after section 6 (15 U.S.C. 2055) the following:

“SEC. 6A. PUBLICLY AVAILABLE CONSUMER PRODUCT SAFETY INFORMATION DATABASE.

“(a) DATABASE REQUIRED.—

“(1) IN GENERAL.—Subject to the availability of appropriations, the Commission shall, in accordance with the requirements of this section, establish and maintain a database on the safety of consumer products, and other products or substances regulated by the Commission, that is—

“(A) publicly available;

“(B) searchable; and

“(C) accessible through the Internet website of the Commission.

“(2) SUBMISSION OF DETAILED IMPLEMENTATION PLAN TO CONGRESS.—Not later than 180 days after the date of enactment of the Consumer Product Safety Improvement Act of 2008, the Commission shall transmit to the appropriate Congressional committees a detailed plan for establishing and maintaining the database required by paragraph (1), including plans for the operation, content, maintenance, and functionality of the database. The plan shall detail the integration of the database into the Commission’s overall information technology improvement objectives and plans. The plan submitted under this subsection shall include a detailed implementation schedule for the database, and plans for a public awareness campaign to be conducted by the Commission to increase consumer awareness of the database.

“(3) DATE OF INITIAL AVAILABILITY.—Not later than 18 months after the date on which the Commission submits the plan required by paragraph (2), the Commission shall establish the database required by paragraph (1).

“(b) CONTENT AND ORGANIZATION.—

“(1) CONTENTS.—Except as provided in subsection (c)(4), the database shall include the following:

“(A) Reports of harm relating to the use of consumer products, and other products or substances regulated by the Commission, that are received by the Commission from—

- “(i) consumers;
- “(ii) local, State, or Federal government agencies;
- “(iii) health care professionals;
- “(iv) child service providers; and
- “(v) public safety entities.

“(B) Information derived by the Commission from notice under section 15(c) or any notice to the public relating to a voluntary corrective action taken by a manufacturer, in consultation with the Commission, of which action the Commission has notified the public.

“(C) The comments received by the Commission under subsection (c)(2)(A) to the extent requested under subsection (c)(2)(B).

“(2) SUBMISSION OF INFORMATION.—In implementing the database, the Commission shall establish the following:

“(A) Electronic, telephonic, and paper-based means of submitting, for inclusion in the database, reports described in paragraph (1)(A) of this subsection.

“(B) A requirement that any report described in paragraph (1)(A) submitted for inclusion in such database include, at a minimum—

“(i) a description of the consumer product (or other product or substance regulated by the Commission) concerned;

“(ii) identification of the manufacturer or private labeler of the consumer product (or other product or substance regulated by the Commission);

“(iii) a description of the harm relating to the use of the consumer product (or other product or substance regulated by the Commission);

“(iv) contact information for the person submitting the report; and

“(v) a verification by the person submitting the information that the information submitted is true and accurate to the best of the person’s knowledge and that the person consents that such information be included in the database.

“(3) ADDITIONAL INFORMATION.—In addition to the reports received under paragraph (1), the Commission shall include in the database, consistent with the requirements of section 6(a) and (b), any additional information it determines to be in the public interest.

“(4) ORGANIZATION OF DATABASE.—The Commission shall categorize the information available on the database in a manner consistent with the public interest and in such manner as it determines to facilitate easy use by consumers and shall ensure, to the extent practicable, that the database is sortable and accessible by—

“(A) the date on which information is submitted for inclusion in the database;

“(B) the name of the consumer product (or other product or substance regulated by the Commission);

“(C) the model name;

“(D) the manufacturer’s or private labeler’s name; and
“(E) such other elements as the Commission considers
in the public interest.

“(5) NOTICE REQUIREMENTS.—The Commission shall provide clear and conspicuous notice to users of the database that the Commission does not guarantee the accuracy, completeness, or adequacy of the contents of the database.

“(6) AVAILABILITY OF CONTACT INFORMATION.—The Commission may not disclose, under this section, the name, address, or other contact information of any individual or entity that submits to the Commission a report described in paragraph (1)(A), except that the Commission may provide such information to the manufacturer or private labeler of the product with the express written consent of the person submitting the information. Consumer information provided to a manufacturer or private labeler under this section may not be used or disseminated to any other party for any purpose other than verifying a report submitted under paragraph (1)(A).

“(c) PROCEDURAL REQUIREMENTS.—

“(1) TRANSMISSION OF REPORTS TO MANUFACTURERS AND PRIVATE LABELERS.—Not later than 5 business days after the Commission receives a report described in subsection (b)(1)(A) which includes the information required by subsection (b)(2)(B), the Commission shall to the extent practicable transmit the report, subject to subsection (b)(6), to the manufacturer or private labeler identified in the report.

“(2) OPPORTUNITY TO COMMENT.—

“(A) IN GENERAL.—If the Commission transmits a report under paragraph (1) to a manufacturer or private labeler, the Commission shall provide such manufacturer or private labeler an opportunity to submit comments to the Commission on the information contained in such report.

“(B) REQUEST FOR INCLUSION IN DATABASE.—A manufacturer or private labeler may request the Commission to include its comments in the database.

“(C) CONFIDENTIAL MATTER.—

“(i) IN GENERAL.—If the Commission transmits a report received under paragraph (1) to a manufacturer or private labeler, the manufacturer or private labeler may review the report for confidential information and request that portions of the report identified as confidential be so designated.

“(ii) REDACTION.—If the Commission determines that the designated information contains, or relates to, a trade secret or other matter referred to in section 1905 of title 18, United States Code, or that is subject to section 552(b)(4) of title 5, United States Code, the Commission shall redact the designated information in the report before it is placed in the database.

“(iii) REVIEW.—If the Commission determines that the designated information is not confidential under clause (ii), the Commission shall notify the manufacturer or private labeler and include the information in the database. The manufacturer or private labeler may bring an action in the district court of the United States in the district in which the complainant resides,

or has its principal place of business, or in the United States District Court for the District of Columbia, to seek removal of the information from the database.

“(3) PUBLICATION OF REPORTS AND COMMENTS.—

“(A) REPORTS.—Except as provided in paragraph (4)(A), if the Commission receives a report described in subsection (b)(1)(A), the Commission shall make the report available in the database not later than the 10th business day after the date on which the Commission transmits the report under paragraph (1) of this subsection.

“(B) COMMENTS.—Except as provided in paragraph (4)(A), if the Commission receives a comment under paragraph (2)(A) with respect to a report described in subsection (b)(1)(A) and a request with respect to such comment under paragraph (2)(B) of this subsection, the Commission shall make such comment available in the database at the same time as such report or as soon as practicable thereafter.

“(4) INACCURATE INFORMATION.—

“(A) INACCURATE INFORMATION IN REPORTS AND COMMENTS RECEIVED.—If, prior to making a report described in subsection (b)(1)(A) or a comment described in paragraph (2) of this subsection available in the database, the Commission determines that the information in such report or comment is materially inaccurate, the Commission shall—

“(i) decline to add the materially inaccurate information to the database;

“(ii) correct the materially inaccurate information in the report or comment and add the report or comment to the database; or

“(iii) add information to correct inaccurate information in the database.

“(B) INACCURATE INFORMATION IN DATABASE.—If the Commission determines, after investigation, that information previously made available in the database is materially inaccurate or duplicative of information in the database, the Commission shall, not later than 7 business days after such determination—

“(i) remove such information from the database;

“(ii) correct such information; or

“(iii) add information to correct inaccurate information in the database.

“(d) ANNUAL REPORT.—The Commission shall submit to the appropriate Congressional committees an annual report on the database, including—

“(1) the operation, content, maintenance, functionality, and cost of the database for the reporting year; and

“(2) the number of reports and comments for the year—

“(A) received by the Commission under this section;

“(B) posted on the database; and

“(C) corrected on or removed from the database.

“(e) GAO STUDY.—Within 2 years after the date on which the Commission establishes the database under this section, the Comptroller General shall submit a report to the appropriate Congressional committees containing—

“(1) an analysis of the general utility of the database, including—

“(A) an assessment of the extent of use of the database by consumers, including whether the database is accessed by a broad range of the public and whether consumers find the database to be useful; and

“(B) efforts by the Commission to inform the public about the database; and

“(2) recommendations for measures to increase use of the database by consumers and to ensure use by a broad range of the public.

“(f) APPLICATION OF CERTAIN NOTICE AND DISCLOSURE REQUIREMENTS.—

“(1) IN GENERAL.—The provisions of section 6(a) and (b) shall not apply to the disclosure under this section of a report described in subsection (b)(1)(A) of this section.

“(2) CONSTRUCTION.—Paragraph (1) shall not be construed to exempt from the requirements of section 6(a) and (b) information received by the Commission under—

“(A) section 15(b); or

“(B) any other mandatory or voluntary reporting program established between a retailer, manufacturer, or private labeler and the Commission.

“(g) HARM DEFINED.—In this section, the term ‘harm’ means—

“(1) injury, illness, or death; or

“(2) risk of injury, illness, or death, as determined by the Commission.”.

(b) UPGRADE OF COMMISSION INFORMATION TECHNOLOGY SYSTEMS.—The Commission shall expedite efforts to upgrade and improve the information technology systems in use by the Commission on the date of enactment of this Act.

(c) CLERICAL AMENDMENT.—The table of contents in section 1 (15 U.S.C. 2051 note), as amended by section 206, is amended by inserting after the item relating to section 6 the following new item:

“Sec. 6A. Publicly available consumer product safety information database.”.

SEC. 213. PROHIBITION ON STOCKPILING UNDER OTHER COMMISSION-ENFORCED STATUTES.

Section 9(g)(2) (15 U.S.C. 2058(g)(2)) is amended—

(1) by inserting “or to which a rule under this Act or similar rule, regulation, standard, or ban under any other Act enforced by the Commission applies,” after “applies,”; and

(2) by striking “consumer product safety rule” the second, third, and fourth places it appears, and inserting “rule, regulation, standard, or ban”.

SEC. 214. ENHANCED RECALL AUTHORITY AND CORRECTIVE ACTION PLANS.

(a) ENHANCED RECALL AUTHORITY.—Section 15 (15 U.S.C. 2064) is amended—

(1) in subsection (a)(1), by inserting “under this Act or a similar rule, regulation, standard, or ban under any other Act enforced by the Commission” after “consumer product safety rule”;

(2) in subsection (b)—

(A) by striking “consumer product distributed in commerce,” and inserting “consumer product, or other product or substance over which the Commission has jurisdiction

under any other Act enforced by the Commission (other than motor vehicle equipment as defined in section 30102(a)(7) of title 49, United States Code), distributed in commerce,”;

(B) by redesignating paragraphs (2) and (3) as paragraphs (3) and (4), respectively;

(C) by inserting after paragraph (1) the following:

“(2) fails to comply with any other rule, regulation, standard, or ban under this Act or any other Act enforced by the Commission;”;

(D) by adding at the end the following: “A report provided under paragraph (2) may not be used as the basis for criminal prosecution of the reporting person under section 5 of the Federal Hazardous Substances Act (15 U.S.C. 1264), except for offenses which require a showing of intent to defraud or mislead.”.

(3) in subsection (c)—

(A) by inserting “(1)” after the subsection designation;

(B) by inserting “or if the Commission, after notifying the manufacturer, determines a product to be an imminently hazardous consumer product and has filed an action under section 12,” after “from such substantial product hazard,”;

(C) by redesignating paragraphs (1) through (3) as subparagraphs (D) through (F), respectively;

(D) by inserting after “the following actions:” the following:

“(A) To cease distribution of the product.

“(B) To notify all persons that transport, store, distribute, or otherwise handle the product, or to which the product has been transported, sold, distributed, or otherwise handled, to cease immediately distribution of the product.

“(C) To notify appropriate State and local public health officials.”;

(E) by striking “comply.” in subparagraph (D), as redesignated, and inserting “comply, including posting clear and conspicuous notice on its Internet website, providing notice to any third party Internet website on which such manufacturer, retailer, distributor, or licensor has placed the product for sale, and announcements in languages other than English and on radio and television where the Commission determines that a substantial number of consumers to whom the recall is directed may not be reached by other notice.”; and

(F) by adding at the end the following:

“(2) The Commission may require a notice described in paragraph (1) to be distributed in a language other than English if the Commission determines that doing so is necessary to adequately protect the public.

“(3) If a district court determines, in an action filed under section 12, that the product that is the subject of such action is not an imminently hazardous consumer product, the Commission shall rescind any order issued under this subsection with respect to such product.”;

(4) in subsection (f)—

(A) by striking “An order” and inserting “(1) Except as provided in paragraph (2), an order”; and

(B) by inserting at the end the following:

“(2) The requirement for a hearing in paragraph (1) shall not apply to an order issued under subsection (c) or (d) relating to an imminently hazardous consumer product with regard to which the Commission has filed an action under section 12.”.

(b) CORRECTIVE ACTION PLANS.—Section 15(d) (15 U.S.C. 2064(d)) is amended—

(1) by inserting “(1)” after the subsection designation;

(2) by inserting “to provide the notice required by subsection (c) and” after “such product” the first place it appears;

(3) by striking “whichever of the following actions the person to whom the order is directed elects:” and inserting “any one or more of the following actions it determines to be in the public interest:”;

(4) by redesignating paragraphs (1), (2), and (3) as subparagraphs (A), (B), and (C);

(5) in each of subparagraphs (A) and (B) (as so redesignated), by striking “consumer product safety rule” each place it appears and inserting “rule, regulation, standard, or ban”;

(6) by striking “more (A)” in subparagraph (C), as redesignated, and inserting “more (i)”;

(7) by striking “or (B)” in subparagraph (C), as redesignated, and inserting “or (ii)”;

(8) by striking “An order under this subsection may” and inserting:

“(2) An order under this subsection shall”;

(9) by striking “satisfactory to the Commission,” and inserting “for approval by the Commission,”;

(10) by striking “paragraphs of this subsection under which such person has elected to act” and inserting “subparagraphs under which such person has been ordered to act”;

(11) by striking “if the person to whom the order is directed elects to take the action described in paragraph (3)” and insert “if the Commission orders the action described in subparagraph (C)”;

(12) by striking “If an order under this subsection is directed” and all that follows through “has the election under this subsection”;

(13) by striking “described in paragraph (3).” and inserting “described in paragraph (1)(C).”; and

(14) by adding at the end the following:

“(3)(A) If the Commission approves an action plan, it shall indicate its approval in writing.

“(B) If the Commission finds that an approved action plan is not effective or appropriate under the circumstances, or that the manufacturer, retailer, or distributor is not executing an approved action plan effectively, the Commission may, by order, amend, or require amendment of, the action plan. In determining whether an approved plan is effective or appropriate under the circumstances, the Commission shall consider whether a repair or replacement changes the intended functionality of the product.

“(C) If the Commission determines, after notice and opportunity for comment, that a manufacturer, retailer, or distributor has failed to comply substantially with its obligations under its action plan, the Commission may revoke its approval of the action plan. The manufacturer, retailer, or distributor to which the action plan applies may not distribute in commerce the product to which the

action plan relates after receipt of notice of a revocation of the action plan.”

(c) CONTENT OF NOTICE.—Section 15 (15 U.S.C. 2064) is further amended by adding at the end the following:

“(i) REQUIREMENTS FOR RECALL NOTICES.—

“(1) GUIDELINES.—Not later than 180 days after the date of enactment of the Consumer Product Safety Improvement Act of 2008, the Commission shall, by rule, establish guidelines setting forth a uniform class of information to be included in any notice required under an order under subsection (c) or (d) of this section or under section 12. Such guidelines shall include any information that the Commission determines would be helpful to consumers in—

“(A) identifying the specific product that is subject to such an order;

“(B) understanding the hazard that has been identified with such product (including information regarding incidents or injuries known to have occurred involving such product); and

“(C) understanding what remedy, if any, is available to a consumer who has purchased the product.

“(2) CONTENT.—Except to the extent that the Commission determines with respect to a particular product that one or more of the following items is unnecessary or inappropriate under the circumstances, the notice shall include the following:

“(A) description of the product, including—

“(i) the model number or stock keeping unit (SKU) number of the product;

“(ii) the names by which the product is commonly known; and

“(iii) a photograph of the product.

“(B) A description of the action being taken with respect to the product.

“(C) The number of units of the product with respect to which the action is being taken.

“(D) A description of the substantial product hazard and the reasons for the action.

“(E) An identification of the manufacturers and significant retailers of the product.

“(F) The dates between which the product was manufactured and sold.

“(G) The number and a description of any injuries or deaths associated with the product, the ages of any individuals injured or killed, and the dates on which the Commission received information about such injuries or deaths.

“(H) A description of—

“(i) any remedy available to a consumer;

“(ii) any action a consumer must take to obtain a remedy; and

“(iii) any information a consumer needs in order to obtain a remedy or information about a remedy, such as mailing addresses, telephone numbers, fax numbers, and email addresses.

“(I) Other information the Commission deems appropriate.”

SEC. 215. INSPECTION OF FIREWALLED CONFORMITY ASSESSMENT BODIES; IDENTIFICATION OF SUPPLY CHAIN.

(a) **INSPECTION OF FIREWALLED CONFORMITY ASSESSMENT BODY.**—Section 16(a) (15 U.S.C. 2065(a)) is amended—

(1) by striking “or (B)” and inserting “(B) any firewalled conformity assessment bodies accredited under section 14(f)(2)(D), or (C)” in paragraph (1); and

(2) by inserting “firewalled conformity assessment body,” after “factory,” in paragraph (2).

(b) **IDENTIFICATION OF MANUFACTURERS, IMPORTERS, RETAILERS, AND DISTRIBUTORS.**—Section 16 (15 U.S.C. 2065) is further amended by adding at the end thereof the following:

“(c) **IDENTIFICATION OF MANUFACTURERS, IMPORTERS, RETAILERS, AND DISTRIBUTORS.**—Upon request by an officer or employee duly designated by the Commission—

“(1) every importer, retailer, or distributor of a consumer product (or other product or substance over which the Commission has jurisdiction under this or any other Act) shall identify the manufacturer of that product by name, address, or such other identifying information as the officer or employee may request, to the extent that such information is known or can be readily determined by the importer, retailer, or distributor; and

“(2) every manufacturer shall identify by name, address, or such other identifying information as the officer or employee may request—

“(A) each retailer or distributor to which the manufacturer directly supplied a given consumer product (or other product or substance over which the Commission has jurisdiction under this or any other Act);

“(B) each subcontractor involved in the production or fabrication of such product or substance; and

“(C) each subcontractor from which the manufacturer obtained a component thereof.”

(c) **CONFORMING AMENDMENTS.**—Section 16 (15 U.S.C. 2065) is further amended—

(1) in subsection (a), by inserting “INSPECTION.—” after the subsection designation; and

(2) in subsection (b), by inserting “RECORDKEEPING.—” after the subsection designation.

SEC. 216. PROHIBITED ACTS.

(a) **SALE OF RECALLED PRODUCTS.**—Section 19(a) (15 U.S.C. 2068(a)) is amended—

(1) by striking paragraphs (1) and (2) and inserting the following:

“(1) sell, offer for sale, manufacture for sale, distribute in commerce, or import into the United States any consumer product, or other product or substance that is regulated under this Act or any other Act enforced by the Commission, that is not in conformity with an applicable consumer product safety rule under this Act, or any similar rule, regulation, standard, or ban under any other Act enforced by the Commission;

“(2) sell, offer for sale, manufacture for sale, distribute in commerce, or import into the United States any consumer product, or other product or substance that is—

“(B) subject to voluntary corrective action taken by the manufacturer, in consultation with the Commission, of which action the Commission has notified the public or if the seller, distributor, or manufacturer knew or should have known of such voluntary corrective action;

“(C) subject to an order issued under section 12 or 15 of this Act; or

“(D) a banned hazardous substance within the meaning of section 2(q)(1) of the Federal Hazardous Substances Act (15 U.S.C. 1261(q)(1));”;

(2) by amending paragraph (6) to read as follows:

“(6) fail to furnish a certificate required by this Act or any other Act enforced by the Commission, or to issue a false certificate if such person in the exercise of due care has reason to know that the certificate is false or misleading in any material respect; or to fail to comply with any requirement of section 14 (including the requirement for tracking labels) or any rule or regulation under such section;”.

(3) by striking “or” after the semicolon in paragraph (7);

(4) by striking “and” after the semicolon in paragraph (8);

(5) by striking “insulation).” in paragraph (9) and inserting “insulation);”; and

(6) by striking the period at the end of paragraph (10) and inserting a semicolon; and

(7) by inserting at the end the following:

“(12) sell, offer for sale, distribute in commerce, or import into the United States any consumer product bearing a registered safety certification mark owned by an accredited conformity assessment body, which mark is known, or should have been known, by such person to be used in a manner unauthorized by the owner of that certification mark;

“(13) misrepresent to any officer or employee of the Commission the scope of consumer products subject to an action required under section 12 or 15, or to make a material misrepresentation to such an officer or employee in the course of an investigation under this Act or any other Act enforced by the Commission; or

“(14) exercise, or attempt to exercise, undue influence on a third party conformity assessment body (as defined in section 14(f)(2)) with respect to the testing, or reporting of the results of testing, of any product for compliance under this Act or any other Act enforced by the Commission.

“(15) export from the United States for purpose of sale any consumer product, or other product or substance regulated by the Commission (other than a consumer product or substance, the export of which is permitted by the Secretary of the Treasury pursuant to section 17(e)) that—

“(A) is subject to an order issued under section 12 or 15 of this Act or is a banned hazardous substance within the meaning of section 2(q)(1) of the Federal Hazardous Substances Act (15 U.S.C. 1261(q)(1)); or

“(B) is subject to a voluntary corrective action taken by the manufacturer, in consultation with the Commission, of which action the Commission has notified the public; or

“(16) violate an order of the Commission issued under section 18(c).”.

(b) CONFORMING AMENDMENT.—Section 17(a)(2) (15 U.S.C. 2066(a)(2)) is amended to read as follows:

“(2) is not accompanied by a certificate required by this Act or any other Act enforced by the Commission, or is accompanied by a false certificate, if the manufacturer in the exercise of due care has reason to know that the certificate is false or misleading in any material respect, or is not accompanied by any label or certificate (including tracking labels) required under section 14 or any rule or regulation under such section;”.

SEC. 217. PENALTIES.

(a) MAXIMUM CIVIL PENALTIES OF THE CONSUMER PRODUCT SAFETY COMMISSION.—

(1) CONSUMER PRODUCT SAFETY ACT.—Section 20(a)(1) (15 U.S.C. 2069(a)(1)) is amended—

(A) by striking “\$5,000” and inserting “\$100,000”;

(B) by striking “\$1,250,000” both places it appears and inserting “\$15,000,000”; and

(C) by striking “December 1, 1994,” in paragraph (3)(B) and inserting “December 1, 2011,”.

(2) FEDERAL HAZARDOUS SUBSTANCES ACT.—Section 5(c)(1) of the Federal Hazardous Substances Act (15 U.S.C. 1264(c)(1)) is amended—

(A) by striking “\$5,000” in paragraph (1) and inserting “\$100,000”;

(B) by striking “\$1,250,000” both places it appears and inserting “\$15,000,000”; and

(C) by striking “December 1, 1994,” in paragraph (6)(B) and inserting “December 1, 2011,”.

(3) FLAMMABLE FABRICS ACT.—Section 5(e)(1) of the Flammable Fabrics Act (15 U.S.C. 1194(e)(1)) is amended—

(A) by striking “\$5,000” in paragraph (1) and inserting “\$100,000”;

(B) by striking “\$1,250,000” and inserting “\$15,000,000”; and

(C) by striking “December 1, 1994,” in paragraph (6)(B) and inserting “December 1, 2011,”.

(4) EFFECTIVE DATE.—The amendments made by this subsection shall take effect on the date that is the earlier of the date on which final regulations are issued under subsection (b)(2) or 1 year after the date of enactment of this Act.

(b) DETERMINATION OF PENALTIES BY THE CONSUMER PRODUCT SAFETY COMMISSION.—

(1) FACTORS TO BE CONSIDERED.—

(A) CONSUMER PRODUCT SAFETY ACT.—Section 20 (15 U.S.C. 2069) is amended—

(i) in subsection (b)—

(I) by inserting “the nature, circumstances, extent, and gravity of the violation, including” after “shall consider”;

(II) by striking “products distributed, and” and inserting “products distributed,”; and

(III) by inserting “, including how to mitigate undue adverse economic impacts on small

businesses, and such other factors as appropriate” before the period; and

(ii) in subsection (c)—

(I) by inserting “, including how to mitigate undue adverse economic impacts on small businesses, the nature, circumstances, extent, and gravity of the violation, including” after “person charged”; and

(II) by inserting “, and such other factors as appropriate” after “products distributed”.

(B) FEDERAL HAZARDOUS SUBSTANCES ACT.—Section 5(c) of the Federal Hazardous Substances Act (15 U.S.C. 1264(c)) is amended—

(i) in paragraph (3)—

(I) by inserting “the nature, circumstances, extent, and gravity of the violation, including” after “shall consider”;

(II) by striking “substance distributed, and” and inserting “substance distributed,”; and

(III) by inserting “, including how to mitigate undue adverse economic impacts on small businesses, and such other factors as appropriate” before the period; and

(ii) in paragraph (4)—

(I) by inserting “, including how to mitigate undue adverse economic impacts on small businesses, the nature, circumstances, extent, and gravity of the violation, including” after “person charged”; and

(II) by inserting “, and such other factors as appropriate” after “substance distributed”.

(C) FLAMMABLE FABRICS ACT.—Section 5(e) of the Flammable Fabrics Act (15 U.S.C. 1194(e)) is amended—

(i) in paragraph (2)—

(I) by striking “nature and number” and inserting “nature, circumstances, extent, and gravity”;

(II) by striking “absence of injury, and” and inserting “absence of injury,”; and

(III) by inserting “, and such other factors as appropriate” before the period; and

(ii) in paragraph (3)—

(I) by striking “nature and number” and inserting “nature, circumstances, extent, and gravity”;

(II) by striking “absence of injury, and” and inserting “absence of injury,”; and

(III) by inserting “, and such other factors as appropriate” before the period.

(2) CIVIL PENALTY CRITERIA.—Not later than 1 year after the date of enactment of this Act, and in accordance with the procedures of section 553 of title 5, United States Code, the Commission shall issue a final regulation providing its interpretation of the penalty factors described in section 20(b) of the Consumer Product Safety Act (15 U.S.C. 2069(b)), section 5(c)(3) of the Federal Hazardous Substances Act (15 U.S.C.

1264(c)(3)), and section 5(e)(2) of the Flammable Fabrics Act (15 U.S.C. 1194(e)(2)), as amended by subsection (a).

(c) CRIMINAL PENALTIES.—

(1) IN GENERAL.—Section 21(a) (15 U.S.C. 2070(a)) is amended to read as follows:

“(a) Violation of section 19 of this Act is punishable by—

“(1) imprisonment for not more than 5 years for a knowing and willful violation of that section;

“(2) a fine determined under section 3571 of title 18, United States Code; or

“(3) both.”.

(2) DIRECTORS, OFFICERS, AND AGENTS.—Section 21(b) (15 U.S.C. 2070(b)) is amended by striking “19, and who has knowledge of notice of noncompliance received by the corporation from the Commission,” and inserting “19”.

(3) UNDER THE FEDERAL HAZARDOUS SUBSTANCES ACT.—Section 5(a) of the Federal Hazardous Substances Act (15 U.S.C. 1264(a)) is amended by striking “one year, or a fine of not more than \$3,000, or both such imprisonment and fine.” and inserting “5 years, a fine determined under section 3571 of title 18, United States Code, or both.”.

(4) UNDER THE FLAMMABLE FABRICS ACT.—Section 7 of the Flammable Fabrics Act (15 U.S.C. 1196) is amended to read as follows:

“PENALTIES

“SEC. 7. Violation of section 3 or 8(b) of this Act, or failure to comply with section 15(c) of this Act, is punishable by—

“(1) imprisonment for not more than 5 years for a knowing and willful violation of that section;

“(2) a fine determined under section 3571 of title 18, United States Code; or

“(3) both.”.

(d) CRIMINAL PENALTIES TO INCLUDE ASSET FORFEITURE.—Section 21 (15 U.S.C. 2070) is amended by adding at the end thereof the following:

“(c)(1) In addition to the penalties provided by subsection (a), the penalty for a criminal violation of this Act or any other Act enforced by the Commission may include the forfeiture of assets associated with the violation.

“(2) In this subsection, the term ‘criminal violation’ means a violation of this Act or any other Act enforced by the Commission for which the violator is sentenced to pay a fine, be imprisoned, or both.”.

SEC. 218. ENFORCEMENT BY STATE ATTORNEYS GENERAL.

(a) IN GENERAL.—Section 24 (15 U.S.C. 2073) is amended—

(1) by striking “PRIVATE” in the section heading and inserting “ADDITIONAL”;

(2) by inserting “(a) IN GENERAL.—” before “Any interested person”; and

(3) by adding at the end the following:

“(b) STATE ATTORNEY GENERAL ENFORCEMENT.—

“(1) RIGHT OF ACTION.—Except as provided in paragraph (5), the attorney general of a State, or other authorized State officer, alleging a violation of section 19(a)(1), (2), (5), (6), (7), (9), or (12) of this Act that affects or may affect such State

or its residents may bring an action on behalf of the residents of the State in any United States district court for the district in which the defendant is found or transacts business to obtain appropriate injunctive relief.

“(2) INITIATION OF CIVIL ACTION.—

“(A) NOTICE TO COMMISSION REQUIRED IN ALL CASES.—A State shall provide written notice to the Commission regarding any civil action under paragraph (1). Except when proceeding under subparagraph (C), the State shall provide the notice at least 30 days before the date on which the State intends to initiate the civil action by filing a complaint.

“(B) FILING OF COMPLAINT.—A State may initiate the civil action by filing a complaint—

“(i) at any time after the date on which the 30-day period ends; or

“(ii) earlier than such date if the Commission consents to an earlier initiation of the civil action by the State.

“(C) ACTIONS INVOLVING SUBSTANTIAL PRODUCT HAZARD.—Notwithstanding subparagraph (B), a State may initiate a civil action under paragraph (1) by filing a complaint immediately after notifying the Commission of the State’s determination that such immediate action is necessary to protect the residents of the State from a substantial product hazard (as defined in section 15(a)).

“(D) FORM OF NOTICE.—The written notice required by this paragraph may be provided by electronic mail, facsimile machine, or any other means of communication accepted by the Commission.

“(E) COPY OF COMPLAINT.—A State shall provide a copy of the complaint to the Commission upon filing the complaint or as soon as possible thereafter.

“(3) INTERVENTION BY THE COMMISSION.—The Commission may intervene in such civil action and upon intervening—

“(A) be heard on all matters arising in such civil action; and

“(B) file petitions for appeal of a decision in such civil action.

“(4) CONSTRUCTION.—Nothing in this section, section 5(d) of the Federal Hazardous Substances Act (15 U.S.C. 1264(d)), section 9 of the Poison Prevention Packaging Act of 1970, or section 5(a) of the Flammable Fabrics Act (15 U.S.C. 1194(d)) shall be construed—

“(A) to prevent the attorney general of a State, or other authorized State officer, from exercising the powers conferred on the attorney general, or other authorized State officer, by the laws of such State; or

“(B) to prohibit the attorney general of a State, or other authorized State officer, from proceeding in State or Federal court on the basis of an alleged violation of any civil or criminal statute of that State.

“(5) LIMITATION.—No separate suit shall be brought under this subsection (other than a suit alleging a violation of paragraph (1) or (2) of section 19(a)) if, at the time the suit is brought, the same alleged violation is the subject of a pending civil or criminal action by the United States under this Act.

“(6) RESTRICTIONS ON PRIVATE COUNSEL.—If private counsel is retained to assist in any civil action under paragraph (1), the private counsel retained to assist the State may not—

“(A) share with participants in other private civil actions that arise out of the same operative facts any information that is—

“(i) subject to attorney-client or work product privilege; and

“(ii) was obtained during discovery in the action under paragraph (1); or

“(B) use any information that is subject to attorney-client or work product privilege that was obtained while assisting the State in the action under paragraph (1) in any other private civil actions that arise out of the same operative facts.”.

(b) CONFORMING AMENDMENTS.—

(1) POISON PREVENTION PACKAGING ACT.—The Poison Prevention Packaging Act of 1970 (15 U.S.C. 1471 et seq.) is amended by adding at the end the following:

“SEC. 9. ENFORCEMENT BY STATE ATTORNEYS GENERAL.

“The attorney general of a State, or other authorized State officer, alleging a violation of a standard or rule promulgated under section 3 that affects or may affect such State or its residents, may bring an action on behalf of the residents of the State in any United States district court for the district in which the defendant is found or transacts business to obtain appropriate injunctive relief. The procedural requirements of section 24(b) of the Consumer Product Safety Act (15 U.S.C. 2073(b)) shall apply to any such action.”.

(2) CLERICAL AMENDMENT.—The table of contents in section 1 (15 U.S.C. 2051 note) is amended by striking the item relating to section 24 and inserting the following:

“Sec. 24. Additional enforcement of product safety rules and of section 15 orders.”.

SEC. 219. WHISTLEBLOWER PROTECTIONS.

(a) IN GENERAL.—The Act (15 U.S.C. 2051 et seq.), as amended by section 206 of this Act, is further amended by adding at the end the following:

“WHISTLEBLOWER PROTECTION

“SEC. 40. (a) No manufacturer, private labeler, distributor, or retailer, may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee, whether at the employee’s initiative or in the ordinary course of the employee’s duties (or any person acting pursuant to a request of the employee)—

“(1) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of any provision of this Act or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts;

“(2) testified or is about to testify in a proceeding concerning such violation;

“(3) assisted or participated or is about to assist or participate in such a proceeding; or

“(4) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this Act or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts.

“(b)(1) A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 180 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination and identifying the person responsible for such act. Upon receipt of such a complaint, the Secretary shall notify, in writing, the person named in the complaint of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

“(2)(A) Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the complainant and the person named in the complaint an opportunity to submit to the Secretary a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary shall initiate an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary’s findings. If the Secretary concludes that there is reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary’s findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Any such hearing shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

“(B)(i) The Secretary shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

“(ii) Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

“(iii) The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any

behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

“(iv) Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

“(3)(A) Not later than 120 days after the date of conclusion of any hearing under paragraph (2), the Secretary shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary, the complainant, and the person alleged to have committed the violation.

“(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) has occurred, the Secretary shall order the person who committed such violation—

“(i) to take affirmative action to abate the violation;

“(ii) to reinstate the complainant to his or her former position together with compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and

“(iii) to provide compensatory damages to the complainant.

If such an order is issued under this paragraph, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys’ and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

“(C) If the Secretary finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary may award to the prevailing employer a reasonable attorneys’ fee, not exceeding \$1,000, to be paid by the complainant.

“(4) If the Secretary has not issued a final decision within 210 days after the filing of the complaint, or within 90 days after receiving a written determination, the complainant may bring an action at law or equity for *de novo* review in the appropriate district court of the United States with jurisdiction, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury. The proceedings shall be governed by the same legal burdens of proof specified in paragraph (2)(B). The court shall have jurisdiction to grant all relief necessary to make the employee whole, including injunctive relief and compensatory damages, including—

“(A) reinstatement with the same seniority status that the employee would have had, but for the discharge or discrimination;

“(B) the amount of back pay, with interest; and

“(C) compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney’s fees.

“(5)(A) Unless the complainant brings an action under paragraph (4), any person adversely affected or aggrieved by a final

order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary. Review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

“(B) An order of the Secretary with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

“(6) Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur, or in the United States district court for the District of Columbia, to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

“(7)(A) A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

“(B) The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorneys’ and expert witness fees) to any party whenever the court determines such award is appropriate.

“(c) Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28, United States Code.

“(d) Subsection (a) shall not apply with respect to an employee of a manufacturer, private labeler, distributor, or retailer who, acting without direction from such manufacturer, private labeler, distributor, or retailer (or such person’s agent), deliberately causes a violation of any requirement relating to any violation or alleged violation of any order, regulation, or consumer product safety standard under this Act or any other law enforced by the Commission.”

(b) CONFORMING AMENDMENT.—The table of contents, as amended by section 206 of this Act, is further amended by inserting after the item relating to section 39 the following:

“Sec. 40. Whistleblower protection.”

Subtitle C—Specific Import-Export Provisions

SEC. 221. EXPORT OF RECALLED AND NON-CONFORMING PRODUCTS.

(a) IN GENERAL.—Section 18 (15 U.S.C. 2067) is amended—

(1) in subsection (b), by striking “any product—” and all that follows through “promulgated under section 9,” and inserting “any product which is not in conformity with an

applicable consumer product safety rule in effect under this Act,”; and

(2) by adding at the end the following:

“(c) The Commission may prohibit a person from exporting from the United States for purpose of sale any consumer product that is not in conformity with an applicable consumer product safety rule under this Act, unless the importing country has notified the Commission that such country accepts the importation of such consumer product, provided that if the importing country has not so notified the Commission within 30 days after the Commission has provided notice to the importing country of the impending shipment, the Commission may take such action as appropriate within its authority with respect to the disposition of the product under the circumstances.

“(d) Nothing in this section shall apply to any consumer product, the export of which is permitted by the Secretary of the Treasury pursuant to section 17(e).”.

(b) CONFORMING AMENDMENTS TO FLAMMABLE FABRICS ACT.—Section 15 of the Flammable Fabrics Act (15 U.S.C. 1202) is amended by adding at the end the following:

“(d) Notwithstanding any other provision of this section, the Consumer Product Safety Commission may prohibit, by order, a person from exporting from the United States for purpose of sale any fabric or related material that the Commission determines is not in conformity with an applicable standard or rule under this Act, unless the importing country has notified the Commission that such country accepts the importation of such fabric or related material, provided that if the importing country has not so notified the Commission within 30 days after the Commission has provided notice to the importing country of the impending shipment, the Commission may take such action as is appropriate with respect to the disposition of the fabric or related material under the circumstances.

“(e) Nothing in this section shall apply to any fabric or related material, the export of which is permitted by the Secretary of the Treasury pursuant to section 17(e).”.

SEC. 222. IMPORT SAFETY MANAGEMENT AND INTERAGENCY COOPERATION.

(a) RISK ASSESSMENT METHODOLOGY.—Not later than 2 years after the date of enactment of this Act, the Commission shall develop a risk assessment methodology for the identification of shipments of consumer products that are—

(1) intended for import into the United States; and

(2) likely to include consumer products in violation of section 17(a) of the Consumer Product Safety Act (15 U.S.C. 2066(a)) or other import provisions enforced by the Commission.

(b) USE OF INTERNATIONAL TRADE DATA SYSTEM AND OTHER DATABASES.—In developing the methodology required under subsection (a), the Commission shall—

(1) provide for the use of the International Trade Data System, insofar as is practicable, established under section 411(d) of the Tariff Act of 1930 (19 U.S.C. 1411(d)) to evaluate and assess information about shipments of consumer products intended for import into the customs territory of the United States;

(2) incorporate the risk assessment methodology required under this section into its information technology modernization plan;

(3) examine, in consultation with U.S. Customs and Border Protection, how to share information collected and retained by the Commission, including information in the database required under section 6A of the Consumer Product Safety Act, for the purpose of identifying shipments of consumer products in violation of section 17(a) of such Act (15 U.S.C. 2066(a)) or other import provisions enforced by the Commission; and

(4) examine, in consultation with U.S. Customs and Border Protection, how to share information required by section 15(j) of the CPSA as added by section 223 of this Act for the purpose of identifying shipments of consumer products in violation of section 17(a) of the Consumer Product Safety Act (15 U.S.C. 2066(a)) or other import provisions enforced by the Commission.

(c) COOPERATION WITH U.S. CUSTOMS AND BORDER PROTECTION.—Not later than 1 year after the date of enactment of this Act, the Commission shall develop a plan for sharing information and coordinating with U.S. Customs and Border Protection that considers, at a minimum, the following:

(1) The number of full-time equivalent personnel employed by the Commission that should be stationed at U.S. ports of entry for the purpose of identifying shipments of consumer products that are in violation of section 17(a) of the Consumer Product Safety Act (15 U.S.C. 2066(a)) or other import provisions enforced by the Commission.

(2) The extent and nature of cooperation between the Commission and U.S. Customs and Border Protection personnel stationed at ports of entry in the identification of shipments of consumer product that are in violation of section 17(a) of the Consumer Product Safety Act (15 U.S.C. 2066(a)) or other import provisions enforced by the Commission under this Act or any other provision of law.

(3) The number of full-time equivalent personnel employed by the Commission that should be stationed at the National Targeting Center (or its equivalent) of U.S. Customs and Border Protection, including—

(A) the extent and nature of cooperation between Commission and U.S. Customs and Border Protection personnel stationed at the National Targeting Center (or its equivalent), as well as at United States ports of entry;

(B) the responsibilities of Commission personnel assigned to the National Targeting Center (or its equivalent) under subsection (b)(3); and

(C) whether the information available at the National Targeting Center (or its equivalent) would be useful to the Commission or U.S. Customs and Border Protection in identifying the consumer products described in subsection (a).

(4) The development of rule sets for the Automated Targeting System and expedited access for the Commission to the Automated Targeting System.

(5) The information and resources necessary for the development, updating, and effective implementation of the risk assessment methodology required in subsection (a).

(d) REPORT TO CONGRESS.—Not later than 180 days after completion of the risk assessment methodology required under this section, the Commission shall submit a report to the appropriate Congressional committees concerning, at a minimum, the following:

(1) The Commission's plan for implementing the risk assessment methodology required under this section.

(2) The changes made or necessary to be made to the Commission's memorandum of understanding with U.S. Customs and Border Protection.

(3) The status of—

(A) the development of the Automated Targeting System rule set required under subsection (c)(4) of this section;

(B) the Commission's access to the Automated Targeting System; and

(C) the effectiveness of the International Trade Data System in enhancing cooperation between the Commission and U.S. Customs and Border Protection for the purpose of identifying shipments of consumer products in violation of section 17(a) of the Consumer Product Safety Act (15 U.S.C. 2066(a)) or other import provisions enforced by the Commission;

(4) Whether the Commission requires additional statutory authority under the Consumer Product Safety Act, the Federal Hazardous Substances Act, the Flammable Fabrics Act, or the Poison Prevention Packaging Act of 1970 in order to implement the risk assessment methodology required under this section.

(5) The level of appropriations necessary to implement the risk assessment methodology required under this section.

SEC. 223. SUBSTANTIAL PRODUCT HAZARD LIST AND DESTRUCTION OF NONCOMPLIANT IMPORTED PRODUCTS.

(a) IDENTIFICATION OF SUBSTANTIAL HAZARDS.—Section 15 (15 U.S.C. 2064), as amended by section 214, is amended by adding at the end thereof the following:

“(j) SUBSTANTIAL PRODUCT HAZARD LIST.—

“(1) IN GENERAL.—The Commission may specify, by rule, for any consumer product or class of consumer products, characteristics whose existence or absence shall be deemed a substantial product hazard under subsection (a)(2), if the Commission determines that—

“(A) such characteristics are readily observable and have been addressed by voluntary standards; and

“(B) such standards have been effective in reducing the risk of injury from consumer products and that there is substantial compliance with such standards.

“(2) JUDICIAL REVIEW.—Not later than 60 days after promulgation of a rule under paragraph (1), any person adversely affected by such rule may file a petition for review under the procedures set forth in section 11 of this Act.”.

(b) DESTRUCTION OF NONCOMPLIANT IMPORTED PRODUCTS.—Section 17(e) (15 U.S.C. 2066(e)) is amended to read as follows:

“(e) Products refused admission into the customs territory of the United States shall be destroyed unless, upon application by the owner, consignee, or importer of record, the Secretary of the Treasury permits the export of the product in lieu of destruction. If the owner, consignee, or importer of record does not export

the product within 90 days of approval to export, such product shall be destroyed.”.

(c) **INSPECTION AND RECORDKEEPING REQUIREMENT.**—The Act is further amended—

(1) by amending section 17(g) (15 U.S.C. 2066(g)) to read as follows:

“(g) Manufacturers of imported products shall be in compliance with all inspection and recordkeeping requirements under section 16 applicable to such products, and the Commission shall advise the Secretary of the Treasury of any manufacturer who is not in compliance with all inspection and recordkeeping requirements under section 16.”; and

(2) by adding at the end of section 16 (15 U.S.C. 2065) the following:

“(d) The Commission shall, by rule, condition the manufacturing for sale, offering for sale, distribution in commerce, or importation into the United States of any consumer product or other product on the manufacturer’s compliance with the inspection and recordkeeping requirements of this Act and the Commission’s rules with respect to such requirements.”.

SEC. 224. FINANCIAL RESPONSIBILITY.

(a) **IN GENERAL.**—The Act (15 U.S.C. 2051 et seq.), as amended by section 219, is further amended by adding at the end the following:

“SEC. 41. FINANCIAL RESPONSIBILITY.

“(a) **IDENTIFICATION AND DETERMINATION OF BOND.**—The Commission, in consultation with U.S. Customs and Border Protection and other relevant Federal agencies, shall identify any consumer product, or other product or substance that is regulated under this Act or any other Act enforced by the Commission, for which the cost of destruction would normally exceed bond amounts determined under sections 623 and 624 of the Tariff Act of 1930 (19 U.S.C. 1623, 1624) and shall recommend to U.S. Customs and Border Protection a bond amount sufficient to cover the cost of destruction of such products or substances.

“(b) **STUDY OF REQUIRING ESCROW FOR RECALLS AND DESTRUCTION OF PRODUCTS.**—

“(1) **STUDY.**—The Comptroller General shall conduct a study to determine the feasibility of requiring—

“(A) the posting of an escrow, proof of insurance, or security sufficient in amount to cover the cost of destruction of a domestically-produced product or substance regulated under this Act or any other Act enforced by the Commission; and

“(B) the posting of an escrow, proof of insurance, or security sufficient in amount to cover the cost of an effective recall of a product or substance, domestic or imported, regulated under this Act or any other Act enforced by the Commission.

“(2) **REPORT.**—Not later than 180 days after the date of enactment of the Consumer Product Safety Improvement Act of 2008, the Comptroller General shall transmit to the appropriate Congressional committees a report on the conclusions of the study required under paragraph (1), including an assessment of whether such an escrow requirement could be implemented and any recommendations for such implementation.”.

(b) CONFORMING AMENDMENTS.—The table of contents in section 1 (15 U.S.C. 2051 note), as amended by section 219, is amended by adding at the end the following:

“Sec. 41. Financial responsibility.”.

SEC. 225. STUDY AND REPORT ON EFFECTIVENESS OF AUTHORITIES RELATING TO SAFETY OF IMPORTED CONSUMER PRODUCTS.

Not later than 1 year after the date of enactment of this Act, the Comptroller General of the United States shall—

(1) conduct a study of the authorities and provisions of the Consumer Product Safety Act (15 U.S.C. 2051 et seq.) to assess the effectiveness of such authorities and provisions in preventing unsafe consumer products from entering the customs territory of the United States;

(2) review and provide recommendations with respect to plans to prevent unsafe consumer products from entering the customs territory of the United States; and

(3) submit to the appropriate Congressional committees a report on the findings of the Comptroller General with respect to paragraphs (1) and (2), including legislative recommendations related to, at a minimum—

(A) inspection of foreign manufacturing plants by the Commission; and

(B) requiring foreign manufacturers to consent to the jurisdiction of United States courts with respect to enforcement actions by the Commission.

Subtitle D—Miscellaneous Provisions and Conforming Amendments

SEC. 231. PREEMPTION.

(a) RULE WITH REGARD TO PREEMPTION.—The provisions of sections 25 and 26 of the Consumer Product Safety Act (15 U.S.C. 2074 and 2075, respectively), section 18 of the Federal Hazardous Substances Act (15 U.S.C. 1261 note), section 16 of the Flammable Fabrics Act (15 U.S.C. 1203), and section 7 of the Poison Packaging Prevention Act of 1970 (15 U.S.C. 1476) establishing the extent to which those Acts preempt, limit, or otherwise affect any other Federal, State, or local law, any rule, procedure, or regulation, or any cause of action under State or local law may not be expanded or contracted in scope, or limited, modified or extended in application, by any rule or regulation thereunder, or by reference in any preamble, statement of policy, executive branch statements, or other matter associated with the publication of any such rule or regulation. In accordance with the provisions of those Acts, the Commission may not construe any such Act as preempting any cause of action under State or local common law or State statutory law regarding damage claims.

(b) PRESERVATION OF CERTAIN STATE LAW.—Nothing in this Act or the Federal Hazardous Substances Act shall be construed to preempt or otherwise affect any warning requirement relating to consumer products or substances that is established pursuant to State law that was in effect on August 31, 2003.

SEC. 232. ALL-TERRAIN VEHICLE STANDARD.

(a) IN GENERAL.—The Act (15 U.S.C. 2051 et seq.), as amended by section 224, is further amended by adding at the end thereof the following:

“SEC. 42. ALL-TERRAIN VEHICLES.

“(a) IN GENERAL.—

“(1) MANDATORY STANDARD.—Notwithstanding any other provision of law, within 90 days after the date of enactment of the Consumer Product Safety Improvement Act of 2008, the Commission shall 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). The standard shall take effect 150 days after it is published.

“(2) COMPLIANCE WITH STANDARD.—After the standard takes effect, it shall be unlawful for any manufacturer or distributor to import into or distribute in commerce in the United States any new assembled or unassembled all-terrain vehicle unless—

“(A) the all-terrain vehicle complies with each applicable provision of the standard;

“(B) the ATV is subject to an ATV action plan filed with the Commission before the date of enactment of the Act, or subsequently filed with and approved by the Commission, and bears a label certifying such compliance and identifying the manufacturer, importer or private labeler and the ATV action plan to which it is subject; and

“(C) the manufacturer or distributor is in compliance with all provisions of the applicable ATV action plan.

“(3) VIOLATION.—The failure to comply with any requirement of paragraph (2) shall be deemed to be a failure to comply with a consumer product safety standard under this Act and subject to all of the penalties and remedies available under this Act.

“(4) COMPLIANT MODELS WITH ADDITIONAL FEATURES.—Paragraph (2) shall not be construed to prohibit the distribution in commerce of new all-terrain vehicles that comply with the requirements of that paragraph but also incorporate characteristics or components that are not covered by those requirements. Any such characteristics or components shall be subject to the requirements of section 15 of this Act.

“(b) MODIFICATION OF STANDARD.—

“(1) ANSI REVISIONS.—If the American National Standard ANSI/SVIA–1–2007 is revised through the applicable consensus standards development process after the date on which the product safety standard for all-terrain vehicles is published in the Federal Register, the American National Standards Institute shall notify the Commission of the revision.

“(2) COMMISSION ACTION.—Within 120 days after it receives notice of such a revision by the American National Standards Institute, the Commission shall issue a notice of proposed rule-making in accordance with section 553 of title 5, United States Code, to amend the product safety standard for all-terrain

vehicles to include any such revision that the Commission determines is reasonably related to the safe performance of all-terrain vehicles, and notify the Institute of any provision it has determined not to be so related. The Commission shall promulgate an amendment to the standard for all-terrain vehicles within 180 days after the date on which the notice of proposed rulemaking for the amendment is published in the Federal Register.

“(3) UNREASONABLE RISK OF INJURY.—Notwithstanding any other provision of this Act, the Commission may, pursuant to sections 7 and 9 of this Act, amend the product safety standard for all-terrain vehicles to include any additional provision that the Commission determines is reasonably necessary to reduce an unreasonable risk of injury associated with the performance of all-terrain vehicles.

“(4) CERTAIN PROVISIONS NOT APPLICABLE.—Sections 7 and 9 of this Act shall not apply to promulgation of any amendment of the product safety standard under paragraph (2). Judicial review of any amendment of the standard under paragraph (2) shall be in accordance with chapter 7 of title 5, United States Code.

“(c) REQUIREMENTS FOR 3-WHEELED ALL-TERRAIN VEHICLES.—Until a mandatory consumer product safety standard applicable to 3-wheeled all-terrain vehicles promulgated pursuant to this Act is in effect, new 3-wheeled all-terrain vehicles may not be imported into or distributed in commerce in the United States. Any violation of this subsection shall be considered to be a violation of section 19(a)(1) of this Act and may also be enforced under section 17 of this Act.

“(d) FURTHER PROCEEDINGS.—

“(1) DEADLINE.—The Commission shall issue a final rule in its proceeding entitled ‘Standards for All Terrain Vehicles and Ban of Three-wheeled All Terrain Vehicles’.

“(2) CATEGORIES OF YOUTH ATVS.—In the final rule, the Commission, in consultation with the National Highway Traffic Safety Administration, may provide for a multiple factor method of categorization that, at a minimum, takes into account—

“(A) the weight of the ATV;

“(B) the maximum speed of the ATV;

“(C) the velocity at which an ATV of a given weight is traveling at the maximum speed of the ATV;

“(D) the age of children for whose operation the ATV is designed or who may reasonably be expected to operate the ATV; and

“(E) the average weight of children for whose operation the ATV is designed or who may reasonably be expected to operate the ATV.

“(3) ADDITIONAL SAFETY STANDARDS.—In the final rule, the Commission, in consultation with the National Highway Traffic Safety Administration, shall review the standard published under subsection (a)(1) and establish additional safety standards for all-terrain vehicles to the extent necessary to protect the public health and safety. As part of its review, the Commission shall consider, at a minimum, establishing or strengthening standards on—

“(A) suspension;

“(B) brake performance;

- “(C) speed governors;
- “(D) warning labels;
- “(E) marketing; and
- “(F) dynamic stability.

“(e) DEFINITIONS.—In this section:

“(1) ALL-TERRAIN VEHICLE OR ATV.—The term ‘all-terrain vehicle’ or ‘ATV’ means—

“(A) any motorized, off-highway vehicle designed to travel on 3 or 4 wheels, having a seat designed to be straddled by the operator and handlebars for steering control; but

“(B) does not include a prototype of a motorized, off-highway, all-terrain vehicle or other motorized, off-highway, all-terrain vehicle that is intended exclusively for research and development purposes unless the vehicle is offered for sale.

“(2) ATV ACTION PLAN.—The term ‘ATV action plan’ means a written plan or letter of undertaking that describes actions the manufacturer or distributor agrees to take to promote ATV safety, including rider training, dissemination of safety information, age recommendations, other policies governing marketing and sale of the ATVs, the monitoring of such sales, and other safety related measures, and that is substantially similar to the plans described under the heading ‘The Undertakings of the Companies in the Commission Notice’ published in the Federal Register on September 9, 1998 (63 FR 48199–48204).”.

(b) GAO STUDY.—The Comptroller General shall conduct a study of the utility, recreational, and other benefits of all-terrain vehicles to which section 42 of the Consumer Product Safety Act (15 U.S.C. 2085) applies, and the costs associated with all-terrain vehicle-related accidents and injuries.

(c) CONFORMING AMENDMENT.—The table of contents of this Act is further amended by inserting after the item relating to section 42 the following:

“Sec. 42. All-terrain vehicles.”.

SEC. 233. COST-BENEFIT ANALYSIS UNDER THE POISON PREVENTION PACKAGING ACT OF 1970.

Section 3 of the Poison Prevention Packaging Act of 1970 (15 U.S.C. 1472) is amended by adding at the end thereof the following:

“(e) Nothing in this Act shall be construed to require the Consumer Product Safety Commission, in establishing a standard under this section, to prepare a comparison of the costs that would be incurred in complying with such standard with the benefits of such standard.”.

SEC. 234. STUDY ON USE OF FORMALDEHYDE IN MANUFACTURING OF TEXTILE AND APPAREL ARTICLES.

Not later than 2 years after the date of enactment of this Act, the Comptroller General, in consultation with the Commission, shall conduct a study on the use of formaldehyde in the manufacture of textile and apparel articles, or in any component of such articles, to identify any risks to consumers caused by the use of formaldehyde in the manufacturing of such articles, or components of such articles.

SEC. 235. TECHNICAL AND CONFORMING CHANGES.

(a) **DEFINITIONS.**—Section 3(a) (15 U.S.C. 2052) is amended by adding at the end the following:

“(15) **APPROPRIATE CONGRESSIONAL COMMITTEES.**—The term ‘appropriate Congressional committees’ means the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate.

“(16) **CHILDREN’S PRODUCT.**—The term ‘children’s product’ means a consumer product designed or intended primarily for children 12 years of age or younger. In determining whether a consumer product is primarily intended for a child 12 years of age or younger, the following factors shall be considered:

“(A) A statement by a manufacturer about the intended use of such product, including a label on such product if such statement is reasonable.

“(B) Whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger.

“(C) Whether the product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger.

“(D) The Age Determination Guidelines issued by the Commission staff in September 2002, and any successor to such guidelines.

“(17) **THIRD-PARTY LOGISTICS PROVIDER.**—The term ‘third-party logistics provider’ means 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.”.

(b) **MISCELLANEOUS.**—Section 3 (15 U.S.C. 2052) is amended—

(1) by striking “(a) for purposes of this Act:” and inserting “(a) **IN GENERAL.**—In this Act:”;

(2) by indenting each paragraph and subparagraph of subsection (a) 2 em spaces;

(3) by inserting a heading, in a form consistent with the form of the heading of this subsection consisting of the term defined by such paragraph, after the designation of each paragraph of subsection (a);

(4) by reordering such paragraphs and the additional paragraphs added by paragraph (1) of this subsection in alphabetical order based on the headings of such paragraphs and renumbering such paragraphs as so reordered; and

(5) by inserting “common carriers, contract carriers, and freight forwarders” after “(b)” in subsection (b).

(c) **CONFORMING AMENDMENTS.**—

(1) Section 3(b) (15 U.S.C. 2052(b)) is amended by inserting “third-party logistics provider,” after “contract carrier,”.

(2) Section 6(e)(4) (15 U.S.C. 2055(e)(4)) is amended by striking “the Committee on Commerce, Science, and Transportation of the Senate or the Committee on Energy and Commerce of the House of Representatives or any subcommittee of such committee,” and insert “either of the appropriate Congressional committees or any subcommittee thereof,”.

(3) Sections 9(a), 9(c), and 35(c)(2)(D)(iii) (15 U.S.C. 2058(a), (c), and 2082(c)(2)(D)(iii)), and 2082(e)(1), respectively) are each amended by striking “the Committee on Commerce, Science,

and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives” each place it appears and inserting “the appropriate Congressional committees”.

(4) Section 32(b)(1) (15 U.S.C. 2050(b)(1)) is amended by striking “the Committee on Energy and Commerce of the House of Representatives, and by the Committee on Commerce, Science, and Transportation of the Senate.” and inserting “the appropriate Congressional committees.”.

(5) Section 35(e)(1) (15 U.S.C. 2082(e)(1)) is amended by striking “the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Energy and Commerce of the House of Representatives” and insert “the appropriate Congressional committees”.

(6) Sections 17(h)(3), 28(j)(10)(F), and 28(k)(1) and (2) (15 U.S.C. 2066(h)(3), 2077(j)(10)(F), and 2077(k)(1) and (2), respectively) are each amended by striking “the Congress” and inserting “the appropriate Congressional committees”.

(7) Section 29(e) (15 U.S.C. 2078(e)) is amended by striking “The Commission” and inserting “Notwithstanding section 6(a)(3), the Commission”.

SEC. 236. EXPEDITED JUDICIAL REVIEW.

(a) IN GENERAL.—Section 11 (15 U.S.C. 2060) is amended by adding at the end thereof the following:

“(g) EXPEDITED JUDICIAL REVIEW.—

“(1) APPLICATION.—This subsection applies, in lieu of the preceding subsections of this section, to judicial review of—

“(A) any consumer product safety rule promulgated by the Commission pursuant to section 15(j) (relating to identification of substantial hazards);

“(B) any consumer product safety standard promulgated by the Commission pursuant to section 42 (relating to all-terrain vehicles);

“(C) any standard promulgated by the Commission under section 104 of the Consumer Product Safety Improvement Act of 2008 (relating to durable infant and toddler products); and

“(D) any consumer product safety standard promulgated by the Commission under section 106 of the Consumer Product Safety Improvement Act of 2008 (relating to mandatory toy safety standards).

“(2) IN GENERAL.—Not later than 60 days after the promulgation, by the Commission, of a rule or standard to which this subsection applies, any person adversely affected by such rule or standard may file a petition with the United States Court of Appeals for the District of Columbia Circuit for judicial review of such rule. Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose and to the Attorney General. The record of the proceedings on which the Commission based its rule shall be filed in the court as provided for in section 2112 of title 28, United States Code.

“(3) REVIEW.—Upon the filing of the petition under paragraph (2) of this subsection, the court shall have jurisdiction to review the rule in accordance with chapter 7 of title 5,

United States Code, and to grant appropriate relief, including interim relief, as provided in such chapter.

“(4) CONCLUSIVENESS OF JUDGMENT.—The judgment of the court affirming or setting aside, in whole or in part, any final rule under this section shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of title 28, United States Code.

“(5) FURTHER REVIEW.—A rule or standard with respect to which this subsection applies shall not be subject to judicial review in proceedings under section 17 (relating to imported products) or in civil or criminal proceedings for enforcement.”.

(b) PENDING ACTIONS UNAFFECTED.—The amendment made by subsection (a) shall not apply to any petition filed before the date of enactment of this Act for judicial review of any action by the Consumer Product Safety Commission.

SEC. 237. REPEAL.

Section 30 (15 U.S.C. 2079) is amended by striking subsection (d).

SEC. 238. POOL AND SPA SAFETY ACT TECHNICAL AMENDMENTS.

Title XIV of the Energy Independence and Security Act of 2007 (Public Law 110–140) is amended—

(1) in section 1403 by adding at the end the following:

“(8) STATE.—The term ‘State’ has the meaning given such term in section 3(10) of the Consumer Product Safety Act (15 U.S.C. 2052(10)), and includes the Northern Mariana Islands.”.

(2) in section 1404 by adding at the end of subsection (b) the following: “If a successor standard is proposed, the American Society of Mechanical Engineers shall notify the Commission of the proposed revision. If the Commission determines that the proposed revision is in the public interest, it shall incorporate the revision into the standard after providing 30 days notice to the public.”; and

(3) by adding at the end the following:

“SEC. 1409. APPLICABILITY.

“This Act is applicable to the United States and its territories, including American Samoa, the Commonwealth of Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, and the United States Virgin Islands.”.

SEC. 239. EFFECTIVE DATES AND SEVERABILITY.

(a) EFFECTIVE DATES.—

(1) IN GENERAL.—Except as otherwise specifically provided in this Act, this Act and the amendments made by this Act shall take effect on the date of enactment of this Act.

(2) CERTAIN DELAYED EFFECTIVE DATES.—The amendments made by sections 103(c) and 214(a)(2) shall take effect on the date that is 60 days after the date of enactment of this Act. Subsection (c) of section 42 of the Consumer Product Safety Act, as added by section 232 of this Act, and the amendments made by sections 216 and 223(b) shall take effect on the date that is 30 days after the date of enactment of this Act.

(b) SEVERABILITY.—If any provision of this Act or the amendments made by this Act, or the application of such provision to

H. R. 4040—62

any person or circumstance, is held invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.

Speaker of the House of Representatives.

*Vice President of the United States and
President of the Senate.*



Navigating the CPSIA

New Enforcement Provisions

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Today's topics

- **CPSIA's New Enforcement Provisions**
- **How the CPSIA Will Be Enforced**
- **Federal vs. State Laws**
- **Preemption**
- **Where Do We Go From Here**

Practice Pointers:

Coverage will include:

- ✓ Who must comply
- ✓ What is required for compliance
- ✓ Exceptions to the requirements
- ✓ When compliance is required
- ✓ Penalties for noncompliance
- ✓ Practical tips and best practices

Background

The CPSIA was passed on August 14, 2008

- Applies to consumer products generally, and children's products specifically**
- Law includes sweeping enforcement changes**
- Full impact continues to evolve**
- Companies may be exposed to significant legal risk from both enforcement actions and private litigation**

What's New – Consumer Products

New Consumer Product Requirements

- **Certifications for any product subject to a CPSC rule under any of the laws for which CPSC has authority**
- **Enhanced recall authority**
- **Enhanced penalties**
- **Whistleblower protections**
- **Public consumer product safety database**



CPSIA ENFORCEMENT PROVISIONS

Prohibited Acts

- Sell, offer for sale, manufacture for sale, distribute in commerce or import into the U.S. any consumer product, or other product or substance, that is not in conformity with any CPSC rule, regulation, standard or ban or subject to any voluntary corrective action.**
- Fail to provide a certificate of conformity or to issue a false certificate.**
- Sell distribute or import any consumer product with a registered certified safety mark unless authorized.**
- Exercise or attempt to exercise undue influence on third-party testing agency.**
- Export for sale any product that constitutes a banned hazardous substance.**

Enforcement of Lead Limits and Phthalates

Effective February 10, 2009, CPSIA set new limits on **lead content** in any children's product and limits on **phthalate content** in children's toys and child care articles.

- Congress gave CPSC limited authority to grant relief from the limit.
- CPSC rulemaking underway regarding accessibility, alternative limits for electronic devices, natural materials that inherently will not exceed lead limits, testing requirements.
- Consider:
 - Children's books
 - Dye textiles, threads, trim and apparel
 - ATVs, bikes and motorcross
 - Other products and points of sale (second-hand shops) ensnared in controversy

Enforcement of COC's

General Conformity Certification

- ❖ **Applies to domestic manufacturers and U.S. importers**
- ❖ **Products subject to any rule, ban, standard or regulation within CPSC's jurisdiction**
- ❖ **Manufactured on or after November 12, 2008**
- ❖ **Must provide a certificate accompanying each product**
 - **How enforced**
 - **Electronic certificate OK**

Stay of Enforcement

On January 30, 2009, CPSC voted to stay enforcement of the testing and certification requirements until February 10, 2010:

- ✓ Stay does not apply to children's products that contain paint or surface coatings with lead, cribs and pacifiers, small parts regulations, Pool Safety Act requirements, ATV certifications, guarantees under Flammable Fabrics Act.
- ✓ Stay does not apply to children's metal jewelry.
- ✓ Stay does not apply to products that required testing and certification before enactment of CPSIA (garage door openers, bike helmets, candles, lawnmowers, lighters, mattresses, etc).

Impact of the Stay

- **Stay of Enforcement does not mean companies do not have to comply with the law and CPSIA standards.**
- **Violations must still be reported if the manufacturer, distributor or retailer obtains information that a product fails to comply.**
- **Many retailers still require testing and certification.**
- **Some companies taking a don't ask/don't tell approach – not recommended.**
- **Better approach – take proactive steps to comply with the law and put QA/QC programs in place well in advance of 2/10/10.**

Export of Products

It is unlawful to export from the U.S. for purpose of sale any consumer product, or other product or substance regulated by the CPSC that is a banned hazardous substance under the law or is subject to a voluntary corrective action.

- **No dumping allowed.**
- **Extra-territorial application of U.S. safety laws in other countries.**
- **Does not apply trade show samples, products imported for testing or products to be re-exported.**

CPSC's Enhanced Recall Authority

- The CPSIA increases the number of products subject to the CPSC's recall powers; expands the definition of "substantial product hazard."**
- The new definition includes any products over which the CPSC has jurisdiction under any rule or act enforced by the agency.**
- The recall powers allow the agency to force companies to cease distribution of a product containing a substantial product hazard.**
- The CPSC has more authority in determining the recall remedy.**
 - ✓ **In the past, companies might choose the most cost effective corrective action such as a repair or refund.**
 - ✓ **Now, the CPSC has more authority to order the form of corrective action if it determines that the manufacturer's plan is not sufficient.**

Civil Penalties

- Up to \$100,000 (previously \$5,000) for each violation.**
- The maximum civil penalty may not exceed \$15,000,000 (previously \$1,250,000) for a series of related violations.**
- Effective on the earlier of the date when the CPSC issues final regulations, or August 14, 2009.**

Penalty Criteria

CPSC must consider a number of factors in setting enforcement penalties, including:

- 1. nature, circumstances, extent and gravity of the violation**
- 2. Now to mitigate undue adverse economic impacts on small businesses**
- 3. Other factors as appropriate**

Criminal Penalties

- Maximum of 5 years imprisonment (previously 1 year imprisonment).**
- May include forfeiture of assets associated with the violation.**
- Directors, officers, and agents of the manufacturer do not need to have notice of a violation to be criminally liable,**

Enforcement by State Attorneys General

- ❖ **State attorneys general may seek injunctive relief to stop the sale of products that do not meet federal requirements.**
- ❖ **State attorneys general must provide 30-days notice to the CPSC and generally may not duplicate a lawsuit filed by the CPSC.**
- ❖ **States may enact their own identical standards to preserve flexibility and allow AGs to seek civil damages.**

Whistleblower Protection

- **The CPSIA establishes new whistleblower protections for employees.**
- **The whistleblower provisions prohibits an employer from discharging or otherwise discriminating against an employee because the employee:**
 - 1. provides information relating to a violation of the CPSIA or any act enforced by the CPSC**
 - 2. testifies or assists in a proceeding concerning a violation of the CPSIA or any act enforced by the CPSC**
 - 3. refuses to participate in an activity, policy, practice, or assigned task that the employee reasonably believes violates the CPSIA or any act enforced by the CPSC.**

Whistleblower Protection

Whistleblower complaints are heard before a special section of the Department of Labor

- ✓ If a violation is found by the employer, remedies may include: (1) abatement of the violation; (2) reinstatement; (3) back pay; (4) compensatory damages; and (5) attorney fees and litigation costs
- ✓ If DOL finds that the complaint was frivolous or brought in bad faith, the DOL may award the employer reasonable attorney's fees not exceeding \$1,000.
- ✓ The law provides a judicial mechanism for review and enforcement of the parties' rights.

CPSC Product Safety Database

- CPSC to provide searchable database on the safety of consumer products from product safety incidents reported to the agency.**
- CPSC will send reports to manufacturers or private labelers within 5 days of receipt.**
- Manufacturers will have an opportunity to submit comments for inclusion in the national database.**
- False or inaccurate reports will not be included in the national database.**
- CPSC rules on the data base to be forthcoming.**



PREEMPTION AND STATE LAWS

Preemption

- The CPSIA leaves in place the preemption provisions in existing consumer protection laws.**
- Under existing laws, states may regulate consumer products if state requirements are identical to federal requirements.**
- The CPSIA prohibits the CPSC from expanding the preemptive effect of the statutes it enforces through rulemaking.**

Preemption (continued)

- **No preemption for:**
 - ✓ **Identical state laws**
 - ✓ **State laws on products not regulated by the CPSC**
 - ✓ **State warning laws**
 - ✓ **Consent agreements between parties**

- **The adoption of ASTM F-963 for toys and children's products preempts state laws.**

- **States may petition for an exemption if:**
 - **Their rules provide a “significantly higher degree of protection” and do not “unduly burden interstate commerce”**
 - **Their laws were in effect by August 13, 2008, and notice was filed with the CPSC by November 12, 2008**

Preemptive provisions include:

- **Limits on lead content in children's products.**
- **Limits for lead paint.**
- **Limits on phthalates (states may regulate chemicals that are used to replace phthalates as they are phased out).**
- **ATV standards.**

PRACTICE POINTER: State warning requirements that were in effect August 31, 2003 or earlier are not preempted.

Phthalates Ban

- **CA AG's office has opined that there is no preemption and CA phthalate ban is valid. CA banned sale of children's toys and child care articles with phthalates on 1/1/09.**
- **Other states, including ME, VT and WA have passed laws that regulate phthalates.**
- **CT, HI, MD, MN, MI, NJ, NY, RI, WV have proposed laws that would regulate phthalates.**
- **PRACTICE POINTER: Some state laws are not limited to children's toys and child care articles, but apply to "children's products"**



WHERE DO WE GO FROM HERE?

What's on the Horizon – Some Knowns

- **Need to monitor CPSC implementation and rulemaking.**
- **Arrange for a reasonable program of testing and third-party certifications.**
- **Prepare for issuance of COCs as of 2/10/10 for compliant products.**
- **Prepare for greater CPSC enforcement activity ramped up after August 2009.**

What's on the horizon – Some Unknowns

- **There is an inventory of existing products that may not comply with lead and phthalate limits. What should be done with these products**
- **What if a product cannot be made without lead or phthalates, but does not pose any exposure risk. Some national scientists have questioned the phthalate ban? Is there any hope for CPSIA reform?**
- **Who will pay for the cost of testing and certification?**
- **Will states try to enact even tougher limits? What is the impact on interstate commerce?**

Proposed State Legislation

IMPORTANT ALERT

Some states have enacting lead and phthalate restrictions and are looking at greater state regulation of products.

Some states such as WA and CA have proposed greater control of consumer products and “Green Chemistry” initiatives.

IN MN, the legislature has proposed the Toxic Free Kids Act:

- **Requires the Minnesota Pollution Control Agency to create a “priority chemicals list” based on children’s exposure and chemical toxicity.**
- **Requires manufacturers to phase out priority chemicals when safer alternatives become available.**
- **Facilitates information sharing with other states that have similar laws.**

Minnesota has also recently passed a ban on bisphenol A (BPA) in children’s products intended for children 3 and under.



QUESTIONS?

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